

Court Issue



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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 CONFERENCE 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 this Rule. The years of practice earned <u>under the supervision and subject to the disciplinary requirements of in multiple reciprocal states may be combined.</u></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 under the supervision and subject to the disciplinary requirements of a reciprocal state bar association or supreme court 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.

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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.

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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 83

BETTY SUE ADAMS PURCELL; GILBERT LYNN PURCELL, JR.; SUSAN DENISE PURCELL PERINE; TWILA JUNE ADAMS MILLER; and BECKY LYNN MILLER CONTI, Petitioners/Appellants, vs. TODD A. PARKER, and JESSICA D. PARKER, husband and wife; STATE OF OKLAHOMA, ex rel. OKLAHOMA WATER RESOURCES BOARD, CASILLAS OPERATING, LLC.; and SELECT ENERGY SERVICES, LLC. Respondents/Appellees.

No. 118,328. October 622, 2020

CORRECTION ORDER

¶1 The opinion in the above styled and numbered cause filed October 6, 2020, is hereby corrected as follows:

"Honorable Charles Grey, Judge" is changed to "Honorable Charles Gray, Judge."

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

DONE BY ORDER OF THE SUPREME COURT THE 22nd DAY OF OCTOBER, 2020.

/s/ Noma D. Gurich CHIEF JUSTICE

2020 OK 87

ISAAC SUTTON and CELESTE SUTTON, Plaintiffs/Appellees, v. DAVID STANLEY CHEVROLET, INC., Defendant/Appellant

Case No. 117,587; Comp. w/117,588 October 21, 2020

ORDER CORRECTING OPINION

The dissenting opinion of Judtice Rowe, filed herein on October 13, 2020, is corrected to reflect the following change. The phrase "In my Opinion" in the first sentence of Paragraph 6 will be replaced with the word "Regrettably." The sentence shall now read: "Regrettably, today's decision will create uncertainty and negative repercussions for Oklahoma business owners and customers executing otherwise arms-length transactions with typically quick turn-around times."

In all other respects, the October 13, 2020 dissenting opinion of Justice Rowe shall remain unchanged.

DONE BY ORDER OF THE SUPREME COURT THIS 21st DAY OF OCTOBER, 2020.

/s/ Noma D. Gurich CHIEF JUSTICE

2020 OK 89

WHITE STAR PETROLEUM, LLC, Appellant, v. MUFG UNION BANK, N.A., Appellee.

No. 118,746. October 20, 2020

CERTIFIED QUESTIONS FROM THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

¶0 The United States Bankruptcy Court for the Western District of Oklahoma certified to this Court two questions of state law pursuant to the Revised Uniform Certification of Questions of Law Act, 20 O.S. §§ 1601-1611.

CERTIFIED QUESTIONS ANSWERED

Lewis Lenaire, Craig Regens, Graydon D. Luthey, Jr., GableGotwals, Oklahoma City, Oklahoma, for Appellant.

Neal Tomlins, Tomlins Law, PLLC, Tulsa, Oklahoma, for Appellee MUFG Union Bank, N.A.

Michael Bickford, Fuller, Tubb & Bickford, PLLC, Oklahoma City, Oklahoma, for Appellee Shebester-Bechtel, Inc.

J. Clay Christensen, Jonathan M. Miles, and Brock Z. Pittman, Christensen Law Group, PLLC, Oklahoma City, Oklahoma, for Appellees Casing Crews, Inc., Casing Equipment Supply, LLC, Monster Services, LLC, and Superior Oilfield Consulting, LLC.

Mark A. Craige and Alexander Sokolosky, Crowe & Dunlevy, Tulsa, Oklahoma, for Appellees Latshaw Drilling Company, LLC, and Mustang Heavy Haul, LLC.

Bradley Davenport, Doerner, Saunders, Daniel & Anderson, LLP, Oklahoma City, Oklahoma, Kenneth Green and James B. Hamm, Snow, Spence, Green, LLP, Hockley, Texas, for Appellee Baker Hughes Oilfield Operations, LLC.

Bradley Davenport, Doerner, Saunders, Daniel & Anderson, LLP, Oklahoma City, Oklahoma, William R. Sudela, Crady, Jewett, McCulley & Houren, LLP, Houston, Texas, for Appellee MS Directional, LLC.

Clayton D. Ketter, Phillips Murrah, P.C., Oklahoma City, Oklahoma, for Appellees Ag & Oil Field, LLC, B.O.P. Ram Block and Iron Rentals, Inc., Journey Oilfield Equipment, LLC, Road Runner Trucking, LLC, Simmons Machine Work, Inc., and Western Workstrings, LLC.

Samuel Scott Ory, Frederic Dorwart, Lawyers, PLLC, Tulsa, Oklahoma, for Appellee Cactus Drilling Company, LLC.

Michael Rubenstein and Leif Swedlow, Rubenstein & Pitts, PLLC, Edmond, Oklahoma, for Appellee Jackson Electrical Construction, LLC.

James Vogt, Reynolds, Ridings, Vogt & McCart, PLLC, Oklahoma City, Oklahoma, for Appellee RK&R Dozer Service, LLC.

Phillip B. Wilson, Franden, Farris, Quillin, Goodnight & Roberts, Tulsa, Oklahoma, for Appellee Day County Services, Inc.

Rowe, J:

¶1 The United States Bankruptcy Court for the Western District of Oklahoma certified two questions of state law to this Court under the Revised Uniform Certification of Questions of Law Act, 20 O.S. §§ 1601-1611. The questions certified are:

- 1. Are the "trust funds" created by Title 42 O.S. § 144.2, entitled "Creation and Appropriation of Trust Funds for Payment of Lienable Claims," limited to obligations due non-operator joint working interest owners, or do such funds include payments due holders of mechanic's and materialmen's liens arising under and perfected by Title 42 O.S. § 144?
- 2. Does the Oil and Gas Owners' Lien Act of 2010, Title 52 O.S. § 549.1 *et seq.*, grant an operator and non-operator working interest owners a lien in proceeds from purchasers of oil and gas which is prior and superior to any claim of the holder of a mechanic's and materialmen's lien asserted under Title 42 O.S. § 144?

CERTIFIED FACTS AND PROCEDURAL HISTORY

¶2 White Star Petroleum, LLC, along with its wholly-owned subsidiary, White Star Petroleum II, LLC (collectively "White Star") were engaged in the business of exploring, acquiring, drilling, and producing oil and natural gas, either as an operator or non-operating working interest owner of various leaseholds across Oklahoma. In instances where White Star's leaseholds had more than one working interest owner, operations of the leaseholds were governed either by consensual joint operating agreements, or in the absence of such agreements, by forced pooling orders entered by the Oklahoma Corporation Commission. In either circumstance, the operator of the leasehold, whether White Star or another entity, was tasked with drilling and producing minerals on behalf of itself and any other interest owners, as well as distributing profits to the interest owners in proportion to their share.

¶3 Incident to managing the leaseholds, White Star and the operators with which it contracted were required to enter into drilling and reworking contracts with various third-party vendors and service providers. Pursuant to the joint operating agreements and forced pooling orders, the costs incurred under these contracts were to be divided among the working interest owners in proportion to their share.

Typically, the operator would bear these costs initially and then receive reimbursements, known as Joint-Interest Billing Payments ("JIBs"), from the other interest owners.

¶4 On May 24, 2019, several of White Star's unpaid vendors filed an involuntary bankruptcy petition against White Star in the United States Bankruptcy Court for the Western District Oklahoma. On May 28, 2019, White Star and its affiliates filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. On June 2, 2019, the bankruptcy case initiated by White Star in Delaware was transferred to the Western District of Oklahoma. On July 3, 2019, the Bankruptcy Court for the Western District of Oklahoma ("the Bankruptcy Court") consolidated the voluntary and involuntary petitions.

¶5 Bankruptcy filings indicated that as of December 2018, White Star had approximately \$347 million in total funded debt, including \$274 million owed to secured lenders. Among its assets were 883 gross productive wells, 590 of which were being operated. On September 30, 2019, the Bankruptcy Court approved the sale of essentially all of White Star's assets to Contango Oil & Gas Company for \$132.5 million.

¶6 During the bankruptcy proceedings, 78 unpaid vendors filed adversary proceedings seeking adjudication of statutory lien claims under 42 O.S. § 144 against White Star's interests in various wells and establishment of trust fund claims under 42 O.S. § 144.2. These proceedings were staved when, on October 31, 2019, White Star initiated two adversary proceedings of its own. The first sought adjudication of the priority, validity, and value of approximately 2,000 mechanic's and materialman's liens ("M&M liens") asserted by the 78 unpaid vendors over various interests held by White Star. The second sought an order of the Bankruptcy Court directing several first purchasers of oil and gas to turn over to White Star approximately 2 million dollars, which were being held in suspense after the purchasers received statutory lien notices from the M&M lien claimants. The Bankruptcy Court certified the questions to this Court to aid in the resolution of these two adversary proceedings.

REQUIREMENTS FOR ANSWERING CERTIFIED OUESTIONS

¶7 This Court is vested with discretionary authority to review questions of law certified

to it by a court of the United States, so long as (1) the answer would be dispositive of an issue in pending litigation in the certifying court; and (2) there is no established and controlling law on the subject matter. 20 O.S. § 1602; *Odom v. Penske Truck Leasing Co.*, 2018 OK 23, ¶7, 415 P.3d 521. This Court may also reformulate questions certified to it. 20 O.S. § 1602.1; *Siloam Springs Hotel, LLC v. Century Surety Company*, 2017 OK 14, ¶ 15, 392 P.3d 262. In reviewing certified questions, we are obligated to consider only those facts enumerated in the certification order, and our examination is confined to resolving legal issues. *Government Employees Ins. Co. v. Quine*, 2011 OK 88, ¶14, 264 P.3d 1245, 1249.

DISCUSSION

¶8 We find that answering both questions would be dispositive of issues pending in the underlying bankruptcy proceedings and that there is presently no controlling law on the subject matter of either question. Both questions present issues of statutory interpretation. Our primary goal when construing a statute is to ascertain and follow the intent of the Legislature. City of Tulsa v. State ex rel. Public Employees Relations Bd., 1998 OK 92, ¶14, 967 P.2d 1214. Legislative intent is determined by looking at the whole legislative act in light of its general purpose and object. Id. If a statute is plain and unambiguous and its meaning is clear, the statute will be accorded the meaning expressed in its language. TRW/Reda Pump v. Brewington, 1992 OK 31, ¶5, 829 P.2d 15, 20. If doubt as to the statute's meaning exists, it can be resolved by looking at legislative history. Lekan v. P&L Fire Protection Co., 1980 OK 56, ¶6, 609 P.2d 1289, 1292. Where a statute is ambiguous or its meaning unclear, it will be accorded a reasonable construction that avoids absurd consequences. TRW/Reda Pump, 1992 OK 31, ¶5, 829 P.2d at 20.

I. Title 42, Section 144.2 does not limit the types of revenue which must be held in trust for payment of lienable claims.

¶9 The first question, as presented in the certification order, asks:

Are the "trust funds" created by Title 42 O.S. § 144.2, entitled "Creation and Appropriation of Trust Funds for Payment of Lienable Claims," limited to obligations due non-operator joint working interest owners, or do such funds include payments due holders of mechanic's and

materialmen's liens arising under and perfected by Title 42 O.S. § 144?

¶10 As presently stated, the question appears to ask whether the trust funds held pursuant to 42 O.S. § 144.2 are designated for both nonoperator working interest owners and M&M lien claimants. However, based on the facts in the certification order and positions of the parties, which will be discussed more thoroughly below, there does not seem to be any dispute as to who the funds are held for; they are held for M&M lien claimants. Rather, the real dispute among the parties relates to what forms of revenue must be held in trust for payment to lienholders. More specifically, do the statutory trusts apply only to JIBs, which are made by non-operator working interest owners and meant to compensate lienholders for their work, or do they apply to other forms of revenue, such as the funds held in suspense by the first purchasers or the funds from the Contango sale, up to the amount secured by the lien? In order to clarify the issue presented for resolution, we have reformulated the first question as follows:

Whether the funds held in trust pursuant to 42 O.S. § 144.2 for payment of lienable claims created by 42 O.S. § 144 are limited to joint-interest billing payments received by operators for services rendered by the lienholders?

¶11 As to this reformulated question, we answer in the negative. Nothing in the text or history of 42 O.S. § 144.2 limits the types of revenue which should be held in trust for payment of lienable claims.

¶12 Title 42, Section 144.2 provides, in relevant part:

A. Except as provided by subsection D of this section, the amount payable under any oil and gas well drilling contract, reworking contract, operating agreement, or monies payable as a condition of participation in the drilling of an oil and gas well under the terms of a pooling order issued by the Oklahoma Corporation Commission shall, upon receipt by any oil and gas well operator, contractor or subcontractor, be held by such operator as trust funds for the payment of all lienable claims due and owing by such operator, contractor or subcontractor by reason of such drilling contract, reworking contract, operating agreement, or force pooling order.

[...]

¶13 White Star contends that the language of 42 O.S. § 144.2 is concerned exclusively with the obligations that operators incur with third-party vendors pursuant to drilling and reworking contracts. White Star further reasons that because the scope of obligations covered by § 144.2(A) is limited to those amounts due to vendors under drilling and reworking contracts, the only funds which must be held in trust to satisfy these obligations are JIBs, which are traditionally used to satisfy these debts. White Star presents a number of arguments based in the text of the statute and industry practice to support this interpretation.

¶14 White Star first claims that the "upon receipt" language in § 144.2(A) evidences an intent on behalf of the Legislature to limit statutory trust obligations to certain sources of funds, specifically those received by the operator to satisfy obligations to third-party vendors. White Star maintains that operators only have one source of such funds, JIBs from nonoperating working interest owners.

¶15 White Star next claims that the Legislature's intent to limit the scope of funds subject to statutory trusts under 42 O.S. § 144.2 is evident in certain omissions from its text. Here, White Star compares § 144.2(A) with § 144, which establishes the basis for and scope of oil and gas well liens.1 Section 144 provides that an oil and gas well lien extends not only to the leasehold and any buildings or appurtenances, but also to the proceeds of any oil and gas produced therefrom. White Star points out that language of § 144.2(A) omits any reference to the proceeds of oil and gas. White Star argues that this omission means the statutory trusts created under § 144.2(A) do not apply to other forms of revenue an operator might take in, such as that from the sale of oil and gas.

¶16 Finally, White Star argues that § 144.2 was drafted with the intent to protect non-operating working interest owners from incurring double liability for obligations due to third-party vendors. White Star notes that non-operating working interest owners are not in privity of contract with the vendors. However, in the event a non-operating working interest owner pays its share of the expenses, and the operator fails to pay a vendor, § 144.2 provides protection to the working interest owner because its payments are held in trust for the benefit of the vendor.

¶17 In short, White star's proffered interpretation of § 144.2(A) limits the scope of the statute's applicability to obligations owed by an operator to third-party vendors; and it limits the funds which are subject to the statutory trust based on their source, specifically to those received by the operator in the form of JIBs. However, we find no basis for these limitations in the text or purpose of § 144.2(A).

¶18 Contrary to White Star's assertions, nothing in the statute purports to limit its applicability to obligations owed by an operator to third-party vendors. In fact, § 144.2(A) extends trust fund protections to all lienable claims arising not only under drilling and reworking contracts, but also under operating agreements and forced pooling orders. In so doing, the statute expressly contemplates a variety of relationships and financial obligations among parties involved in the drilling process, which include not only vendors and operators but also contractors and working interest owners. If it was the intent of the Legislature to limit the scope of § 144.2 to lienable claims due and owing by operators to vendors, the extension of trust fund protections to lienable claims arising under operating agreements and forced pooling orders would make little sense. Neither operating agreements nor forced pooling orders give rise to contractual relationships or lienable claims between operators and vendors.2 As such, we see no basis for limiting the applicability of § 144.2(A) to obligations between third-party vendors and operators, and the Court will not read limitations into the text of a statute where they are not clearly expressed. See TRW/Reda Pump, 1992 OK 31, ¶5, 829 P.2d at 20.

¶19 Similarly, nothing in the text of § 144.2(A) purports to limit the sources of revenue subject to the statutory trust to JIBs. Rather than referencing specific funds, § 144.2(A) merely states that the "amount payable" shall be held by the operator as trust funds for payment of lienable claims. The omission of any reference to specific funds, in favor of the "amount payable" language, which we take to mean the amount owing, demonstrates that the Legislature was more concerned with securing the full amount of any lienable claims than with securing certain sources of revenue for payment of those claims. Likewise, the "upon receipt" language does not limit the sources of revenue which are subject to the statutory trust. Rather, this language speaks to the priority which the Legislature placed on an operator's obligation under § 144.2(A), which is to say that as funds are received, they should be held in trust for that purpose.

¶20 White Star also made several arguments not based in the text to support its claimed limitations on the sources of revenue subject to the statutory trust. We are not willing to ascribe an intent to the Legislature to limit the scope of § 144.2 based on the language in § 144. Furthermore, to the extent that § 144 is relevant to our analysis, it may well support an interpretation contrary to that of White Star. If the proceeds of oil and gas produced from a particular leasehold are subject to a service provider's lien pursuant § 144, we see no reason why those proceeds would be exempt from statutory trust funds created by § 144.2 to secure those liens. Finally, we do not agree that the Legislature's intent in creating the statutory trusts under § 144.2 was to protect non-operating working interest owners from incurring double liability for costs and expenses due to third-party vendors.

¶21 The manifest purpose of § 144.2 is to provide a measure of security in the form of trust funds to the designated lienholders against the risk of insolvency or corrupt dealing of operators. This security is afforded to any holder of a lienable claim due and owing by the operator pursuant to a drilling contract, reworking contract, operating agreement, or forced pooling order. In operation, § 144.2 achieves that goal by creating a simple mandate for operators: any amount received, up to the amount of all lienable claims, shall be held in trust for payment of said lienable claims until paid. The statute does not require that these funds be received from any particular source, but it does require that operators make a priority of accumulating and maintaining the funds when they are received. For these reasons, we answer the reformulated first question in the negative. Title 42, Section 144.2 does not limit the types of revenue which must be held in trust for payment of lienable claims.

II. The Oil and Gas Owners' Lien Act does not grant operators and non-operating working interest owners a lien in proceeds from the sale of oil and gas which is prior and superior to any claim of the holder of a mechanic's and materialman's lien. ¶22 As to the second question, we answer in the negative as well. The Oil and Gas Owners' Lien Act, 52 O.S. § 549.1 et seq., does not grant operators and non-operating working interest owners a lien in proceeds from the sale of oil and gas which is prior and superior to any claim of the holder of a mechanic's and materialman's lien asserted under 42 O.S. § 144.

¶23 Title 52, Section 549.3 states:

A. To secure the obligations of a first purchaser to pay the sales price, each interest owner is hereby granted an oil and gas lien to the extent of the interest owner's interest in oil and gas rights. The oil and gas lien granted by this act is granted and shall exist as part of and incident to the ownership of oil and gas rights.

[...]

C. An oil and gas lien exists until the interest owner or representative first entitled to receive the sales price has received the sales price.

[...]

¶24 White Star points to § 549.7, which states, "Except for a permitted lien, an oil and gas lien is a lien that takes priority over any other lien, whether arising by contract, law, equity or otherwise, or any security interest." White Star thus contends that the liens held by it and affiliated non-operating working interest owners are superior to those held by the M&M lien claimants.

¶25 White Star's position, however, is inconsistent with both the text and legislative history of the Oil and Gas Owners' Lien Act. As defined in the act, an interest owner is "a person owning an interest of any kind or nature in oil and gas rights before the acquisition thereof by a first purchaser." 52 O.S. § 549.2(6) (emphasis added). Oil and gas rights include, among other things, any right, title, or interest in oil, gas, proceeds from the sale of either, or an oil and gas lease. Id. at § 549.2(9)(a). It also includes a "mortgage lien or security interest in any of the foregoing." Id. at § 549.2(9)(b)(6). Title 42, Section 144 provides vendors, in this case the M&M lien claimants, a lien on the leasehold on which they performed work, as well as the proceeds from the sale of oil and gas therefrom. Thus, the M&M lien claimants are in parity to operators and non-operating working interest owners pursuant to the Oil and Gas Owners'

Lien Act, and they are entitled to the same super-priority as White Star and its affiliated non-operating working interest owners.⁴

¶26 Additionally, both White Star and the M&M lien claimants note that the Oil and Gas Owners' Lien Act was amended in 2010 in response to a decision out of the United States Bankruptcy Court for the District of Delaware. See In re Semcrude, L.P., 407 B.R. 140 (Bankr. D. Del. 2009); see also Comment 1 to 52 O.S. 549.1. The bankruptcy court in In re Semcrude determined that based on an old version of the act, the claims of working interest owners in Oklahoma on the assets of a defunct first purchaser were subordinate to security interests and liens asserted by the first purchaser's other creditors under the Uniform Commercial Code. Semcrude, 407 B.R. at 156-57.

¶27 White Star argues that the Legislature sought to respond to the Semcrude decision by providing traditional interest owners with a security interest in proceeds from the sale of oil and gas that is prior and superior to all other lienholders. This reading, however, demonstrates a misunderstanding of the relationships among the parties in *Semcrude* and their respective security interests. In that case, the interest owners were seeking to establish priority in relation to the other creditors of a first purchaser. Id. at 140. The present case is distinguishable because White Star, as an interest owner and operator, is seeking to establish priority in relation to its own creditors. Such a result would be plainly absurd. See TRW/Reda Pump, 1992 OK 31, ¶5, 829 P.2d at 20. The 2010 amendments to the Oil and Gas Owners' Lien Act were clearly intended to ensure that interest owners received payment from first purchasers of oil and gas. The 2010 amendments were not intended to insulate traditional interest owners from liabilities they incurred in the operation of their well sites.

CONCLUSION

¶28 In answer to the first question of law certified to this Court by the Bankruptcy Court, we find that the funds which must be held in trust for payment of lienable claims pursuant to 42 O.S. § 144.2 are not exclusively limited to joint-interest billing payments received by operators for services rendered by the lienholders. In answer to the second question, we find that the Oil and Gas Owners' Lien Act, 52 O.S. § 549.1 et seq., does not grant operators and non-operating working interest owners a lien

in proceeds from the sale of oil and gas which is prior and superior to any claim of the holder of a mechanic's and materialman's lien asserted under 42 O.S. § 144.

CERTIFIED QUESTIONS ANSWERED

ALL JUSTICES CONCUR

Rowe, J:

1. Title 42, Section 144 provides:

Any person, corporation, or copartnership who shall, under contract, expressed or implied, with the owner of any leasehold for oil and gas purposes, or the owner of any gas pipeline or oil pipeline, or with the trustee or agent of such owner, perform labor or services, including written contracts for the services of a geologist or petroleum engineer, or furnish material, machinery, and oil well supplies used in the digging, drilling, torpedoing, completing, operating, or repairing of any oil or gas well, or who shall furnish any oil or gas well supplies, or perform any labor in constructing or putting together any of the machinery used in drilling, torpedoing, operating, completing, or repairing of any gas well, or perform any labor upon any oil well supplies, tools, and other articles used in digging, drilling, torpedoing, operating, completing, or repairing any oil or gas well, shall have a lien upon the whole of such leasehold or oil pipeline, or gas pipeline, or lease for oil and gas purposes, the buildings and appurtenances, the proceeds from the sale of oil or gas produced therefrom inuring to the working interest, exempting, however, any valid, bona fide reservations of oil or gas payments or overriding royalty interests executed in good faith and payable out of such working interest, and upon the material and supplies so furnished, and upon any oil well supplies, tools, and other articles used in digging, drilling, torpedoing, operating, completing, or repairing any oil or gas well, and upon the oil or gas well for which they were furnished, and upon all the other oil or gas well fixtures and appliances used in the operating for oil and gas purposes upon the leasehold for which said material and supplies were furnished or labor or services performed. Such lien shall be preferred to all other liens or encumbrances which may attach to or upon said leasehold for gas and oil purposes and upon any oil or gas pipeline, or such oil and gas wells and the material and machinery so furnished and the leasehold for oil and gas purposes and the fixtures and appliances thereon subsequent to the commencement of or the furnishing or putting up of any such machinery or supplies; and such lien shall follow said property and each and every part thereof, and be enforceable against the said property wherever the same may be found; and compliance with the provisions of this article shall constitute constructive notice of the lien claimant's lien to all purchasers and encumbrancers of said property or any part thereof, subsequent to the date of the furnishing of the first item of material or the date of the performance of the first labor or services.

2. Although primarily relevant to the second certified question, the comments to 52 O.S. § 549.1 provide a helpful overview of the oil and gas industry, particularly as it is understood by the Legislature. The comments also explain, at least in part, the nature of joint operating agreements and forced pooling orders. Comment 8 explains that joint operating agreements "typically set the terms by which the operator or working interest owner is given the authority to sell the oil and gas product on behalf of those with an interest in the product, including the royalty share." Comment 5 states, "Under a forced pooling order, an unleased interest owner [...] is afforded the opportunity to participate in the development of the minerals; in the absence of an election to participate, those rights are transferred by operation of the pooling order to the operator of the unit."

While the full extent of the relationships and obligations created by joint operating agreements and forced pooling orders are not explained by these comments, it seems clear that neither joint operating agreements nor forced pooling orders exclusively, or even primarily, give rise to relationships between operators and third-party vendors.

rise to relationships between operators and third-party vendors.

3. To clarify, an "oil and gas lien," as used here, refers to a lien granted by the Oil and Gas Owners' Lien Act, 52 O.S. § 549.1 *et seq.*, as opposed to the oil and gas well lien granted to vendors under 42 O.S. § 144.

Additionally, a "permitted lien" generally refers to:

a. a mortgage lien or security interest granted by a first purchaser in favor of a person not an affiliate of the first purchaser which mortgage lien or security interest secures payment under a written instrument of indebtedness signed by the first purchaser and accepted in writing by the payee thereof prior to the effective date of this act with a principal amount and a fixed maturity stated therein; [..., or]

b. a validly perfected and enforceable lien created by statute or by rule or regulation of a governmental agency for storage or transportation charges, including terminal charges, tariffs,

demurrage, insurance, labor or other charges, owed by a first purchaser in relation to oil or gas originally purchased under an agreement to sell [...]

52 O.S. § 549.2(11).

4. Although the definition of "interest owner" set out in 52 O.S. § 549.2(6) may include royalty owners, the scope of the question presented to this Court does not contemplate royalty owners, and thus, our findings are limited to the priority of operators and non-operating working interest owners in relation to M&M lien claimants.

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NOTICE OF JUDICIAL VACANCY

The Judicial Nominating Commission seeks applicants District Judge, Seventh Judicial District, Office 9, Oklahoma County.

To be appointed to the office of District Judge, Office 9, Seventh Judicial District, one must be a registered voter of Oklahoma County, Seventh Judicial District and a resident of Electoral Division One 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 as a licensed practicing attorney, or as a judge of a court of record, or both, 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, November 13, 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 November 13, 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

2021 OBA Board of Governors Vacancies

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

OFFICERS

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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 **Iudicial District One**

Current: Brian T. Hermanson,
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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.

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Opinions of Court of Civil Appeals

2020 OK CIV APP 50

IN RE THE MARRIAGE OF: LENA RENEE ROODZANT, Petitioner/Appellant, vs. DANIEL CHARLES ROODZANT, Respondent/Appellee.

Case No. 116,896; Comp. w/116,244, 116,722 March 12, 2019

APPEAL FROM THE DISTRICT COURT OF CUSTER COUNTY, OKLAHOMA

HONORABLE DONNA L. DIRICKSON, TRIAL JUDGE

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

Donelle H. Ratheal, Jason M. Gresham, Eric P. Warner, RATHEAL, MAGGARD & FORTUNE, PLLC, Oklahoma City, Oklahoma, for Petitioner/Appellant

George H. Brown, Tony Gould, BROWN & GOULD, PLLC, Oklahoma City, Oklahoma, for Respondent/Appellee

JANE P. WISEMAN, VICE-CHIEF JUDGE:

¶1 Lena Renee Roodzant appeals a trial court order denying her application for attorney fees and costs incurred in this dissolution of marriage action. After review, we conclude Lena's application must be granted pursuant to 43 O.S.2011 § 112.6. We reverse the denial and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

¶2 This is the third appeal involving the dissolution proceedings for Lena and Daniel Charles Roodzant. In Case No. 116,244, we addressed Daniel's appeal from a decree of dissolution of marriage. In that appeal, we affirmed the trial court's order. In Case No. 116,722, we addressed Daniel's appeal from a trial court ordering imposing a sentence for contempt. We affirmed the trial court's order except as to the amount of the attorney fees awarded to Lena which we reversed and remanded for further proceedings. This appeal involves the trial court's denial of Lena's application for attorney fees and costs for the dissolution of marriage proceedings.

¶3 The facts of this case have been discussed in depth in the two previous appeals, but we will restate them here as they relate to the attorney fee application. Lena and Daniel were married on May 26, 2012. Lena filed a petition for dissolution of marriage in Custer County, Oklahoma, on June 30, 2016. Two minor children were born of the marriage. On July 15, 2016, Daniel filed an objection to venue and motion to dismiss alleging Lena had never been a resident of Custer County. The trial court concluded there was no basis under Oklahoma law to dismiss the case, so the question before it was whether the case should be transferred to Caddo County, where Lena had previously resided. After considering all the circumstances and the interests of judicial economy, the trial court found Custer County was the proper venue and denied Daniel's motion to dismiss. The parties stipulated Lena should be granted sole custody of the children and after the trial, the court awarded Daniel visitation in accordance with a schedule set by the court.

¶4 In its order filed after trial, the court stated: "The Court determines from testimony received that a domestic violence incident occurred between the parties. [Daniel] is verbally and emotionally abusive to [Lena], and manipulated [Lena] by controlling the financial resources of the parties." After the trial court announced its decision regarding property and debt division, Daniel filed a motion to reconsider, which the trial court denied after a hearing. On July 7, 2017, the court entered a journal entry of judgment and decree of dissolution of marriage. As noted above, Daniel appealed from the trial court's decision and this Court affirmed the trial court's order.

¶5 On August 4, 2017, Lena filed an "Application to Assess Attorney Fees and Costs" for the dissolution proceedings and Daniel's motion to reconsider. An affidavit attached to the application indicated Lena incurred \$106,829 in attorney fees. Daniel filed a response which detailed his objections to Lena's application.

¶6 On November 17, 2017, the trial court entered an order denying Lena's application for attorney fees and costs, stating, "Based

upon the asset allocation for the reasons previously determined by the Court and the award of an attorney fee for the prosecution of the contempt citation, the Court finds that any additional attorney fee to [Lena] is not warranted." The order indicated it was sent to Lena's attorney by email.

¶7 On January 18, 2018, Lena filed a "Motion for Alternative Service of Final, Appealable Order and Supporting Brief." Lena alleged, "None of [her] filed pleadings include a Consent or Instructions for service by electronic transmission." Lena asserted she did not learn that the court had entered an order denying her application until she attended the January 10, 2018, hearing on a motion to quash filed by Daniel. Lena asserted, "Without a 'Consent' and 'Instructions' for electronic service by [Lena] or her counsel on a pleading or Entry of Appearance, this Court was required to direct service of the final, appealable Order to [Lena's] counsel by regular United States mail. It failed to provide effective service." She asserted, "Without a regular mailing, with the alternative service date, [Lena's] rights to pursue reconsideration and/or an appeal of this Court are foreclosed."

¶8 On February 27, 2018, the trial court entered an "Order Granting Petitioner's Motion for Alternative Service of Final Appealable Order on Attorney Fees and Costs." The trial court correctly directed that the order denying Lena's application "shall be sent to counsel of record through the USPS with a certificate of service filed with the court clerk." A certificate of mailing indicated a certified copy of the order was mailed to the attorneys of record on February 27, 2018.

¶9 On March 29, 2018, Lena filed a motion to reconsider the denial of her attorney fee and cost application. That same day, she filed a petition in error seeking review of the trial court's decision to deny her application for attorney fees and costs. On October 16, 2018, Lena filed an amended petition in error in which she indicated the trial court denied her motion to reconsider on August 6, 2018.

STANDARD OF REVIEW

¶10 "Whether a party has a right to recover a statutory attorney's fee is a legal question, and will be reviewed *de novo* by this Court." *State ex rel. Dep't of Transp. v. Cedars Grp., L.L.C.,* 2017 OK 12, ¶ 10, 393 P.3d 1095.

ANALYSIS

¶11 Lena asserts as her first proposition of error on appeal: "The trial court erred as a matter of law when it refused to award [Lena] any attorney fees or costs relating to the marriage dissolution proceeding after it specifically found that domestic violence had occurred during the marriage and that [Lena] was a domestic violence victim." We agree.

¶12 Lena cites 43 O.S.2011 § 112.6 in support of her argument, which provides:

In a dissolution of marriage or separate maintenance or custody proceeding, a victim of domestic violence or stalking shall be entitled to reasonable attorney fees and costs after the filing of a petition, upon application and a showing by a preponderance of evidence that the party is currently being stalked or has been stalked or is the victim of domestic abuse. The court shall order that the attorney fees and costs of the victimized party for the proceeding be substantially paid for by the abusing party prior to and after the entry of a final order.

Although the term "'shall' can be used permissively generally, when the Legislature uses the term 'shall,' it signifies a mandatory directive or command." *In re Harris*, 2002 OK 35, n. 31, 49 P.3d 710.

¶13 Here, the trial court specifically found there had been a domestic violence incident during the marriage. This finding triggers a court, if requested, to award attorney fees and costs pursuant to 43 O.S.2011 § 112.6, because such an award pursuant to this statutory provision is mandatory.

¶14 Daniel asserts Lena is not entitled to attorney fees and costs pursuant to § 112.6 because she "did not request fees for domestic abuse." We conclude that this provision is applicable in deciding the attorney fee issue even if Lena did not request fees specifically under this section in her attorney fee and cost application.

¶15 For example, in *Maxxum Construction*, *Inc. v. First Commercial Bank*, 2011 OK CIV APP 84, ¶ 10, 256 P.3d 1058, the plaintiff "asserted the equitable remedy of unjust enrichment to recover for unpaid labor and services rendered." This Court concluded, "Because the underlying nature of the action was one to recover damages arising directly from the provision of labor or services, [12 O.S. § 936]

authorized an award of prevailing party attorney's fees to [the defendant], having prevailed on [the plaintiff's] labor and services claim." The Court instructed that "if the underlying nature of the suit is one to recover for unpaid labor or services rendered, §936 authorizes an award of prevailing party attorney's fees, even though recovery is claimed under an equitable theory." *Id.* ¶ 8. Here, § 112.6 was applicable and should have been considered although Lena filed a general application for attorney fees.

¶16 After Lena requested attorney fees in this dissolution of marriage action, with the trial court's finding of domestic violence, she was entitled to have her request considered pursuant to § 112.6. Daniel argues that Lena raised the issue of domestic violence for the first time in her motion to reconsider. Although supported by the record, this fact is not dispositive of the issue before us because (1) the trial court specifically found a domestic violence incident occurred during the marriage, and domestic violence was therefore already an issue in the case, and (2) Lena timely appealed from the order denying her application rather than from the order denying her motion to reconsider.

¶17 On remand, the trial court will be required to address Lena's application pursuant to § 112.6, and award a reasonable attorney fee and costs considering the court's previous asset allocation and whatever attorney fee amount has been awarded for the prosecution of the contempt citation.

CONCLUSION

¶18 Because the legislative directive in 43 O.S.2011 § 112.6 makes the award of attorney fees and costs mandatory in this situation, the denial of Lena's request for at least a portion of her attorney fees and costs in this dissolution of marriage action requires reversal. Accordingly, we must reverse the denial and remand for further proceedings as outlined in this Opinion.

¶19 REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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

2020 OK CIV APP 51

IN THE MATTER OF THE ESTATE OF CLARENCE FRED STITES, Jr., deceased. TYTHE HILL STITES, Personal Representative of the Estate of Clarence Fred Stites, Jr., Appellant, vs. JEFFRY TAPP STITES, Appellee.

Case No. 117,240. August 9, 2019

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE LINDA MORRISSEY, JUDGE

AFFIRMED

Tythe Hill Stites, Tulsa, Oklahoma, *Pro Se*, Jeffry Tapp Stites, Tulsa, Oklahoma, *Pro Se*. Kenneth L. Buettner, Judge:

¶1 Tythe Hill Stites (Ty) appeals from an order for the partial distribution of the estate of Clarence Fred Stites, Jr. (Decedent). The trial court determined that a transfer-on-death deed for particular real estate (the Property) to Jeffry Tapp Stites (Jef), which Jef failed to accept by filing an affidavit according to statute, reverted to Decedent's estate for distribution according to Decedent's will (the Will). The trial court held the reverted Property should be distributed according to the specific devise in the Will and ordered the Property be distributed to Jef. On appeal, Ty argues that the Property should have been distributed according to the Will's residuary clause, such that the Property should have been divided evenly amongst Decedent's three sons – Ty, Jef, and Chad. We hold that the trial court's determination that Decedent intended the reverted Property be distributed according to the Will's specific bequests was not against the weight of the evidence and affirm.

¶2 Decedent passed away August 17, 2016. On June 27, 2017, Jef filed a petition for letters of administration of Decedent's estate (the Estate). Jef attached a copy of the Will to his petition. Jef also alleged Ty – who was named executor in Decedent's Will - had failed to petition for the probate of the Will within the statutory period, so that Jef should be named administrator of the Estate. On July 20, 2017, Ty objected to Jef's petition and petitioned for the admittance of the Will to probate. Ty also sought appointment as personal representative of the Estate, pursuant to the terms of the Will. Jef dismissed his petition for letters of administration July 25, 2017. The Will was admitted to probate August 30, 2017. Ty was appointed personal representative and letters testamentary were issued. Notice of probate of the Estate was sent to creditors October 23, 2017, and inventory and appraisement of the Estate was completed October 30, 2017.

¶3 Jef petitioned for partial distribution of the Estate March 16, 2018. Specifically, Jef sought the distribution of three real estate properties specifically devised to him in the Will. In his petition, Jef acknowledged that two of the properties devised to him had also been the subject of a transfer-on-death deed (TODD) executed by Decedent naming Jef as the transferee. Jef admitted he had failed to accept the two properties transferred via the TODD by failing to file an affidavit accepting the property within the statutory period. Still, Jef argued the Decedent's Will and TODD evinced an intent that all of the Property devised to him in the Will should be distributed to him according to the Will's specific provisions, despite his failure to accept the TODD.

¶4 As personal representative of the Estate, Ty objected to Jef's petition for partial distribution. Following additional briefing and a hearing held May 23, 2018, the trial court agreed with Jef and ordered the Property be distributed to Jef. Ty appeals.

¶5 "Probate proceedings are of equitable cognizance." In re Estate of Sneed, 1998 OK 8, ¶ 8, 953 P.2d 1111. This Court will review the entire record on appeal and weigh the evidence, but will not disturb the trial court's findings "unless they are clearly against the weight of the evidence or some governing principle of law." Id. When construing a will, "[t]he intention of the testator is controlling," and the trial court "must ascertain and give effect to the testator's intent, unless the intent attempts to effect what the law forbids." Matter of Estate of Westfahl, 1983 OK 119, ¶ 5, 674 P.2d 21. "This Court will not interfere with trial court's construction of a will unless it is clearly against the weight of the evidence." Cavett v. Peterson, 1984 OK 59, ¶ 21, 688 P.2d 52 (citing Savage v. Hill, 1959 OK 157, ¶ 15, 346 P.2d 323).

¶6 The primary issue on appeal is whether real property conveyed by a transfer-on-death deed that was not accepted via the statutory procedure and thus reverted back to the testator's estate should be distributed according to the will's specific provisions or via the will's residuary clause. The mechanism of a transfer-on-death deed (TODD) is a relatively recent addition to Oklahoma law and serves as an alternative to traditional testate succession for the posthumous transfer of real property. This

statutory will alternative was created though the enactment of the "Nontestamentary Transfer of Property Act," which provides:

An interest in real estate may be titled in transfer-on-death form by recording a deed, signed by the record owner of the interest, designating a grantee beneficiary or beneficiaries of the interest. The deed shall transfer ownership of the interest upon the death of the owner. A transfer-on-death deed need not be supported by consideration . . . The signature, consent or agreement of or notice to a grantee beneficiary or beneficiaries of a transfer-on-death deed shall not be required for any purpose during the lifetime of the record owner.

58 O.S. Supp. 2015 § 1252.

¶7 In order to accept real estate granted via TODD, within nine months following the grantor's death, the grantee beneficiary must execute and file an affidavit affirming (1) proof of the grantor's death, (2) whether the grantor and beneficiary were married, and (3) a legal description of the real property. *Id.* A TODD beneficiary's failure to file the requisite affidavit within the statutory period will result in the property reverting to the transferor's estate. *Id.* A properly executed TODD may not be revoked by the provisions of a will. *Id.*

¶8 Here, the parties do not disagree that Decedent properly executed a Will wherein Decedent devised three particular real estate properties to Jef. Nor do they dispute that on the same day he executed the Will, July 12, 2016, Decedent also executed a TODD for two of the three properties devised to Jef (the Property), in which Decedent named Jef as the beneficiary. The parties further agree that Jef, allegedly unaware of the statutory requirements, failed to file the mandatory affidavit accepting the Property within nine months of Decedent's death. As such, the parties agree the Property reverted to Decedent's estate for probate according to the Will.

¶9 The dispute between the parties arises, however, in determining whether the Property reverted back to the estate to be distributed according to the specific devises in the Will, or whether the Property should be treated similarly to a disclaimed or lapsed gift such that it should be distributed according to the Will's residuary clause. In determining the distribution of Decedent's estate, we look firstly to the

Will, which is the best indication of Decedent's testamentary intent.

¶10 In the provisions providing for Decedent's specific devise of the Property to Jef, the Will states that the Property shall go to Jef "if he survives [Decedent] by thirty (30) days" and if Decedent has "not disposed of said property or any part thereof prior to [Decedent's] death including, but not limited to, by Transfer on Death Deed" The Will also states that the Decedent's residuary estate "shall consist of all property or interest therein of whatever type and wherever located, both real and personal, tangible and intangible, not otherwise effectively disposed of in this Will, including any lapsed gifts"

¶11 Of note, the two instruments at issue here - the Will and the TODD - were executed on the same day. A similar question of the consideration of the combination of a will and TODD arose in In re Estate of Carlson, 2016 OK 6, 367 P.3d 486. There, the Supreme Court determined that the two documents, executed on the same day, should be construed together as a single estate plan in determining the testator's intent. Id. ¶ 13. The Carlson court pointed to 84 O.S. 2011 § 154, which provides, "Several testamentary instruments, executed by the same testator, are to be taken and construed together as one instrument." Id. The Supreme Court determined that although TODDs are nontestamentary documents, they can still be "examined with Decedent's simultaneously executed testamentary instruments to determine Decedent's intent " Id. ¶ 14.

¶12 Below, the trial court concluded that the Decedent's complementary Will and TODD evidenced a "belt and suspenders" approach, demonstrating Decedent's intent that Jef should receive the Property under all circumstances. We agree. Where Decedent's Will and TODD were executed on the same day, impliedly with the intention of creating a single scheme for the posthumous distribution of his estate, we take the two documents together in determining Decedent's intent. As such, the trial court did not rule against the clear weight of the evidence in determining that the Decedent intended in the event that the TODD failed, Jef would still receive the Property through the Will.

¶13 Specifically, the words "not disposed of ... by Transfer on Death Deed" evince an intent that the only alteration of the Will would be in

the event that Decedent's property was effectively otherwise transferred. This provision was likely included as an acknowledgment of the statutory prohibition of the canceling of TODDs via testamentary devise. Still, the nature of TODDs is such that nothing is transferred to the beneficiary upon execution, but instead the transfer of interest occurs only upon the grantee's death with final disposition upon the beneficiary's acceptance. See Joyce Palomar, 2 PATTON AND PALOMAR ON LAND TITLES § 333 (3d ed. 2018 update). No final property interest transfers to the beneficiary of a TODD prior to death and acceptance. As such, where no property interest was "disposed of" via the TODD because Jef never accepted it by filing the requisite affidavit, the specific devise in the Will remains effective and Jef is entitled to distribution of the Property.

¶14 We similarly reject Ty's arguments that the unaccepted transfer of the Property by TODD was a lapsed gift or a "de facto disclaimer." Firstly, the concept of a "lapse" primarily refers to an instance in which a testate beneficiary predeceases the testator. See R. Robert Huff, 1 OKLA. PROB. LAW & PRACTICE § 4.8 (3d ed. 2017 update). But where the predeceasing beneficiary is a child or other close relative of the testator, the lapsed gift is preserved by Oklahoma's antilapse statute, which provides that the lapsed gift shall pass to the predeceased beneficiary's issue. 84 O.S. 2011 § 142. A grant of property by TODD that is not accepted by the beneficiary is not a lapsed gift. But even if Jef had predeceased Decedent and the devise had lapsed, Jef's testate share would have passed to his lineal descendants via the antilapse statute. As such, we reject Ty's argument that the unaccepted transfer by TODD was a lapsed gift that should have been distributed via the residuary clause.

¶15 Further, Jef's failure to accept the TODD could not constitute a disclaimer under Oklahoma law, which requires that a disclaimer of an interest passing by will, intestate succession, or other testamentary instrument shall be in writing. 84 O.S. 2011 § 22. In providing for the option of disclaimer, the Oklahoma Legislature provided a means by which a beneficiary could avoid the burdens associated with accepting a posthumous gift. See R. Robert Huff, 1 OKLA. PROB. LAW & PRACTICE § 24.17 (3d ed. 2017 update). But the Legislature also sought to protect beneficiaries from unintentionally disclaiming their share of an estate

by requiring that such a disclaimer be explicit in writing. We will not go against the Legislature's intent and thus reject Ty's argument that the unaccepted TODD was a disclaimed interest.

¶16 During the pendency of this appeal, Ty submitted an additional issue for appellate review via motion pursuant to Oklahoma Supreme Court Rule 1.37(b). According to 12 O.S. 2011 § 990.1,

When a petition in error is timely filed, the Supreme Court shall have jurisdiction of the entire action that is the subject of the appeal. No additional jurisdictional steps shall be necessary to enable the Supreme Court to rule upon any errors made in the trial of the action which are asserted by any party to the appeal and involve any other party to the appeal.

Ty filed a motion with this Court seeking vacation of a post-appeal order by the trial court. Ty appeals a May 19, 2019 order by the trial court compelling his compliance with Jef's discovery requests, ordering the reconciliation of items allegedly contained in Decedent's safety deposit box and compliance with any subpoena duces tecum issued by Jef in pursuit of relevant bank records. Ty asserts that this Court should reverse and vacate the trial court's order because the Oklahoma Discovery Code does not apply to probate proceedings. Oklahoma Supreme Court precedent indicates to the contrary.

¶17 In Stone v. Hodges, 1967 OK 214, 435 P.2d 165, the Oklahoma Supreme Court considered the novel question of whether the provision in the Discovery Code allowing for the use of interrogatories applied to probate proceedings. There, the language of the then-effective Code stated that the provision applied to "[a]ny party to a civil action or proceeding." Id. ¶ 2. The title of the Act enacting the Code also specified that it was "[a]n Act relating to civil procedure." Id. In Stone, the appellant claimed that the terms "civil action or proceeding" and "civil procedure" did not encompass probate proceedings. Id. The Supreme Court disagreed and determined the use of interrogatories was permitted in probate proceedings. *Id.* ¶¶ 3, 9.

¶18 Though slightly different, the language of the current Discovery Code is nearly identical to that addressed in *Stone*. The current provision, 12 O.S. 2011 § 3224, states: "The Oklahoma Discovery Code shall govern the procedure for discovery in all suits of a civil nature in all courts in this state." We find that the

words "suits of a civil nature" to be at least as broad as the words "civil action and proceeding" and hold that the Oklahoma Discovery Code applies to probate proceedings. We therefore deny Ty's motion.

¶19 The trial court's determination that the Decedent's Will and TODD evinced an intent that Jef receive the entire Property in the event that the TODD was not accepted was not against the weight of the evidence. Further, the unaccepted transfer via TODD was not a lapsed gift or disclaimed interest. As such, we affirm the trial court's order distributing the Property to Jef according to the Will's specific devise. We also hold that the Discovery Code applies to probate proceedings and deny Ty's motion to reverse or vacate the trial court's May 19, 2019 order.

¶20 AFFIRMED.

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

Kenneth L. Buettner, Judge:

1. Decedent's third son, Chad Fred Stites, has not appeared in this appeal.

2020 OK CIV APP 52

MILLER VALVE AND CONTROLS, INC., Plaintiff/Counter-Defendant, vs. JEDSON ENGINEERING, INC., Defendant/Cross-Claimant/Cross-Defendant/Third-Party Plaintiff/Appellant/Counter-Appellee, and CP KELCO U.S., INC., Defendant/Counter-Claimant/Cross-Defendant, and REXEL, INC., ELLIOTT ROOFING, LLC, NABHOLZ INDUSTRIAL SERVICES, and HIMIC SALES CORPORATION, Defendants/Counter-Claimants/Cross-Claimants/Cross-Defendants, and LOGAN AND COMPANY, INC., and ELLIOTT ELECTRIC SUPPLY, INC., Defendants/Counter-Claimants/Cross-Claimants/Counter-Defendants/Cross-Defendants/ Third-Party Plaintiffs/Appellees/Counter-Appellants, and ELLIOTT ELECTRIC SUP-PLY, INC., Defendant/Counter-Claimant/ Cross-Claimant/Counter-Defendant/Cross-Defendant/Third-Party Plaintiff, and RACHID ABDALLAH, JOHN VIGNALE LIGHTHOUSE ELECTRIC, INC., FISCHER PUMP & VALVE COMPANY, d/b/a FISCH-ER PROCESS INDUSTRIES, SPIRAX SARCO, INC., SHELBY McDONALD, and JOHN H. CARTER CO., INC., Third-Party Defendants, and YOUNG'S SHEET METAL, INC., and BRAZEAL MASONRY, INC., Intervenors.

Case No. 117,043. February 14, 2020

APPEAL FROM THE DISTRICT COURT OF OKMULGEE COUNTY, OKLAHOMA

HONORABLE KENNETH ADAIR, JUDGE

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

James S. Daniel, Diane M. Black, SECREST, HILL, BUTLER and SECREST, Tulsa, Oklahoma, for Jedson Engineering, Inc.,

James M. Elias, Rick D. Tucker, ROBINETT, KING, ELIAS, BUHLINGER, BROWN & KANE, Bartlesville, Oklahoma, for Logan and Company, Inc.

Kenneth L. Buettner, Judge:

¶1 Defendant/Appellant/Counter-Appellee Jedson Engineering, Inc. and Defendant/Appellee/Counter-Appellant Logan and Company, Inc. appeal an interlocutory order granting injunctive relief to Logan by directing Jedson to place \$745,439.89 in escrow to protect construction trust funds pending the outcome of litigation. Jedson challenges the court's decision to enter the injunction while Logan argues the trial court erred in limiting the injunction to an amount less than the pending lienable claims. By statute, Jedson had a fiduciary duty to hold funds it received under its contract with Defendant CP Kelco (CPK) in trust for payment of lienable claims. The evidence showed Jedson may have breached that duty by paying itself before paying lienholders and therefore we find no abuse of discretion in the decision to enter the injunction. Furthermore, we agree with Logan that because the lienable claims exceeded the amount Jedson received from CPK, the trial court abused its discretion in limiting the injunction to less than all funds subject to the statutory trust. We affirm in part and remand with directions to modify the temporary injunction to include all funds received by Jedson, pending final distribution to lienholders.

¶2 CPK hired Jedson to renovate a manufacturing plant in Okmulgee. As part of the project, Jedson purchased materials from several parties, including Logan and Plaintiff Miller Valve and Controls, Inc. After Jedson left the project, Miller initiated this case by filing a petition against CPK and Jedson seeking payment for materials. Miller's Petition named Logan as a defendant but did not assert any claims against Logan. The numerous defendant

dants then filed claims against each other, Miller, and third parties.

¶3 Logan filed its answer with counterclaims, cross-claims, and third party claims October 21, 2016. Logan asserted the contract between CPK and Jedson provided CPK would pay Jedson \$7,660,023 for the project, and CPK had paid Jedson 75% of that before litigation began. Logan asserted Jedson owed Logan \$131,169 on a purchase order for fabrication of piping, and \$2,169,341.05 on a time and materials agreement for electrical and mechanical installation. Logan sought judgment against Jedson for breach of contract seeking payment on an open account, quantum meruit, unjust enrichment, foreclosure on its liens, and for violation of Oklahoma's construction trust fund statutes. Jedson denied Logan's claims.

¶4 Logan filed its motion for temporary injunction November 27, 2017. Logan asserted Jedson's counsel had acknowledged that CPK had paid Jedson \$5,745,017,1 of which Jedson had paid \$2,763,975 to vendors and \$2,235,602.11 to itself, leaving \$745,439.89 that Jedson was holding for distribution after the lien claims were resolved. Logan asserted the funds Jedson had paid itself and the funds it was holding (totaling \$2,981,042) were statutory construction trust funds which Jedson was required to hold pending payment of lienable claims and that a temporary injunction was necessary to safeguard those funds. Logan urged lienholders had a high likelihood of success on the merits, there was a risk of irreparable harm to their interests without an injunction, Jedson was merely the trustee of the construction funds and therefore would not suffer if enjoined from disposing of the funds, and an injunction would further the policy goal of insuring lienable claims are paid.

¶5 Jedson objected, denying the funds it held were construction trust funds and arguing Logan could not prove it would be irreparably harmed without an injunction. Jedson contended Logan's quest for an injunction was an attempt to deny Jedson payment for its work. Jedson also asserted Logan was not entitled to an injunction because Logan had no ownership interest in the funds until the lien claims were resolved.

¶6 Following a hearing, the trial court entered its Order Granting Injunctive Relief May 14, 2018. The trial court found Logan had met its burden of showing the four factors required for an injunction. The court noted Jedson had ad-

mitted to receiving and not objecting to Logan's pre-lien notice. The court found temporary injunctive relief was necessary to preserve the construction funds, but the court limited the injunction to \$745,439.89, an amount Jedson had admitted it was holding pending determination of lien claims. The trial court denied Logan's request for a temporary injunction on the remaining funds pending further discovery as to whether Jedson retained those funds. The trial court ordered Jedson to deposit the enjoined funds in its attorney's client trust account until further order.

¶7 Both Jedson and Logan appeal.

As an equitable matter, "[i]njunction is an extraordinary remedy and relief by this means should not be granted lightly." ... We review the grant or denial of an injunction to determine whether the trial court abused its discretion in making its decision... "Under an abuse of discretion standard, the appellate court examines the evidence in the record and reverses only if the trial court's decision is clearly against the evidence or is contrary to a governing principle of law." ...

A party must prove the following to obtain an injunction: "1) the likelihood of success on the merits; 2) irreparable harm to the party seeking injunction relief if the injunction is denied; 3) his threatened injury outweighs the injury the opposing party will suffer under the injunction; and 4) the injunction is in the public interest." ... The party seeking an injunction must establish the right to injunctive relief "by clear and convincing evidence and the nature of the injury must not be nominal, theoretical or speculative." ...

Autry v. Acosta, Inc., 2018 OK CIV APP 8, ¶24 and ¶34, 410 P.3d 1017 (citations omitted).

¶8 Logan sought an injunction based on the fact Jedson held the funds it had received from CPK in trust for lienholders pursuant to statute: "The amount payable under any building or remodeling contract shall, upon receipt by any contractor or subcontractor, be held as trust funds for the payment of all lienable claims due and owing or to become due and owing by such contractors or subcontractors by reason of such building or remodeling contract." 42 O.S. 2011 §152(1) (emphasis added). Logan urged that Jedson had paid itself with construction trust funds as defined by §152(1) and therefore

an injunction was necessary to protect lienable claims from Jedson dissipating the trust funds.

¶9 At the hearing, the trial court noted that Jedson had admitted it paid itself first without perfecting a lien, which the trial court found would be a breach of the fiduciary duty implicit in the statutory construction trust.² A contractor or subcontractor must have complied with the lien filing statutes in order to assert a claim to construction trust funds. *In re Tefertiller,* 1989 OK 60, 772 P.2d 396. "Having failed to perfect its lien under § 143, [Jedson] lost the benefits accorded by §§ 152 and 153, and is in the same position as other general creditors of the construction trust funds" Id. at ¶19. At the hearing, Jedson agreed Logan had complied with the lien notice requirements. The court concluded that because Jedson had already paid itself in violation of the construction trust statute, then preserving the remaining funds in a trust account to safeguard them for lienholders was necessary to protect the statutory trust.

¶10 Jedson's first argument on appeal is that the trial court failed to make specific findings on each of the four elements for granting an injunction. The order on appeal includes the statement that the court found Logan had met its burden of proving each of the four elements. At the hearing, Logan noted that a violation of statute satisfied the irreparable harm element, citing Public Service Co. of Oklahoma v. Duncan Public Utilities Authority, 2011 OK CIV APP 15, ¶14, 248 P.3d 400. The trial court found there was a risk of irreparable harm because Section 152(1) created a fiduciary duty to protect the funds at issue here which Jedson had violated by paying itself with trust funds. The court also found Logan had shown a likelihood of success. The court found Jedson would not suffer harm by imposition of the injunction because it intended to hold the funds pending resolution of the lien claims. We find the trial court made the necessary findings to enter an injunction.

¶11 Jedson next argues an injunction was not warranted because Logan sought only a money judgment so that there was no irreparable harm. Logan sought to enjoin Jedson's violation of the construction trust fund statutes by dissipating funds to the disadvantage of lienable claims.

When it appears, by the petition, that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continu-

ance of some act ... which ... would produce injury to the plaintiff; or when ... it appears that the defendant is doing ... some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. And when, during the pendency of an action, it shall appear, by affidavit, that the defendant threatens or is about to remove or dispose of his property with intent to defraud his creditors, or to render the judgment ineffectual, a temporary injunction may be granted to restrain such removal or disposition....

12 O.S.2011 §1382. The record here supports a temporary injunction under the plain language of §1382. The authority cited by Jedson on this issue provides, "[w]here the alleged contemplated injury is such as can be fully compensated in money damages, and the defendants are wholly and unquestionably solvent and responsible, a temporary injunction should not be granted;" Marshall v. Homier, 1903 OK 84, 74 P. 368, 369, 13 Okla. 264 (emphasis added). The record shows Jedson retained \$745,000 in construction trust funds to pay \$4,000,000 in lienable claims. Money damages are considered inadequate where they cannot be collected because of insolvency or concealment of assets. See Restatement (Second) of Contracts § 360 (1981).

¶12 We find Logan showed it was entitled to a temporary injunction by clear and convincing evidence and the trial court did not abuse its discretion in granting Logan's motion. We next consider Logan's counter-appeal, in which it challenges the trial court's decision to limit the injunction to the \$745,440 remaining after Jedson paid itself. Logan contends the analysis supporting a temporary injunction applies to all construction trust funds, comprising all funds Jedson received on the construction contract. We agree. The construction trust fund statute quoted above is followed by the following statute:

- (1) The trust funds created under Section 152 of this title shall be applied to the payment of said valid lienable claims and no portion thereof shall be used for any other purpose until all lienable claims due and owing or to become due and owing shall have been paid.
- (2) If the party receiving any money under Section 152 of this title is an entity having the characteristics of limited liability pur-

suant to law, such entity and the natural persons having the legally enforceable duty for the management of the entity shall be liable for the proper application of such trust funds and subject to punishment under Section 1451 of Title 21 of the Oklahoma Statutes. For purposes of this section, the natural persons subject to punishment shall be the managing officers of a corporation and the managers of a limited liability company.

* * *

42 O.S.2011 §153 (emphasis added). The plain language of §153(1) shows that Jedson violated the statute by paying itself with trust funds before paying lienable claims.³ We see no reason to limit an order preserving the trust funds to an amount so reduced. We therefore reverse the trial court's limit of the injunction to \$745,440 and remand with directions to modify the temporary injunction consistent with this opinion.

¶13 AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

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

Kenneth L. Buettner, Judge:

- 1. Logan asserted Jedson and CPK originally entered an agreement for a fixed price of \$7,666,023 for Jedson to complete the project. Jedson and CPK dispute how and why Jedson stopped work before completing the project.
- 2. "(T)he trust created by the Oklahoma lien trust statutes is an express trust that effected a fiduciary relationship" Carey Lumber Co. v. Bell, 615 F.2d 370, 374 (5th Cir.1980).
- 3. The parties' dispute about what intent is currently required to avoid discharge of a construction debt in bankruptcy is not relevant to our decision.

2020 OK CIV APP 53

LEE NAYLES and LANA NAYLES, Plaintiffs/ Appellants, vs. KELVIN DODSON, d/b/a Broken Arrow Motor Company, Defendant/ Appellee.

Case No. 117,457. April 7, 2020

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE KIRSTEN PACE, TRIAL JUDGE

REVERSED AND REMANDED FOR FEE DETERMINATION

Caleb M. Salmon, SALMON LAW FIRM, PLLC, Tulsa, Oklahoma, for Plaintiffs/Appellants

Alexander F. King, Christopher B. Woods, KING WOODS, PLLC, Tulsa, Oklahoma, for Defendant/Appellee

P. THOMAS THORNBRUGH, PRESIDING JUDGE:

¶1 Lee Nayles and Lana Nayles appeal a decision of the district court denying their application for attorney fees. On review, we reverse the decision of the district court and remand for the determination of a reasonable attorney's fee.

BACKGROUND

¶2 As the underlying case was settled by an agreed journal entry before any hearing on the merits, the district court did not pass judgment on the facts. As stated by Plaintiffs in their motion for summary judgment, they made a \$1,000 deposit against the purchase of a vehicle, but, after discussing a loan with their bank, decided that the vehicle was over-priced and not to buy it. Defendant refused to refund the deposit, stating it was "non-refundable."

¶3 Defendant disputes this claim and stated in a narrative filed as his answer that Plaintiffs paid a deposit to "hold" the vehicle and fund some requested modifications, and he was entitled to retain the deposit because it was intended to be non-refundable. Defendant further states he suffered a loss by holding the vehicle for 10 days when he had an opportunity to sell it to another buyer.

¶4 Defendant, who was represented by counsel by that time, did not respond to Plaintiffs' motion for summary judgment, and the parties settled the contract claims in an agreed journal entry of judgment, leaving only the question of attorney fees open.

¶5 Plaintiffs applied for fees pursuant to 12 O.S. § 936, arguing that this was a case involving a contract for the sale of goods. Defendant responded arguing (among several theories) that, because the sale was never completed, there had been no "sale of goods," and no fees were available. The district court apparently agreed, and denied Plaintiffs' fee request. Plaintiffs now appeal.

STANDARD OF REVIEW

¶6 When the appeal raises an issue of the reasonableness of an attorney's fee awarded by the trial court, then the standard of review is whether there has been an abuse of discretion

by the trial judge. State ex rel. Burk v. Oklahoma City, 1979 OK 115, ¶ 22, 598 P.2d 659. However, the question here – whether a party is entitled to an award of attorney fees and costs – presents a question of law subject to the *de novo* standard of review. Hastings v. Kelley, 2008 OK CIV APP 36, ¶ 8, 181 P.3d 750.

ANALYSIS

I. A CONTRACT RELATING TO THE PURCHASE OR SALE OF GOODS

¶7 Section 936 of Title 12 of the Oklahoma Statutes provides: "In any civil action to recover for . . . [a] contract relating to the purchase or sale of goods . . . the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs." Defendant argues that a case in which a deposit is paid for the purchase of goods, but the transaction is not completed, does not involve a "contract relating to the purchase or sale of goods," because the case is premised on the "absence of the sale of the goods" rather than on the "sale of the goods."

A. The Limits of § 936

¶8 Oklahoma courts have limited the application of § 936 in several circumstances. *Kay v.* Venezuelan Sun Oil Co., 1991 OK 16, 806 P.2d 648, provides the most comprehensive guide to the interpretation of § 936, citing four examples of the types of cases that will not support fees pursuant to § 936. The cases noted by *Kay* were Russell v. Flanagan, 1975 OK 173, 544 P.2d 510 (failure to honor a warranty on work that later became defective was not a "labor and services" case); Ferrell Construction Co., Inc. v. Russell Coal Co., 1982 OK 24, 645 P.2d 1005 (damages for loss of anticipated profits do not fall under the "labor and services" provision of § 936); *Holbert v. Echeverria*, 1987 OK 99, 744 P.2d 960 (real property is not "goods, wares or merchandise" and breach of a contract to convey improved real property is not a "labor and services" case), and ABC Coating Company, Inc. v. J. Harris & Sons Limited, 1987 OK 125, 747 P.2d 271 (breach of quasi-contract for the use of a secret manufacturing process is not a "labor and services" case). Kay itself held that an assignment of an overriding royalty interest is not one of the contracts enumerated as fee-bearing in § 936. Since *Kay* was decided, *Brisco v. State ex rel*. Bd. of Regents of Agric. & Mech. Colleges, 2017 OK 35, ¶ 11, 394 P.3d 1251, has also held that an alleged breach of contract for future employment is not a "labor and services" case. The Legislature amended § 936 in 2002, and *Kay* discusses an earlier version of the statute. *See* Subsection 'B' below.

¶9 Two clear, general rules appear from these cases: 1) the provision of goods, labor or services must be central to the case, not a peripheral matter; and 2) cases merely arising from a "contract related to" labor and services, or involving the breach of a *future* potential of employment or services (such as those noted in *Russell* and *Brisco*) are not fee bearing under § 936. Defendant argues, however, that *Kay* went well beyond these established exceptions and held that § 936 applies only to a contract for goods actually <u>sold</u> and <u>delivered</u>. As the vehicle was never "delivered," Defendant argues that § 936 does not apply.

¶10 The reference to goods "sold and delivered" as opposed to the statutory language regarding a "contract relating to the purchase or sale of goods" comes from footnote 11 of *Kay*, which states in part:

These amendments indicate legislative intent to mandate, "shall be allowed", attorney fees in actions to collect money promised, whether evidenced by a promissory note, a negotiable instrument, an account whether for sale of tangible property or labor and services and a bill or a contract for goods sold and delivered.

Defendant argues that this footnote establishes precedent that § 936 applies only in "goods and services" cases where the goods were *actually delivered*.

¶11 Although we know of no absolute rule that a footnote, standing alone, cannot constitute precedent, footnotes are generally considered to be dicta, and are usually in the form of an "aside" that may expand on facts or principles to assist the comprehension of the reader.1 Footnote 11 of Kay refers back to ¶ 10 of that opinion, and ¶ 10 does not repeat the "goods delivered" versus "goods not delivered" dichotomy Defendant suggests. We do not regard footnote 11 of Kay as binding precedent. Nor do we believe that the Kay court intended to exclude any and all cases where goods were not delivered from the reach of § 936 and contradict the text of § 936, which simply states that fees are available in cases based on "a contract relating to the purchase or sale of goods."

B. The 2002 Legislative Amendment of § 936

¶12 The primary goal of statutory interpretation is to ascertain and follow the intent of the Legislature. Where a statute's meaning is ambiguous or unclear, we employ rules of statutory construction to give the statute a reasonable construction that will avoid absurd consequences. It is important in construing the legislative intent behind a word to consider the whole act in light of its general purpose and objective, considering relevant portions together to give full force and effect to each. *Estes v. ConocoPhillips Co.*, 2008 OK 21, 184 P.3d 518.

¶13 We first note that the Legislature clearly indicated in 2002 that a different treatment for "contracts for labor and services" was warranted as compared to contracts for the "purchase or sale of goods." In Russell v. Flanagan, the "for labor and services" provisions of § 936 were strictly limited to actions brought to recover for labor and services actually rendered. The Supreme Court specifically rejected an interpretation of § 936 which would authorize the courts to award attorney fees to the prevailing party in an action alleging injury from a contract relating to labor and services. The legislative response to the Russell decision guides our decision here. The 1970 version of § 936 stated:

In any civil action to recover on an open account, a statement of account, account stated, note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, unless otherwise provided by law or the contract which is the subject to the action, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs. (Emphasis added).

¶14 This statute as written at that time raised some confusion, settled by *Russell*, as to whether a matter was fee-bearing if it arose from a "contract relating to labor and services," versus the stricter interpretation that fees were only available if a case sought recovery for "labor and services actually rendered." In 2002, the Legislature amended § 936. According to the Oklahoma comments, it did so to conform the statute to *Russell*. The 2002 version stated:

In any civil action to recover for **labor or services rendered**, or on an open account, a statement of account, account stated, note, bill, negotiable instrument, or contract **relating to** the purchase or sale of

goods, wares, or merchandise, unless otherwise provided by law or the contract which is the subject of the action, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs. (Emphasis added).

¶15 We find it clear that, to reflect the *Russell* decision, the Legislature deliberately divorced the "labor or services" provisions of § 936 from the "contract relating to" language. In doing so, it made it clear that this "contract relating to" language did not apply to the "labor or services" provision, and a claim under that provision must be for labor and services actually provided. It is equally clear that the Legislature re-affirmed that, unlike labor and services contracts, contracts properly *relating to* the purchase or sale of goods were still feebearing pursuant to § 936.

¶16 Simply put, if the Legislature, acting in the wake of *Russell*, wished to exclude *all* claims that were "related to" the purchase or sale of goods, and instead impose a standard of "sale of goods actually received," it would have done just that. Instead, it narrowed the availability of fees in labor and services cases to those involving "labor and services actually rendered," but did not eliminate the phrase "contract related to" from the statute altogether. Instead, the Legislature retained the phrase, and separated the labor and services provision from it.²

¶17 In this case, we find the transaction between the parties was centrally and primarily one relating to the purchase or sale of goods, and hence fee-bearing. Defendant cites a federal trial court opinion, Nasir v. Fischer, 11-CV-0700-CVE-PJC, 2012 WL 2505496, at *1 (N.D. Okla. June 28, 2012) as persuasive authority contrary to this conclusion.3 In the Nasir case, however, "The parties agree[d] that the only potentially relevant portion of § 936 is the first-described action, 'to recover for labor or services rendered." Id., *2. This opinion was written well after the Legislature modified § 936 to separate the "goods" and "labor and services" provisions. Hence Nasir has no relevance to a "contract relating to the purchase or sale of goods" case.

¶18 We find that the Legislature has clarified § 936 since *Russell* and *Kay* were published. The Legislature chose to adopt the *Russell* rule that a "labor and services" claim must centrally

involve labor and services actually rendered, but clearly did not adopt the "goods actually delivered" standard stated in n. 11 of *Kay*. The amendments made it clear that, unlike labor and services contracts, contracts *relating to* the purchase or sale of goods were still fee-bearing pursuant to § 936. We find Plaintiffs were entitled to a fee pursuant to § 936.

II. APPORTIONMENT

¶19 Defendant also makes an apportionment argument. Plaintiffs pled claims for breach of contract and breach of the Oklahoma Consumer Protection Act (OCPA). The agreed journal entry of judgment filed on July 31, 2018, recites that Defendant will pay \$1,000 on the contract claim, and that the Consumer Protection Act claim is dismissed with prejudice. Defendant now argues that, because of this agreed dismissal, Plaintiffs were not the "prevailing party" on the OCPA claim, and any fee request has to be segregated between the contract claim and the consumer protection claim.

¶20 Apportionment usually becomes necessary when a party successfully prosecutes or defends both fee-bearing and non-fee-bearing claims. *Parker v. Genson*, 2017 OK CIV APP 59, ¶6, 406 P.3d 585. However, a damaged plaintiff may recover fees in an OCPA claim. *Tibbetts v. Sight 'n Sound Appliance Centers, Inc.*, ⁴2003 OK 72, ¶0, 77 P.3d 1042, as corrected (Sept. 30, 2003). The contract and OCPA theories in this case were both potentially fee-bearing, and comprised a single cause of action, seeking money damages for the same act, and based on the same facts.

¶21 Defendant cites *Tsotaddle v. Absentee Shawnee Housing Authority*, 2001 OK CIV APP 23, ¶ 31, 20 P.3d 153, as authority for his position that apportionment is required. *Tsotaddle* states that, in a case involving multiple claims where prevailing party attorney fees are authorized for only one claim, the law dictates that the court "apportion" the fees so that attorney fees are awarded only for the claim for which there is *authority to make the award. Id.* Defendant interprets *Tsotaddle* as requiring not merely apportionment between a fee-bearing and non-fee-bearing claim, but apportionment between a dismissed claim and a successful claim, even if both claims were fee-bearing.

¶22 *Tsotaddle* is, however, a conventional apportionment case involving fee-bearing and non-fee-bearing claims.⁵ The law has required apportionment in those circumstances since

Green Bay Packaging, Inc. v. Preferred Packaging, Inc., 1996 OK 121, 932 P.2d 1091. Tsotaddle does not, however, comment on Defendant's theory that a plaintiff must segregate time spent on a voluntarily dismissed fee-bearing claim that sought the same relief as a successful fee-bearing claim. Nor does Sisney v. Smalley, 1984 OK 70, 690 P.2d 1048, the case relied on by Tsotaddle, which involved a fee-bearing property damage claim, and a non-fee-bearing personal injury claim. Id., ¶ 1.

¶23 Defendant also cites *C-P Integrated Servs.*, Inc. v. Muskogee City-Cty. Port Auth., 2009 OK CIV APP 57, 215 P.3d 835, but that is also a conventional apportionment case involving a feebearing breach of contract and a non-fee-bearing tort claim. *Id.* ¶¶ 33, 34. In short, the parties cite no case in which an Oklahoma court has discussed a question of apportionment between concluded and dismissed fee-bearing claims in this scenario. We find only four published cases apparently dealing with apportionment between "successful," and "unsuccessful" claims, and all four of those cases involve a conventional question of apportionment between feebearing and non-fee-bearing claims. The theory raised by Defendant that a court is required to apportion between a successful fee-bearing claim and a voluntarily dismissed fee-bearing claim appears to be one of first impression.

¶24 The reason why this scenario has not generally arisen is clear. If a case involves two fee-bearing claims, and a plaintiff is successful in only one, this will normally lead to two fee awards (as plaintiff and defendant are both prevailing parties). Only in the situation where a fee-bearing claim is dismissed before judgment (and hence there is no prevailing party on that claim) does the current question arise.

C. The "Inextricably Intertwined" Rule

¶25 Before attempting to fashion new law on this question, we must first determine if apportionment would otherwise be required, or if the "inextricably intertwined" rule applies. The "inextricably intertwined" rule holds that time spent in establishing the common elements necessary to both a fee-bearing and a non-fee-bearing claim need not be apportioned. Defendant argued to the district court that the "inextricably intertwined" theory is not recognized in Oklahoma, citing the Tenth Circuit case of *Combs v. Shelter Mut. Ins. Co.*, 551 F.3d 991, 1001 (10th Cir. 2008) as authority. COCA has, in fact, recognized this theory on

several occasions. *See Beavers v. Byers*, 2010 OK CIV APP 79, ¶ 18, 239 P.3d 484; *Bank of Am., N.A. v. Unknown Successors of Lewis*, 2014 OK CIV APP 78, ¶ 47, 336 P.3d 1034; *Margaret Blair Tr. v. Blair*, 2016 OK CIV APP 47, ¶ 51, 378 P.3d 65.

¶26 In this case, the two theories (contract and OCPA) were premised on the same act – the refusal to refund the deposit. The two theories also sought the same remedy of money damages. There appear to be no required elements that are unique to one theory as opposed to the other. This is the exact situation that the "inextricably intertwined" rule addresses. We see no reason at law or equity why a party should receive less than a full fee for proving a necessary element of a fee-bearing claim simply because the *same elements* would support a dismissed or non-fee-bearing claim. We find no need for any apportionment.

III. SUFFICIENCY OF THE FEE EVIDENCE

¶27 Defendant finally complains of the adequacy of the various proofs of fees, the absence of *Burk* findings, and whether certain activities were properly chargeable as fees. The district court, having denied Plaintiffs' entitlement to fees, did not address these issues below, and we will not make an initial determination of them here.

CONCLUSION

¶28 We find that Plaintiffs were statutorily entitled to a reasonable attorney fee in this matter. We further find that no form of apportionment is necessary. We remand this matter for hearing regarding the proper amount of the fee to be awarded.

¶29 REVERSED AND REMANDED FOR FEE DETERMINATION.

REIF, S.J. (sitting by designation), and WISE-MAN, C.J., concur.

P. THOMAS THORNBRUGH, PRESIDING JUDGE:

- 1. As noted by Judge Lumpkin in *White v. State*, 2019 OK CR 2, \P 4, 437 P.3d 1061, "setting forth the law in footnotes leads to confusion as to what is controlling precedent. Such confusion can be extinguished by properly placing the holding of the Court in the body of the opinion where it belongs."
- 2. Further, the interpretation of *Kay* proposed by Defendant would likely lead to an irrational construction and potentially absurd consequences, in that it implies that fees are available if a vendor takes money, but then delivers defective, inferior or incorrect goods, but not available if vendor takes money, but then delivers *no goods at all*.
- 3. Defendant devotes a substantial amount of briefing to unpublished decisions from federal trial courts. Although opinions from the federal appellate courts are considered precedential within the circuit on matters of *federal law*, and may be *persuasive* on matters of state law

in the absence of adequate state precedent, we find no authority on how to weigh the recent flood of published federal trial court rulings. We note some dissonance if these may be cited as persuasive authority while the opinions and orders of our state judges may not.

- 4. Usually referred to as "Tibbetts II" to distinguish the case from the earlier published case of Tibbetts v. Sight 'n Sound Appliance Centers, Inc., 2000 OK CIV APP 47, 6 P.3d 1064, (overruled in later appeal sub nom).
- 5. The case involved two claims, a § 1983 claim "for which a fee is authorized" (*Id.*, ¶ 35), and a breach of employment contract claim that did not statutorily support fees.
- 6. See Parker v. Genson, 2017 OK CIV APP 59, 406 P.3d 585 (intermixed tort claim and surface damage claim); Beavers v. Byers, 2010 OK CIV APP 79, 239 P.3d 484 (breach of contract and willful damage to property) and RJB Gas Pipeline Co. v. Colorado Interstate Gas Co. (two cases, 1989 OK CIV APP 100, 813 P.2d 1 & 1990 OK CIV APP 47, 813 P.2d 14)(tort and contract claims).
- 7. And not, as is sometimes argued, that the time is inextricable because the claimant's time sheets failed to segregate time spent on fee-bearing and non-fee-bearing claims.

NOTICE OF JUDICIAL VACANCY

The Judicial Nominating Commission seeks applicants to fill a vacancy for the position of District Judge for Oklahoma County, Seventh Judicial District, Office 13. This vacancy is created by the appointment of the Honorable Trevor Pemberton to the Court of Civil Appeals on September 1, 2020.

Office 13 is an at-large position. To be appointed to the office of District Judge for Oklahoma County, Office 13, one must be a legal resident and registered voter of Oklahoma County, Seventh Judicial 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, November 13, 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 November 13, 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



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Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS Thursday, October 8, 2020

F-2018-963 — Appellant Sebastian Aguirre was tried by jury for the crime of Child Abuse Murder in Tulsa County District Court Case No. CF-2014-4450. In accordance with the jury's recommendation the trial court sentenced Appellant to life imprisonment. From this judgment and sentence Sebastian Aguirre has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.: Lewis, P.J.: concur; Lumpkin, J.: concur in results; Hudson, J.: concur; Rowland, J.: concur.

F-2019-201 — Appellant Shannon Amber Long was tried by jury for the crime of Embezzlement, After Conviction of a Felony, in Marshall County District Court Case No. CF-2018-15. In accordance with the jury's recommendation the trial court sentenced Appellant to seven years imprisonment and fined her \$5,000.00. The court also imposed \$5,423.28 in restitution and \$571 in court costs. From this judgment and sentence Shannon Amber Long has perfected her appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.: Lewis, P.J.: concur; Lumpkin, J.: concur; Hudson, J.: concur; Rowland, J.: concur.

F-2019-883 — Jeffrey DeWayne McCoy, Appellant, was tried by jury for the crime of Count 1, Second Degree Murder; Counts 3 & 4, Pointing a Firearm at Another in Case No. CF-2018-4697 in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment Twenty years imprisonment on Count 1, and two years' imprisonment on Counts 3 & 4. The trial court sentenced accordingly. From this judgment and sentence Jeffrey DeWayne McCoy has perfected his appeal. Judgment and Sentence are AFFIRMED and Mandate Ordered. Opinion by: Lumpkin, J.; Lewis, P.J., Concurs in Part/Dissents in Part; Kuehn, V.P.J., Concurs in Part/Dissents in Part; Hudson, J., Concurs; Rowland, J., Concurs.

F-2019-114 — Eric Jerome Jackson, Appellant, was tried by jury for the crime of one count of Conspiracy to Commit Aggravated Trafficking of a Controlled Dangerous Sub-

stance (Methamphetamine), After Former Conviction of Two or More Felonies, in Case No. CF-2017-0090C, in the District Court of Carter County. The jury returned a verdict of guilty and recommended as punishment forty-five years imprisonment. The Honorable Dennis R. Morris, District Judge, sentenced accordingly and also imposed a \$50,000 fine. From this judgment and sentence Eric Jerome Jackson has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs in Results; Lumpkin, J., Concurs; Rowland, J., Concurs.

C-2019-468 — Cheyenne Noe Quick, Petitioner, pled no contest to using a vehicle to facilitate intentional discharge of a firearm (Counts 3, 4, 6, 7, and 8) in Case No. CF-2017-157 in the District Court of Jackson County. The Honorable Clark E. Huey, Associate District Judge, found Petitioner guilty and sentenced him to concurrent terms of 35 years imprisonment on Counts 3, 4, 6, and 7, and 20 years in Count 8, the last term to be suspended, and to be served consecutively. Judge Huey also imposed a \$1,000.00 fine on each count, and various fees and costs. Petitioner timely moved to withdraw the plea which the trial court denied after hearing. Cheyenne Noe Quick 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., specially concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

F-2019-87 — Robert Nataski Cowan, Appellant, was tried by jury and convicted of Count 1, first degree murder; Count 2, assault and battery with a deadly weapon; Count 3, possession of a firearm after former delinquency adjudication; Count 5, feloniously pointing a firearm; Count 6, gang-related offense; and Count 7, shooting with intent to kill, in Case No. CF-2017-5897 in the District Court of Tulsa County. The jury set punishment at life imprisonment and a \$10,000.00 fine in Count 1; twenty-five (25) years and a \$5,000.00 fine in Count 3; ten (10) years and a \$5,000.00 fine in Count 5; five (5) years and a \$10,000.00 fine in Count 6; and

twenty-five (25) years and a \$5,000.00 fine in Count 7. The trial court sentenced accordingly and ordered the sentences in Counts 1, 2, 5, and 7 to run consecutively, Count 3 to run concurrent with Count 7, and Count 6 to run concurrent with Count 5. From this judgment and sentence Robert Nataski Cowan has perfected his appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., specially concurs; Hudson, J., specially concurs; Rowland, J., concurs.

C-2019-217 — On December 2, 2015, Petitioner Cesar Jurado entered pleas of guilty in the District Court of Oklahoma County, before the Honorable Donald L. Deason in the following cases:

CF-2017-8607: Count – 1 Possession of a Controlled Dangerous Substance With Intent to Distribute (Marijuana), a felony; Count 2 – Driving while Privilege suspended, a misdemeanor; and Count 3 – failure to carry a Valid Security Verification, a misdemeanor.

CF-2015-5536: Count 1 – Possession of a Controlled Dangerous substance With Intent to Distribute (Marijuana), a felony: and Count 3: Possession of a Firearm After Juvenile Adjudication, a felony.

CF-2015-6471: Possession of a Controlled Dangerous Substance With Intent to Distribute (Cocaine), a felony.

Sentencing was delayed until September 11, 2016, while Petitioner was committed to the Delayed Sentencing Program for Youthful Offenders. After successfully completing the Delayed Sentencing Program, Petitioner's sentences were deferred until June 14, 2026, by the Honorable Bill Graves, District Judge. The State thereafter filed an application to accelerate Petitioner's deferred sentences on January 18, 2018. The State alleged Petitioner committed the new crimes of Murder in the First Degree and Assault with a Deadly Weapon as alleged in Oklahoma County District Court Case No. CF-2017-659.

Following a hearing on July 26, 2018, Judge Graves granted the State's motion to accelerate. Petitioner was sentenced in Case No. CF-2014-8607 to life imprisonment on Count 1, one year in the county jail on Count 2 and thirty days in the county jail on Count 3. In Case No. CF-2015-5536, Petitioner was sentenced to life imprisonment on Count 1 and ten years on Count 3. Petitioner was also given life imprisonment in Case No. CF-2015-6471. The sentences in these three cases were ordered to run

concurrently. Petitioner thereafter appealed to this Court from the acceleration of his deferred sentences. We affirmed Judge Graves's decision to accelerate in an unpublished summary opinion.

On August 6, 2018, Petitioner filed a motion to withdraw his guilty pleas. At a hearing held September 5, 2018, Judge Graves denied the motion. The present certiorari appeal followed after Appellant was granted an appeal out of time. Petitioner now seeks a writ of certiorari. The Petition for Writ of Certiorari is DENIED. The Judgments and Sentences of the District Court are AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs in Results; Kuehn, V.P.J., Concurs in Part/Dissents in Part; Lumpkin, J., Concurs; Rowland, J., Recuses.

F-2019-149 — Kimberli Sue Dunham, Appellant, appeals from an order of the District Court of Delaware County, entered by the Honorable Barry Denney, District Judge, terminating Appellant from Drug Court, and convicting and sentencing her in accordance with the plea agreement and Drug Court Contract in Case Nos. CF-2017-96, CF-2017-64, and CF-2016-186. AFFIRMED and matter is REMAND-ED to district court. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., specially concurs; Lumpkin, J., concurs; Hudson, J., concurs.

Thursday, October 15, 2020

F-2019-261 — Paul Anthony Sanchez, Appellant, was tried by jury for the crime of first degree murder in Case No. CF-2017-5849 in the District Court of Oklahoma County. The jury returned a verdict of guilty and set punishment at life imprisonment. The trial court sentenced accordingly. From this judgment and sentence Paul Anthony Sanchez has perfected his appeal. The judgment and sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., recuses.

S-2020-55 — Appellee Dion E. Robinson was charged with shooting with intent to kill in Pottawatomie County District Court Case No. CF-2020-428. At the conclusion of a preliminary hearing, the Honorable David Cawthon, Special Judge, granted Appellee's demurrer. The ruling was upheld by the Honorable Sheila G. Kirk, Associate District Judge. The State appealed. The decision of the district court is REVERSED. Opinion by: Lewis, P.J.; Kuehn, V.P.J.: Concur; Lumpkin, J.: Concur; Hudson, J.: Concur; Rowland, J.: Concur.

Thursday, October 22, 2020

RE-2019-0686 — Phillip Thomas Burris, Jr., Appellant, entered a negotiated plea of guilty on June 18, 2007, to Armed Robbery, a felony, after former conviction of a felony. He was sentenced to twenty years suspended. The sentence was ordered to run consecutive to Case Nos. CF-2007-21A and CF-2006-76. The State filed a motion to revoke Appellant's suspended sentence on June 28, 2018. On August 20, 2018, Appellant stipulated to the first allegation in the State's motion to revoke. The Honorable William Culver, Special Judge, found Appellant violated the rules and conditions of probation. Sentencing was continued to February 22, 2019. Following a hearing on September 11, 2019, Appellant's suspended sentence was revoked in full, twenty years, with credit for time served. The sentence was ordered to run consecutive to CF-2017-21A and CF-2006-76. Judge Culver made it clear on the record that he was proceeding only on the motion to revoke suspended sentence in Case No. CF-2007-33-A filed on June 28, 2018. Appellant appeals the revocation of his suspended sentence. The revocation of Appellant's suspended sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J.: Concur; Lumpkin, J.: Concur; Hudson, J.: Concur; Rowland, J.: Concur.

S-2019-676 — Wendy Nguyen Pham and Luan Ahn Tran, Appellees, were charged with the crime of transporting proceeds from drug activity in Case Nos. CF-2016-717 and CF-2016-718 in the District Court of Rogers County. The State filed a notice of intent to use evidence of other crimes, and Appellees filed a motion to exclude such evidence, which the trial court later granted in part and denied in part. The State appeals. The order suppressing evidence of other crimes is REVERSED and REMAND-ED for further proceedings. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs; Rowland, J., concurs.

COURT OF CIVIL APPEALS (Division No. 1) Tuesday, October 6, 2020

117,082 — Turbo Nitro Inc. d/b/a Valkyrie, and Arron Post, Plaintiffs/Appellees, vs. The Burlington Insurance Company, Defendant/Appellant, and Grahm-Rogers, Inc., Overland Solutions, Inc. And Wally Wallace, Defendants. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Linda Morrissey,

Judge. Defendant/Appellant, The Burlington Insurance Company, appeals from the trial court's judgment, entered upon a jury verdict, in favor of Plaintiffs/Appellees, Turbo Nitro Inc. d/b/a Valkyrie and Aaron Post, in Plaintiffs' action arising from an insurance contract. The jury ruled in favor of Burlington on Plaintiffs' breach of contract claim, but ruled against Burlington on Plaintiffs' fraud claim. In 2012, Post opened Valkyrie, a cocktail lounge. Burlington ultimately agreed to provide the bar with commercial general and liquor liability insurance coverage, basing its premium on the bar's annual gross liquor sales: the more drinks the bar sold, the greater its risk of liability and the higher the premium. Because Valkyrie had no prior sales, Burlington calculated a "Deposit Premium" of \$9,665.08 based on Post's estimate of \$250,000.00 in annual gross sales of liquor. Among other things, the Policy made clear (1) the sales estimate was subject to an audit at any time within three years after the policy period and (2) an additional premium would be owed for the policy period if actual sales exceeded estimated sales. The Policy also set forth that Burlington was not obligated to perform an audit. The Policy was issued effective May 2012. Due to a mistake by the broker in initially recording the Policy as a six-month (as opposed to an annual) policy, Burlington conducted a telephone audit at the end of November 2012 which showed Valkyrie's gross receipts were \$210,117.00 in its first six months of operations. Burlington did not charge Plaintiffs any additional premiums based on this audit. In May 2013, Plaintiffs renewed the Policy for a second year under virtually identical terms, with a Deposit Premium of \$9,816.68. Plaintiffs did not revise their annual gross sales estimate of \$250,000.00 for the second policy period and Burlington did not increase the premium based on any sales figures. The same month, Burlington conducted a limited inspection of Valkyrie's premises and learned the bar's "gross receipts" for an unspecified time period were \$580,000.00. Burlington maintained the report was not a sales audit, would not have been used to adjust the premium and, in any event, was not seen by Burlington before the Policy was renewed. In 2014, Plaintiffs chose not to renew the Policy with Burlington. Burlington thereafter performed an audit of Plaintiffs' second policy period (May 2013 - May 2014), learned the gross sales were in excess of \$480,000.00, and invoiced Plaintiffs \$8,647.48 in additional premium due for the second year of coverage. Burlington denied Post's request for an installment payment plan, but granted Post an extension to pay the bill. Plaintiffs paid the bill and filed the instant lawsuit alleging inter alia Burlington breached the parties' contract and committed fraud. Following trial, the jury found in favor of Burlington on the breach of contract claim and in favor of Plaintiffs on the fraud claim. The jury awarded Plaintiffs \$2.5 million in compensatory damages and \$8,647.48 (the exact amount Burlington billed for the audit premium) in punitive damages. The trial court entered judgment in the amount of \$2,519,593.19, including interest and court costs. Plaintiffs maintain that by failing to act on the 2012 audit and 2013 inspection, Burlington fraudulently misled Post into believing Plaintiffs' premiums would never be increased based upon an audit and, therefore, Plaintiffs' total premium for the Policy's second term would not increase. We hold Burlington's decision to forego an audit at the end of the Policy's first term and its decision to waive any additional premium due for the first term were contractually permissible under the plain terms of the Policy. Also clearly allowed by the Policy was Burlington's decision to conduct an audit of Plaintiffs' second policy term and to retrospectively charge Plaintiffs additional premium based on the underestimated gross liquor sales. Burlington's conduct does not constitute fraud. Accordingly, the judgment for fraud is reversed with instructions to enter judgment for Burlington. The contract claim portion of the judgment is affirmed. AF-FIRMED IN PART, REVERSED IN PART WITH INSTRUCTIONS. Opinion by Bell, P.J.; Buettner, J., and Pemberton, J. (sitting by designation), concur.

118,707 — In the Matter of the Adoption of P.E.C. and R.G.C., minor children: Erik and Rachel Nichols, Petitioners/Appellees, vs. Robin Huffman, Defendant/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Kurt Glassco, Judge. Defendant/Appellant Robin Huffman (Mother) appeals a trial court order granting an application by Mother's brother and sister-in-law, Petitioners/Appellees Erik Nichols and Rachael Nichols (the Nichols), to adopt Mother's two minor children – P.E.C., age 4, and R.G.C., age 2 (collectively "Children") – without Mother's consent. In granting the Nichols' application for adoption without consent, the trial court held that Mother willfully failed to pay court-ordered child support for 12 consecutive months out of the last 14 months preceding the petition for

adoption. Mother appeals, arguing that because she was unemployed during the relevant period, and because the Nichols told her she did not need to pay support, her nonpayment was not willful. She also argues that payments made by her father, Children's maternal grandfather (Grandfather), to the Nichols in support of Children should be attributed to her in satisfaction of her child support obligations. Because the Nichols failed to demonstrate by clear and convincing evidence that Mother willfully failed to make child support payments during the relevant period, we REVERSE. Opinion by Buettner, J. Goree, J., concurs; Bell, J., dissents.

Thursday, October 8, 2020

117,477 — In Re the Marriage of: Jenny Chen, Petitioner/Appellee, vs. Frank Boutsen, Respondent/Appellant. Appeal from the District Court of Cleveland County, Oklahoma. Honorable Lori Walkley, Trial Judge. From the divorce decree Frank Boutsen (Husband), Appellant, appeals the division of property awarding Jenny Chen (Wife), Appellee, the marital home, personal property, and certain retirement accounts, among other items. Husband specifically challenges the valuation and/or the equitable division of the following: Oklahoma Teachers Retirement System (pension), marital home, sailboat, personal property, tax refund, credit for expenses, and alleged premarital retirement shares. Husband additionally claims the trial court erred in refusing to find Wife in contempt. We affirm most of the trial court's decree, but because the trial court failed to consider the tax refund in its calculation, we reverse alimony in lieu of property and modify the decree to include Husband's equitable share of the refund. AFFIRMED AS MODIFIED. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

117,554 — Kris K. Agrawal and Energy Production Services, LLC., Plaintiffs/Appellants, vs. Oklahoma County Clerk, Michael T. Bidwell, Chris Holland, Daniel Delluomo, Jerry Parent, Sonoco Partners Marketing and Terminals, L.P., Jerry Kite, Oklahoma Bar Association, Defendants/Appellees and Vance-1 Properties, LLC, Plaintiff. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Aletia Haynes Timmons, Trial Judge. Agrawal challenged multiple orders on the basis that the trial judge continued to proceed with the case while his motions for the trial judge's disqualification were pending. We find that *Clark v*.

Board of Education of Independent School Dist. No. 89 of Oklahoma County, 2001 OK 56, 32 P.3d 851 disposes of the issues in this appeal. The trial court's failure to make a ruling memorialized on the record on the challenges to the judge's impartiality constitutes reversible error. RE-VERSED AND REMANDED. Opinion by Goree, J.; Buettner, J., concurs and Bell, P.J., dissents.

118,029 — Mark William Riggle, Petitioner/Appellant, v. The State of Oklahoma, Respondent/Appellee. Appeal from the District Court of Lincoln County, Oklahoma. Honorable Cindy Ferrell Ashwood, Judge. Petitioner/Appellant, Mark William Riggle, appeals from the trial court's order rejecting his application for deregistration as a sex offender on the ground he does not qualify for such relief under 57 O.S. Supp. 2014 §583(E). For the reasons set forth below, we AFFIRM. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

118,156 — Curtis Mark Myers, Plaintiff, vs. Larry Steve Myers, as Co-trustee of the Patterson Revocable Living Trust; and Guy W. Jackson, as Trustee Executor of the Patterson Revocable Living Trust, Defendants, Danny Bob Myers, an Individual, and Walter Kent Myers, an Individual, Plaintiffs/Appellees, vs. Guy W. Jackson, Individually and as Trustee of the Patterson Revocable Living Trust Dated August 29, 2007, Defendant/appellant, and Larry Steve Myers, Individually and as Co-trustee of the Patterson Revocable Living Trust Dated August 29, 2007, and Richard Franklin Myers. Defendants. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Richard Ogden, Trial Judge. Plaintiffs/Appellees, Danny Bob Myers and Walter Kent Myers, brought this action for breach of trust and other claims against Defendant/Appellant, Guy W. Jackson, individually and as Trustee Executor of the Patterson Revocable Living Trust (Trust). Plaintiffs also brought this action against the former trustee of the Trust, Defendant Steve Myers, now deceased. Plaintiffs dismissed their claims against Steve Myers' estate. After a bench trial, the trial court held Jackson breached his fiduciary duty by wrongfully appointing himself as trustee of the Trust, by failing to resign as trustee, by failing to provide an accounting to the Trust's beneficiaries, and by wasting trust assets. The court found Jackson wasted Trust assets by paying himself trustee fees in the amount of \$27,000.00 and paying \$29,390.24 in attorney fees to his attorney, Ken Felker, Esq. The court also determined Jackson wasted

Trust assets by paying \$17,575.00 in attorney fees to J. John Hager, Jr., Esq. who represented Steve Myers, the former trustee of the Trust. The trial court held these payments were not made in good faith. The court ordered Jackson to disgorge these fees and pay damages to the Trust in the amount of these fees. Jackson appeals from the portion of the trial court's judgment ordering Jackson to pay damages in the amount of the \$17,575.00 in attorney fees that Jackson paid to Mr. Hager. After reviewing the record, we AFFIRM the trial court's judgment. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

Wednesday, October 7, 2020

117,727 — Red Oil Realty, LLC, Plaintiff/Appellant, vs. Gomaco Operating Company, an Oklahoma Professional Corporation, Defendant/Third-Party Plaintiff/Appellee, vs. Dead Fern Resources, Inc., an Oklahoma Corporation, Third-Party Defendant/Appellant, and Young Bowden Law Group, P.C., an Oklahoma Professional Corporation; Synergy Oil, LLC, an Oklahoma Limited Liability Corporation; Gomaco Energy Corporation, an Oklahoma Professional Corporation; and Gomaco Inc., an Oklahoma Corporation, Defendants. Appeal from an Order of the District Court of Hughes County, Hon. B. Gordon Allen, Trial Judge. Red Oil Realty, LLC appeals an order awarding Gomaco Operating Company (Gomaco) an attorney's fee and costs pursuant to the Nonjudicial Marketable Title Procedures Act (NMTPA), 12 O.S.2011, § 1141.1 et seq. The trial court found Gomaco substantially complied with the NMTPA, thereby entitling it to fees. This was error. In order to qualify under the NMTPA, Gomaco must come within the strict confines of the Act. When we strictly apply the attorney fee provisions of the NMTPA to this case, we must conclude Gomaco failed to meet the statutory requirements entitling it to recover fees and costs. The order awarding Gomaco an attorney's fee and costs pursuant to the NMTPA was therefore in error and is reversed. REVERSED. Opinion from the Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C.J., and Thornbrugh, P.J., concur.

Tuesday, October 13, 2020

118,043 — Trinity Tank Car, Inc. and Ace American Insurance Company, Insurance Carrier, Petitioners, vs. Rodriguez Crescencio and The Workers' Compensation Commission. Proceeding to Review an Order of The Workers' Compensation Commission En Banc. Employer argues the WCC mishandled the standard of review. The WCC is required to assess the weight of the evidence in the performance of its review. We hold its decision is not clearly erroneous in view of the reliable, material, probative and substantial competent evidence. AFFIRMED. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

Wednesday, October 14, 2020

118,785 — Richard L. Cornforth, Plaintiff/ Appellant, v. Graham Guhl, Defendant/Appellee. Appeal from the District Court of Canadian County, Oklahoma. Honorable Paul Hesse, Trial Judge. Richard Cornforth, Plaintiff/Appellant, filed an amended petition against his former counsel, Graham Guhl, Defendant/Appellee. Taking all of Appellant's allegations as true, we hold the pleading is valid under 12 O.S. §2008(A) because it contains a statement of a cognizable claim for professional legal negligence and a demand for judgment. The order granting a motion to dismiss based on 12 O.S. §2012(b)(6) is REVERSED. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

Wednesday, October 21, 2020

117,352 — In Re The Marriage of Little: Leslie Little, Petitioner/Appellant, v. Chad Garret Little, Respondent/Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Tammy Bruce, Judge. This is the second appeal in this child custody and visitation proceeding. In the first appeal, Little v. Little, Appellate Case No. 116,041 (mandated July 3, 2019), this Court affirmed the trial court's decision to award Respondent/Appellee, Chad Garrett Little (Father), attorney fees and costs under 43 O.S. 2011 §111.1(C)(3) and §111.3(E). While the first appeal was pending, the trial court considered both parties' motions for attorney fees and costs and Father's fee statement. Without explaining any basis for its ruling, the trial court entered a "Decision on Attorney Fees" on August 6, 2018. The court determined the reasonable amount of Father's attorney fees and costs was \$268,976.83, and the court ordered Petitioner/Appellant, Leslie Little, now Staubus (Mother), to pay such fees and costs. The court also awarded Mother attorney fees and costs in the amount of \$44,267.30. Both parties appeal from the trial court's Decision on Attorney Fees. After reviewing the record, we cannot find the trial court abused its discretion in awarding both parties a portion of their attorney fees. We hold Father's entitlement to his attorney fees and costs in enforcing his visitation rights under §§111.1 and 111.3 is now settled-law-of-thecase and Mother is barred from re-litigating this issue which was settled by this Court's earlier appellate opinion. Read v. Read, 2001 OK 87, ¶15, 57 P.3d 561. We also hold the trial court properly awarded Mother attorney fees and costs under 12 O.S. 2011 §3237 for successfully obtaining orders compelling Father's compliance with discovery requests. We further hold the trial court properly exercised its discretion in awarding the parties attorney fees and costs under 43 O.S. 2011 §110(D) after a judicial balancing of the equities. Thielenhaus v. Thielenhaus, 1995 OK 5, ¶19, 890 P.2d 925. However, because both parties contested the reasonableness of the awards and the trial court failed to specify the amount of fees attributable to each statutory ground, the circumstances and factors considered in making the awards, and the mathematical computation of the awards, we reverse the amounts of the awards and remand this issue to the trial court with directions to enter an order specifying the facts and computation in support of the awards. AFFIRMED IN PART; REVERSED IN PART AND REMAND-ED. Opinion by Bell, P.J.; Goree, J., and Mitchell, P.J. (sitting by designation), concur.

(Division No. 2) Monday, October 26, 2020

118,542 — Michael C. Washington, Plaintiff/ Appellant, v. John Pettis, Jr., Defendant/Appellee, and Dr. Major Lewis Jemison, Defendant. Appeal from the District Court of Oklahoma County, Hon. Richard Ogden, Trial Judge. In his second amended petition, Plaintiff/Appellant Michael C. Washington, a self-described community leader and activist, filed this lawsuit seeking damages, including punitive damages, alleging various theories of recovery for events that occurred at a town hall meeting against Defendant/Appellee John Pettis Jr., a former Oklahoma City council member, and Defendant Dr. Major Lewis Jemison, the pastor of the church where the town hall meeting was held, in their individual capacities. The trial court granted summary judgment to Mr. Pettis, denied Mr. Washington's motion to compel discovery as moot, and ordered the scheduled pretrial conference be stricken. After a hearing, the trial court subsequently denied Mr. Washington's amended motion to vacate the court's grant of summary judgment to Mr. Pettis. We

conclude the trial court did not err in denying Mr. Washington's motion for findings of fact and conclusions of law and did not abuse its discretion in denying his motion to stay its ruling on the motion for summary judgment pending discovery, and denying his motion for discovery as moot. From our review of the summary judgment record, we conclude the trial court properly granted summary judgment to Mr. Pettis and considered all theories of recovery asserted by Mr. Washington; consequently, we further conclude the trial court did not err in denying Mr. Washington's amended motion to vacate. Accordingly, we affirm. AF-FIRMED. Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Rapp, J., and Fischer, J., concur.

118,643 — Michael C. Washington, Plaintiff/ Appellant, v. Dr. Major Lewis Jemison, Defendant/Appellee, and John Pettis, Jr., Defendant. Appeal from the District Court of Oklahoma County, Hon. Richard Ogden, Trial Judge. Appellant appeals from the trial court's grant of summary judgment to Appellee and its order denying his amended motion to vacate. We affirm for the reasons set forth in Case No. 118,542. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Rapp, J., and Fischer, J., concur.

118,373 — In re G.W., an adjudicated deprived child: John J. Walker, Appellant, vs. State of Oklahoma, Appellee. Appeal from Order of the District Court of Oklahoma County, Hon. Cassandra M. Williams, Trial Judge. Appellant John Walker (Father) appeals the district court's order memorializing the jury's verdict to terminate his parental rights on the grounds of failure to correct the conditions which led to the child's deprived adjudication pursuant to 10A O.S. Supp. 2015 § 1-4-904(B)(5) and length of time in foster care for a child younger than four years old pursuant to 10A O.S. Supp. 2015 § 1-4-904(B)(17). Father claims that his parental rights were terminated without sufficient notice of the conditions to be corrected. After review of the record, we find this contention to be without merit. Consequently, the order of the district court terminating his parental rights is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Fischer, J.; Barnes, P.J., and Rapp, J., concur.

118,111 — In re the marriage of: Jeffrey Paul Bridges, Petitioner/Appellant, vs. Rhonda Lynette Bridges, Respondent/Appellee. Appeal from Order of the District Court of McClain

County, Hon. Charles Gray, Trial Judge. Appellant Jeffrey Bridges appeals the district court's order denying his motion for new trial in this divorce action. The pension at issue in this case was prematurely classified as marital property before a determination was made as to the type of income it was intended to replace. We find that the district court declined to apply the appropriate analysis to determine if Jeffrey's firefighter pension is properly characterized as separate or marital property. Consequently, the district court's order denying Jeffrey's motion for new trial is vacated and remanded to the district court for reconsideration. VACATED AND REMANDED. Opinion from Court of Civil Appeals, Division II, by Fischer, J.; Barnes, P.J., and Rapp, J., concur.

(Division No. 3) Friday, October 16, 2020

117,265 — (Comp w/ 118,051) Eddie Paul Hunter, Petitioner/Appellant, vs. Taryn Andrea Hunter, Respondent/Appellee. Appeal from the District Court of Murray County, Oklahoma. Honorable Wallace Coppedge, Judge. Petitioner/Appellant Eddie Hunter (Father) appeals a trial court order that modified joint custody of twin daughters, and awarded sole custody to Respondent/Appellee Taryn Hunter (Mother), visitation to Father, and ordered him to pay monthly child support. Father appeals the award of custody of the minor children to Mother. After review of the record and evidence, we affirm the custody decision. Opinion by Swinton, V.C.J.; Mitchell, P.J., and Pemberton, J., concur.

117,306 — In Re the Marriage of Ramey: Jerry Lee Ramey, Jr., Petitioner/Appellant vs. Tiffany Lynn Ramey, Respondent/Appellee. Appeal from the District Court of Kay County, Oklahoma. Honorable Jennifer Brock, Trial Judge. Petitioner/Appellant Jerry Lee Ramey, Jr. (Father) appeals from a decree of dissolution of marriage that awarded custody of the parties' minor children to Respondent/Appellee Tiffany Lynn Ramey (Mother) and ordered child support and support alimony, as well as an order denying Father's motion for new trial. Father asserts that the trial court erred in dividing the marital estate, awarding custody to Mother, and in its award of support alimony and child support to Mother. Father also asserts that the trial court erred in finding Father guilty of indirect civil contempt. The voluminous record before us contains conflicting evidence on a significant portion of the issues raised by Father. Given that the trial court was in the best position to determine credibility of the testimony and demeanor of the witnesses, we do not find that an abuse of discretion occurred. Based upon our review of the record, we AFFIRM the trial court's orders. Opinion by Swinton, V.C.J.; Mitchell, P.J., and Pemberton, J., concur.

117,418 — First National Bank and Trust Company of Vinita, as Successor Trustee of the Joseph R. Enloe, Jr. Living Trust Dated February 20, 1986, Plaintiff/Counter-Defendant/ Appellant, vs. Gary D. Spencer, Defendant/ Counter-Claimant/Appellee. Appeal from the District Court of Mayes County, Oklahoma. Honorable Dwayne J. Steidley, Trial Judge. Plaintiff/Counter-Defendant/Appellant First National Bank and Trust Company of Vinita, as Successor Trustee of the Joseph R. Enloe, Jr. Living Trust Dated February 20, 1986 (Trustee, the Trust, or Enloe) appeals from an order amending the Journal Entry entered in Trustee's action for trespass in which he sought damages, an injunction, and judgment declaring the parties' rights under an easement. The Trust owns lake front property which is burdened by a lake access easement owned by Defendant/Counter-Claimant/Appellee Gary D. Spencer, who maintains a commercial dock in front of Trust's property. Trustee asserts Spencer's dock exceeded the terms of the easement and sought an order directing him to remove it. Following trial, the court found Spencer's easement was not exclusive and directed Spencer to allow Trustee onto the dock to access the lake. The trial court later entered its Court Order with the same rulings it made in the Journal Entry, but incorporating an attached exhibit identifying two specific areas on the dock where Spencer was required to allow Trustee access for certain activities. Trustee appeals. Trustee has not presented a record showing the trial court's decision was against the clear weight of the evidence or contrary to law and we therefore AFFIRM. Opinion by Swinton, V.C.J.; Mitchell, P.J., and Pemberton, I., concur.

118,051 — Eddie Paul Hunter, Petitioner/ Appellant, v. Taryn Andrea Hunter, Respondent/Appellee. Appeal from the District Court of Murray County, Oklahoma. Honorable Wallace Coppedge, Trial Judge. Plaintiff/Appellant Eddie Hunter (Father) appeals a trial court order that awarded him a child support arrearage judgment without interest and determined the Defendant Taryn Hunter (Mother) did not owe an arrearage on child support related expenses. In case number 117,265, these same parties litigated the custody of their minor children. After review of the record and evidence, we affirm the finding relating to child support related expenses and tax deduction liability and reverse the finding that no interest should accrue on past due child support payments. Opinion by Swinton, V.C.J.; Mitchell, V.P., and Pemberton, J., concur.

118,134 — Stella Oluwadele, Plaintiff/Appellant, v. Stratford House Enterprises, LLC and All Unknown Occupants of the Premises, Defendant/Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Rebecca B. Nightingale, Trial Judge. Stella Oluwadele ("Appellant") seeks review of the trial court's June 20, 2019 order, granting Appellee Stratford House Enterprises, L.L.C.'s ("Appellee") Motion to Dismiss Plaintiff's Amended Petition, and denying Ms. Oluwadele's Response to the Defendant's Opposition to the Plaintiff's Motion to File Amended Petition and/or Request for More Time to Respond to Defendant's Motion, and the Request of Plaintiff [sic] Leave of Court to Amend Petition for Negligence. The applicable standard of review for a trial court's dismissal of a petition is de novo review. Dani v. Miller, 2016 OK 35, ¶ 11, 374 P.3d 779, 786. Matters within the discretion of the trial court will not be disturbed absent an abuse of discretion. Eskridge v. Ladd, 1991 OK 3, ¶12, 811 P.2d 587, 590. Appellant raises three propositions of error on appeal. First, Appellant asserts the trial court abused its discretion by striking her reply brief. Second, Appellant asserts the trial court erred in dismissing her Amended Petition. Third, Appellant asserts the trial court abused its discretion by not allowing oral argument on Appellee's Motion to Dismiss and Appellant's request to amend her petition and/or for additional time to respond. We AFFIRM the decision of the District Court of Tulsa County. Opinion by Pemberton, J.; Mitchell, P.J., and Swinton, V.C.J., concur.

118,237 — In the Matter of K.E.W., Deprived Child: State of Oklahoma, Petitioner/Appellee, vs. James Patrick Keenan, Jr., Respondent/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Cassandra Williams, Judge. Respondent/Appellant James Patrick Keenan, Jr. (Father) challenges the termination of his parental rights to his

daughter, K.E.W. Petitioner/Appellee the State of Oklahoma (the State) sought termination on two grounds: failure to correct the conditions leading to K.E.W.'s being adjudicated deprived and substantial erosion of Father's relationship with K.E.W. The trial court found clear and convincing evidence to support both grounds for termination. We find the court's decision is supported by sufficient evidence. Further, because we find no reversible errors of law and the trial court's order sets forth extensive findings of fact and conclusions of law adequately explaining its decision, we AFFIRM under Oklahoma Supreme Court Rule 1.202(d), 12 O.S. 2011, Ch. 15, App. 1. Opinion by Mitchell, P.J.; Swinton, V.C.J., and Pemberton, J., concur.

118,514 — In the Matter of the Estate of Horace Green, Sr.: Mackiel Brewer, Petitioner/Appellant, vs. Milton and Barbara Williams, Respondents/Appellees. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Kendra Coleman, Judge. Mackiel Brewer ("Appellant" or "Brewer") seeks review of the November 25, 2019 interlocutory order of the Oklahoma County District Court granting certain creditor claims Milton and Barbara Williams filed in the underlying probate action. Appellant submits three propositions of error. First, Appellant contends the district court erred in approving Appellees' claim for funeral expenses related to the death of Horace Green, Jr. Second, Appellant argues the district court erred in ruling that the 1997 Chevrolet Corvette should remain in possession of Appellees. Third, Appellant contends the district court erred in approving the Appellees' claim for reimbursement of the cost of Horace Green Sr.'s lift chair in an amount exceeding their claim. Probate proceedings are of equitable cognizance. Matter of Estate of Pope, 1990 OK 125, ¶ 12, 808 P.2d 640, 646. While an appellate court will examine and weigh the proof in the record, it must abide by the law's presumption that the decision is legally correct and cannot be disturbed unless found to be clearly contrary to the weight of the evidence or to some governing principle of law. Id. We reverse the trial court's decision regarding funeral expenses as the decision is clearly contrary to the weight of the evidence and governing principles of law. We otherwise affirm the decision (except as may relate to reimbursement of funeral expenses) as Appellant's contentions are unsupported by the record. AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS. Opinion by

Pemberton, J.; Mitchell, P.J., concurs and Swinton, V.C.J., concurs in part and dissents in part.

(Division No. 4) Friday, October 16, 2020

118,133 — Richard A. Bailey-Dreuppel and Vicci Shay Bailey, Plaintiffs/Appellees, vs. David Stanley Chevrolet, Inc., and Ally Financial, Inc., Defendants/Appellants. Appeal from an Order of the District Court of Oklahoma County, Hon. Susan C. Stallings, Trial Judge. David Stanley Chevrolet, Inc. and Ally Financial, Inc. appeal a decision of the district court denving a motion to compel arbitration. The district court erred by failing to give effect to the Purchase Agreement, and the RISC, entered into as part of the same transaction, and the Purchase Agreement's requirement that both agreements be read together as one. As such, the district court erred in its determination that the dispute resolution clause was not part of the written agreements executed by Richard and should not be considered. We hold that the dispute resolution clause is part of Richard's agreement to purchase the vehicle. The district court did not reach the issues of whether Plaintiffs' claims are within the scope of the dispute resolution clause, or whether Ally had standing as a nonsignatory to enforce that agreement against Richard, and we will not make an initial determination of those issue. The district court also erred by failing to determine whether Plaintiffs' claim of fraud in the inducement concerned the Purchase Agreement itself, or procurement of the dispute resolution clause, and thus, whether fraud was properly before the district court. We reverse the district court's order with instructions to the district court to make a determination of whether Richard's claims against DSC are within the scope of the dispute resolution clause, whether Ally has standing to enforce the dispute resolution clause, and whether the claims against it fall within the scope of that agreement. The district court should also determine whether Plaintiffs' claim is that the Purchase Agreement was procured by fraud, and must be submitted to arbitration to resolve, or whether the dispute resolution clause itself was procured by fraud and rule upon Defendants' motions to compel arbitration. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C.J. concurs, and Thornbrugh, P.J., dissents.

Friday, October 23, 2020

118,037 — (In the Matter of: N.A.H., A Minor Child, Elena Huffman, Natural Mother of N.A.H., a Minor Child, Respondent/Appellant, vs. Gregory N. Huffman and Kimberly J. Huffman, Paternal Grandparents of N.A.H., a Minor Child, Petitioners/Appellees. Appeal from an order of the District Court of Cherokee County, Hon. Douglas A. Kirkley, Trial Judge, granting grandparental visitation to Gregory Huffman and Kimberly Huffman (Grandparents) and denying Elena Huffman's (Mother) motion to dismiss, motion for new trial, and motion to vacate. Grandparents sought reasonable visitation rights with NAH, stating in the petition that their son and NAH's natural father, Alexander Todd Huffman, is deceased. Mother asserts on appeal that the trial court's ruling was against the clear weight of the evidence. She cites Dr. Eric Nelson's testimony and report as proof of the lack of a pre-existing relationship between Grandparents and NAH and for the proposition that there was no finding of harm to NAH if the relationship with Grandparents was not maintained. The trial court heard and considered all of the evidence, including Dr. Nelson's testimony, decided the facts, and applied the law. Mother has failed to show that this decision is contrary to the weight of the evidence or based on an error of law. With the failure to show error in the underlying decision, we conclude the trial court did not abuse its discretion in denying the motion to vacate or the motion for new trial. Mother tries to show trial court error based solely on Dr. Nelson's testimony while disregarding any evidence presented at the hearing on the petition for visitation on which the trial court based its decision. Without the benefit of that evidence, we must presume that the trial court, having heard and considered all of the evidence, did not err or abuse its discretion, and we affirm its decision. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, C.J.; Thornbrugh, P.J., and HIixon, J., concur.

Monday, October 26, 2020

118,077 — In the Matter of the Guardianship of Mary Ruth Olsen, an Adult Incapacitated Person: Mary Ruth Olsen, James Olsen, and Robert Olsen, Appellants, vs. Darrol Olsen, Jr., Appellee. Appeal from an Order of the District Court of Rogers County, Hon. Stephen Pazzo, Trial Judge. Appellants appeal the trial court's order of May 24, 2019 ordering Darrol's attor-

ney's fee and payments to Brookdale Senior Living Communities, Inc. to be paid by Ms. Olsen. Oklahoma law allows any person interested in the welfare of a person "believed to be" incapacitated or partially incapacitated to file a petition alleging such person is an incapacitated or partially incapacitated person and requesting the appointment of a guardian. 30 O.S.2011, § 3-101. Under section 4-403, the ward's estate "is liable for compensation of counsel's representation, unless the court determines that it would substantially impede or impair the ward's essential requirements and financial resources." Estate of Kerns v. W. Sur. Co., 1990 OK CIV APP 88, ¶ 2, 802 P.2d 1298. We find Darrol was acting on Ms. Olsen's behalf in what he felt was her best interest while serving as her special guardian and seeking to be appointed as her general guardian. Thus, Darrol was entitled to have his attorney's fee paid from Ms. Olsen's estate pursuant to 30 O.S.2011, § 4-403, and the trial court did not err in ordering her to pay Darrol's attorney's fee. Ms. Olsen also alleges the trial court abused its discretion by not surcharging the payments made to Brookdale against Darrol. In view of the evidence presented at the hearing, the trial court's finding that Darrol acted in what he believed was Ms. Olsen's best interest, precluding a finding that he engaged in willful or negligent misconduct, was not against the clear weight of the evidence. Thus, the trial court did not abuse its discretion by declining to surcharge the payments made to Brookdale against Darrol. We therefore affirm the trial court's order. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C.J., and Thornbrugh, P.J., concur.

Monday, November 2, 2020

118,848 — Kalen Lavender, Plaintiff/Appellant, vs. Dominick Palmisano, Jr., and Dominick's Anesthesia Service, Inc., Defendants/ Appellees. Appeal from an order of the District Court of Craig County, Hon. Terry H. McBride, Trial Judge, granting Defendants Dominick Palmisano, Jr.'s and Dominick's Anesthesia Service, Inc.'s motion to dismiss. Defendants requested dismissal under 12 O.S. § 2012(B)(6) for failure to state a claim because the statute of limitations had expired. The issue before us in the previous appeal (Lavender v. Craig General Hospital, 2013 OK CIV APP 80, 308 P.3d 1071) over claims against Hospital was "whether Plaintiff gave timely written notice of her governmental tort claim within one year of the

date of her loss." We said in our previous Opinion that "this question cannot be answered without determining the applicability of the discovery rule in ascertaining whether Plaintiff properly gave notice within the prescribed one-year period," and the case was reversed and remanded to the trial court. After remand, Plaintiff with leave of court filed a second amended petition adding the Dominick Defendants asserting newly discovered evidence. After briefing, the trial court granted Defendants' motion to dismiss. We agree with the trial court's finding that "there is no question of fact to be determined as to when the Statute of Limitations began to run" because "Plaintiff knew or should have known that she may have a cause of action against [Defendants] at the very latest on August 25, 2011, as evidenced by her Amended Petition filed against [Hospital] on May 18, 2012." Because the statute of limitations began to run at the latest on August 25, 2011, Plaintiff was required to assert her action against Defendants no later than two years after this date or be barred as untimely. Her October 21, 2016, second amended petition against these Defendants was untimely. The trial court also decided that: "The failure to name these [Defendants] was not due to a mistake in identity of a proper party." Plaintiff knew or should have known of Defendants' identities and involvement in the 2005 procedure at the very latest following the deposition of Betty Winfrey, R.N., in August 2011. Although Plaintiff was made aware of all possible defendants no later than August 2011, she initially named the Hospital as a defendant and left out Palmisano, apparently because she postulated Palmisano was employed by Hospital. Making a tactical decision to name Hospital, only to learn later she had made an error in judgment about liability, does not constitute a mistake of identity under the relation back doctrine. The trial court properly determined the requirements to meet the test of the relation back doctrine had not been met. The trial court's order granting Defendants' motion to dismiss 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 (Division No. 1) Thursday, October 8, 2020

117,984 — SGN Foods, LLC, an Oklahoma Limited Liability Company, Plaintiff/Appellee, vs. Sweet Appetit, Inc., an Oklahoma Limited Liability Company, Defendant/Appellant. Appellee's Petition for Rehearing, filed October 2nd, 2020, is *DENIED*.

(Division No. 2) Friday, October 16, 2020

115,445 — David Shawn Fritz, Plaintiff/Appellant, vs. The Estate of Billy Pat Eberhardt (substituted for Billy Pat Eberhardt); and The Estates of Dallas Taliaferro, Jr. and Alma Maxine Taliaferro, Defendants/Appellees. Appellant's Petition for Rehearing is hereby *DENIED*.

(Division No. 3) Wednesday, October 14, 2020

118,461 — Ronnie Seal, Plaintiff/Appellant, vs. Ada Coca-Cola Bottling Company, and its successor in interest, Ada Coca-Cola Bottling Company, and its successor in interest Coca-Cola and Dr. Pepper Co., Defendants/Appellees. Plaintiff/Appellant's Petition for Rehearing and Brief in Support, filed September 2, 2020, is *DENIED*.



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The Ethics and Realities of Paying Debtors' Counsel in Bankruptcy Cases

The Honorable Terrence L. Michael,

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