THE OKLAHOMA BAR
Journal
Volume 91 — No. 22 — 11/20/2020

Court Issue

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DAY ONE:

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The Dark Side of Business Bankruptcy:
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Survey of Recent Oil and Gas Industry Developments
Chuck Carroll, FTI Consulting, Inc., Dallas, TX

Survey of Recent Oil and Gas Bankruptcy Litigation in Oklahoma, Texas and Colorado
Eric M. Van Horn, Spencer Fran LLP, Dallas, TX

DAY TWO:

Sid & Sam Show
Sidney Swinson, Gable Gotwals, Tulsa
Sam G. Bratton II, Doerner Saunders Daniel & Anderson, LLP, Tulsa

Shelley's Frankenstein and Bankruptcy Tax: A Study in Monsters
Professor Jack F. Williams, Georgia State University, Atlanta, GA

The Ethics and Realities of Paying Debtors' Counsel in Bankruptcy Cases
The Honorable Terrence L. Michael,
U.S. Bankruptcy Court for the Northern District of Okla., Tulsa

Bankruptcy Court Panel
The Honorable Dana L. Rasure U.S. Bankruptcy Court Northern District of Okla.
The Honorable Tom R. Cornish U.S. Bankruptcy Court Eastern District of Okla.
The Honorable Janice D. Loyd U.S. Bankruptcy Court Western District of Okla.
The Honorable Sarah Hall U.S. Bankruptcy Court Western District of Okla.
The Honorable Terrence L. Michael

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2020 OK 90

COMANCHE NATION OF OKLAHOMA, a Federally Recognized Indian Tribe, ex rel. COMANCHE NATION TOURISM CENTER, Plaintiff/Appellee, v. WALLACE COFFEY, Defendant/Appellant.

No. 117,267. November 17, 2020

ON APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY, STATE OF OKLAHOMA

HONORABLE IRMA NEWBURN, DISTRICT JUDGE

¶0 Plaintiff/Appellant Comanche Nation of Oklahoma, a federally recognized Indian Tribe, *ex rel.* Comanche Nation Tourism Center, filed a lawsuit seeking a declaratory judgment that Defendant/Appellant Wallace Coffey was indebted to it for the amount of the outstanding balance on an open account. The trial court granted Coffey's motion to dismiss for lack of subject matter jurisdiction and dismissed the case with prejudice. Thereafter, Coffey filed an application for prevailing party attorney fees pursuant to 12 O.S.2011 § 936. The trial court denied Coffey's request for attorney fees, finding he was not the prevailing party because he had not prevailed on the merits of the action. Coffey appealed the order denying attorney fees, and this Court retained the appeal. We hold a defendant is not a "prevailing party" within the meaning of 12 O.S. § 936 when the court dismisses the action with prejudice for lack of subject matter jurisdiction. The trial court's order denying Coffey's motion for attorney fees is affirmed.

ORDER OF DISTRICT COURT IS AFFIRMED.

Michael Salem, Salem Law Offices, Norman, Oklahoma, for Appellant.

KANE, J.:

I. FACTS AND PROCEDURAL HISTORY

¶1 Comanche Nation filed the underlying lawsuit originally seeking a money judgment against Wallace Coffey on October 11, 2016. Comanche Nation alleged Coffey had purchased goods from it on an open account and failed to pay the balance of $18,415.09. Comanche Nation amended its petition on November 7, 2016, alleging the same facts but seeking a declaratory judgment that Coffey was indebted to it for the amount of the outstanding balance on the open account and that Coffey was obligated to pay Comanche Nation's reasonable expenses for bringing and maintaining the action.

¶2 Coffey entered a special appearance and filed a motion to dismiss for lack of subject matter jurisdiction on February 8, 2017. Coffey argued that at all relevant times he was acting in his official capacity as Chairman of Comanche Nation and was, therefore, entitled to assert the defense of tribal sovereign immunity.[1] The trial court granted Coffey's motion to dismiss on November 16, 2017 and entered a final order dismissing the case with prejudice on February 15, 2018. In its order, the trial court found that all disputed transactions occurred on Tribal trust land. The trial court concluded that Tribal trust land is "Indian country" within the meaning of 18 U.S.C. § 1151 and, therefore, it lacked jurisdiction over a controversy involving Indian parties relating to conduct occurring in Indian country. Comanche Nation did not appeal the final order dismissing the case with prejudice.

¶3 On March 16, 2018, Coffey filed an application for attorney fees pursuant to 12 O.S.2011 § 936. The trial court found Coffey was not entitled to attorney fees, because he "was not a 'prevailing party' upon the merits of the cause of action." The Journal Entry denying Coffey's application for attorney fees was filed on July 26, 2018.[2] Coffey appealed.

¶4 This Court granted Coffey's motion to retain appeal. Comanche Nation has not entered an appearance or filed a Response to the Petition in Error. Therefore, the appeal will be decided without a response or additional record.[3]

II. STANDARD OF REVIEW

¶5 This appeal presents issues of statutory construction and whether a party is entitled to attorney fees under 12 O.S. § 936. Both are questions of law. *See Fanning v. Brown*, 2004 OK 7, ¶ 8, 85 P.3d 841 (statutory construction); *Finnell v. Seismic,* 2003 OK 35, ¶ 7, 67 P.3d 339 (entitled to attorney fees). Questions of law are reviewed *de novo. See Fanning*, 2004 OK 7, ¶ 8. Appellate courts have plenary, independent and nondeferential authority to determine whether the trial court erred in its legal rulings. *Id.*

III. DISCUSSION

A. Jurisdiction to Adjudicate Application for Attorney Fees

¶6 This Court has a duty to inquire into its own jurisdiction and the jurisdiction of the lower court. *See Hall v. GEO Group, Inc.*, 2014 OK 22, ¶ 12, 324 P.3d 399. As an initial matter, we find the trial court had jurisdiction to adjudicate Coffey's application for attorney fees despite its lack of subject matter jurisdiction over the merits of the case. It follows that this Court has jurisdiction to review the trial court's order denying attorney fees.

¶7 Comanche Nation did not appeal from the underlying order sustaining Coffey's dispositive motion and dismissing the case for lack of subject matter jurisdiction, and that stands as the law of the case. The trial court had the inherent authority and duty to adjudicate whether it had jurisdiction over the matter before it. *See Dutton v. City of Midwest City*, 2015 OK 51, ¶ 15, 353 P.3d 532. Because the trial court had jurisdiction to determine it lacked subject matter jurisdiction and to enter an order dismissing the case, it also had jurisdiction to rule on Coffey's request for prevailing party attorney fees. The trial court's order denying attorney fees was ancillary to the underlying dismissal. Even if the trial court lacks subject matter jurisdiction over the merits of the case, it retains jurisdiction to adjudicate an application for attorney fees and costs. *See Brown v. Desert Christian Ctr.,* 122 Cal. Rptr. 3d 590, 594-596 (Cal. Ct. App. 2011) (costs incidental to judgment of dismissal); *New v. Dumitrache,* 604 S.W.3d 1, 20 (Tenn. 2020) (attorney fees incurred in determining the trial court lacked jurisdiction); *see also In re De-Annexation of Certain Real Property from the City of Seminole*, 2007 OK 95, ¶¶ 18-22, 177 P.3d 551 (reviewing the correctness of the trial court's order denying attorney fees after holding the trial court lacked subject matter jurisdiction over the merits of the case).

¶8 Applications for attorney fees and costs are routinely filed after a case has been dismissed. The parties have 30 days after the filing of the judgment, decree, or appealable order to file an application for attorney fees and costs. See 12 O.S.Supp.2012 § 696.4(B); Haggard v. Haggard, 1998 OK 124, ¶ 13, 975 P.2d 439 ("If a party files a motion for new trial following the entry of a judgment, decree, or appealable order, we interpret § 696.4 to mean that the party will have thirty days after the filing of the order disposing of her motion for new trial within which to file her attorneys' fee application."). The February 15, 2018 order dismissing the case for lack of subject matter jurisdiction was an appealable order. Coffey timely filed his application for attorney fees on March 16, 2018. The trial court's prior order dismissing the case for lack of subject matter jurisdiction did not inhibit Coffey's right to request attorney fees or the trial court's power to rule on such a request.

B. Prevailing Party

¶9 Title 12, § 936 provides, in pertinent part:

> ***In any civil action to recover*** for labor or services rendered, or ***on an open accoun***t, 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.***

12 O.S.2011 § 936(A) (emphasis added). The most obvious prevailing party is the single party for whom judgment is rendered after a trial on the merits. Here, the case was disposed of without a judgment for either party. The trial court dismissed the action with prejudice. The issue on appeal is whether a defendant is the "prevailing party" when the court dismisses the action with prejudice for lack of subject matter jurisdiction.

¶10 Statutes allowing an award of attorney fees are to be strictly construed. *See Beard v. Richards,* 1991 OK 117, ¶ 12, 820 P.2d 812, 816. The fundamental purpose of statutory construction is to ascertain and give effect to the intent of the Legislature. *See In re City of Durant*,

2002 OK 52, ¶ 13, 50 P.3d 218. To do this, we first look to the language of the statute. *Id.* If the statutory language is clear and unambiguous, this Court must apply the plain and ordinary meaning of the words. *Id.* Only when the legislative intent cannot be determined from the statutory language due to ambiguity or conflict should rules of statutory construction be employed. *See Keating v. Edmondson*, 2001 OK 110, ¶ 8, 37 P.3d 882.

¶11 We are guided by our prior decisions construing "prevailing party," as used in various attorney fees statutes. *Carter v. Rebrecht,* 1940 OK 500, 108 P.2d 546, involved the then-effective usury statute. In an action to recover the penalty for usury, the prevailing party was entitled to a reasonable attorney fee. *See* 15 O.S.1931 § 268. This Court found the defendant was not the prevailing party where the plaintiff dismissed the action without prejudice before trial. *See Carter,* 1940 OK 500, ¶ 13, 108 P.2d at 548. In doing so, we defined "prevailing party" as the party who prevails on the merits as determined by final judgment:

> [T]he court has regarded as the prevailing party, the party who prevailed on the merits, and has regarded as the losing party, and the party subject to the additional penalty of an attorney's fee for his adversary, the party who lost upon the merits. That is, it appears to have been the policy to tax the attorney's fee only in those cases where the other party was determined by final judgment to be the losing party on the issue of the usury penalty. And while we have not before considered the question of the claim for an attorney's fee where the usury claim was dismissed without prejudice before trial, we are inclined to the view that a person so dismissing such claim should not be held to be the losing party on the issue of usury. He has not finally lost upon that issue for he might subsequently refile his action and might there prevail on the merits. While a defendant might be said to prevail on the pleadings or in the action when the plaintiff dismisses without prejudice, yet he has not finally prevailed upon the issue tendered in plaintiff's petition.

Carter, 1940 OK 500, ¶ 11, at 548.

¶12 In *Swan-Sigler, Inc. v. Black*, 1966 OK 90, 414 P.2d 300, we looked at statutory attorney fees in a lien foreclosure. Title 42, § 176 provided: "In an action brought to enforce any lien the party for whom judgment is rendered shall be entitled to recover a reasonable attorney's fee, to be fixed by the court, which shall be taxed as costs in the action." 42 O.S.1961 § 176. Although this particular fees statute does not use the term "prevailing party," we observed the interchangeability of "the party for whom judgment is rendered" and "prevailing party":

> We believe that the use of the words "prevailing party" by this court . . . meant merely the one for whom judgment is rendered, meaning, of course, a judgment upon the validity or invalidity of the lien. In the present case no judgment was entered for or against anyone adjudging that the plaintiff did or did not have a valid lien against the property of the defendants . . . . The issue of the validity of the lien was removed from this lawsuit by the filing of a voluntary dismissal by the plaintiff.

Swan-Sigler, 1966 OK 90, ¶ 7, 414 P.2d at 302. We found the defendants were not prevailing parties where the plaintiff dismissed the case. *See id.* ¶ 7, at 301-302.

¶13 In *General Motors Acceptance Corp. v. Carpenter*, 1978 OK 39, 576 P.2d 1166, we relied on our decisions in *Carter* and *Swan-Sigler.* The attorney fees statute for a replevin action provided: "The judgment rendered in favor of the prevailing party in such action may include a reasonable attorney fee to be set by the court, to be taxed and collected as costs." 12 O.S.Supp. 1977 § 1580. We found "the right to attorney fees, taxed as costs, attaches only on behalf of a party who prevails on the merits." *General Motors,* 1978 OK 39, ¶ 4, 576 P.2d at 1167.

¶14 This Court reaffirmed our definitions of "prevailing party" in *Underwriters at Lloyd's of London v. North American V*an, 1992 OK 48, 829 P.2d 978. Title 12, § 940 provided, in pertinent part:

> In any civil action to recover damages for the negligent or willful injury to property and any other incidental costs related to such action, the prevailing party shall be allowed reasonable attorney's fees, court costs and interest to be set by the court and to be taxed and collected as other costs of the action.

12 O.S.1981 § 940(A). After reviewing this Court's "prevailing party" jurisprudence, we held: "Our interpretation is that 'prevailing party' as used in § 940 of Title 12 is the party for

whom judgment is rendered." *Underwriters,* 1992 OK 48, ¶ 10, 829 P.2d at 981. The jury returned a verdict finding defendant liable for negligence. *See id.* ¶ 10, at 981. The defendant appealed the amount of damages but did not appeal the finding of negligence. *Id.* The 10th Circuit Court of Appeals reduced the amount of damages. *Id.* This Court concluded that, although the defendant was successful in limiting the plaintiff's damages, it did not prevail on the claim for negligent injury to property. *Id.* Because the successful defense did not result in a judgment for the defendant, it was not the prevailing party. *Id.* ¶ 11, at 981.

¶15 Coffey cites *Professional Credit Collections, Inc. v. Smith,* 1997 OK 19, 933 P.2d 307, as the sole legal authority supporting his argument that by securing the dismissal with prejudice he is the prevailing party. Coffey argues that he was granted affirmative relief when the case was dismissed with prejudice and, according to Professional Credit, is entitled to attorney fees.

¶16 In *Professional Credit,* a collection agent secured a default judgment against the formerly married defendants and sought to garnish the wife's wages. *See id.* ¶ 4, at 309. The trial court later vacated the default judgment and allowed the wife additional time to answer. *Id.* ¶ 5, at 309. Before the wife filed an answer, the collection agent dismissed her as a defendant. *Id.* The wife then sought attorney fees pursuant to 12 O.S.1991 § 936. *Id.* ¶ 7, at 309. The trial court denied the request, and the Court of Civil Appeals affirmed. *Id.* ¶ 7, at 309-310.

¶17 On certiorari, this Court stated:

> The definition of a prevailing party cannot narrowly be confined to one who obtains *judgment* after a trial on the merits. The operative factor under § 936 is success, not the particular stage at which success is achieved. When [the wife] prevailed in the judgment's vacation, she, as recipient of affirmative relief, clearly became the successful party.

Prof'l Credit, 1997 OK 19, ¶ 12, 933 P.2d at 311 (footnote omitted) (emphasis original). In defining prevailing party, we focused on whether "affirmative relief" had been granted to the defendant, rather than our traditional definitions.[4] While the opinion does not explicitly address why an expanded or alternative definition was applied, from the outset, this Court recognized the interplay of 12 O.S. § 684 and 12 O.S. § 936 present in *Professional Credit. See id.* ¶ 8, at 310. At the time, 12 O.S.1991 § 684 provided, in pertinent part: "A plaintiff may, on the payment of costs and without an order of court, dismiss any civil action brought by him at any time before a petition of intervention or answer praying for *affirmative relief* against him is filed in the action." (emphasis added). In *Professional Credit*, we reasoned that "[t]he test for an effective cost-escaping § 684 voluntary dismissal does not depend on whether a prevailing party has yet been determined. Instead, the key is whether, before plaintiff's voluntary dismissal, the defendant has requested affirmative relief against the plaintiff." 1997 OK 19, ¶ 9, 933 P.2d at 310. Harmonizing § 684 and § 936, we determined that the wife's motion to vacate the default judgment was a request for affirmative relief and the trial court's ruling in the wife's favor made her a prevailing party for purposes of 12 O.S. § 936. *See id.* ¶ 10, at 310. "[The collection agent's] statutory power to dismiss an action does not include the authority to wipe the slate clean of prior orders in the case which bear directly on its counsel-fee liability." *Prof'l Credit*, 1997 OK 19, ¶ 12, 933 P.2d at 311 (emphasis original).

¶18 For more than half a century, we consistently interpreted "prevailing party" as one who prevails on the merits of the action or for whom final judgment is rendered. Just five years after *Underwriters,* we appeared to have reversed course in *Professional Credit.* The Court determined that the trial court's interlocutory decision to vacate the default judgment against the defendant, coupled with the plaintiff's voluntary dismissal, elevated the defendant to prevailing party status. The result was that, although the defendant had not prevailed on the merits or obtained a judgment in her favor, she was deemed the prevailing party for purposes of 12 O.S. § 936. This was an undeniable divergence from our prevailing party jurisprudence.

¶19 After *Professional Credit,* we quickly returned to our traditional understanding that a prevailing party is one who prevails on the merits or for whom final judgment is rendered.[5] In fact, in the 23 years since *Professional Credit* was decided, this Court has never cited it for the definition of "prevailing party." The Court of Civil Appeals has, likewise, been extremely hesitant to apply *Professional Credit*.[6] So much so, the case has been found to be controlling in only one reported decision, which presented facts nearly identical to those in *Pro-*

fessional Credit.[7] Additionally, 12 O.S. § 684 has since been amended and the "affirmative relief" language relied on by this Court in *Professional Credit* has been removed from the statute.[8]

¶20 For these reasons, *Professional Credit* must be confined to its facts. The facts in this case are clearly distinguishable. Therefore, *Professional Credit* does not apply directly or by analogy. Furthermore, our decision in *Professional Credit* did not dismantle this court's long-standing interpretation that a "prevailing party" is one who prevails on the merits of the action or for whom final judgment is rendered.

¶21 Coffey argues he prevailed in the litigation insofar as the proceeding was improperly brought in state court. He is absolutely correct that he prevailed on his motion to dismiss. When the trial court granted the dismissal, it summarily disposed of the case. However, there is a critical distinction between prevailing on a dispositive motion that terminates the case and prevailing on the merits of the action. In *Carter v. Rebrecht,* 1940 OK 500, 108 P.2d 546, we said: "[A] defendant might be said to prevail on the pleadings or in the action when the plaintiff dismisses without prejudice, yet he has not finally prevailed upon the issue tendered in plaintiff's petition." *Id.* ¶ 11, at 548. Coffey did not finally prevail upon the issue tendered in Comanche Nation's amended petition. The issue tendered was whether Coffey was indebted to Comanche Nation for the amount of the outstanding balance on the open account. This issue was removed for determination when the trial court dismissed the case. The trial court never made a determination on the merits of Comanche Nation's declaratory judgment action. Rather, the trial court dismissed the case for lack of subject matter jurisdiction. A court does not have power to decide an issue on the merits or enter judgment if it does not have jurisdiction over the subject matter. No judgment was entered for or against any party in this case.[9]

¶22 Coffey has not prevailed on the merits nor has final judgment been rendered in his favor. Therefore, we hold Coffey is not a prevailing party for purposes of an award of attorney fees under 12 O.S. § 936.[10] We affirm the trial court's order denying Coffey's motion for attorney fees.

¶23 Our conclusion does not offend Coffey's right to equal access to the courts. *See Prof'l Credit*, 1997 OK 19, n.11, 933 P.2d 307, 311 (citing *Thayer v. Phillips Petroleum Co.*, 1980 OK 95, 613 P.2d 1041). Title 12, § 936 does not treat the defendant who obtains a dismissal for lack of subject matter jurisdiction different from the plaintiff who successfully defeats the motion to dismiss. Neither is entitled to prevailing party attorney fees. The statute applies equally to the plaintiff or the defendant who ultimately prevails on the merits of the action or for whom final judgment is rendered.

¶24 Some may view it as inequitable to deny an award of attorney fees to the defendant when the plaintiff files a lawsuit in a court without jurisdiction over the subject matter. Whether a party is entitled to an award of attorney fees pursuant to 12 O.S. § 936 is not determined based on equitable considerations. "[E]ach litigant bears the cost of his/her legal representation and our courts are without authority to assess and award attorney fees in the absence of a specific statute or a specific contract therefor between the parties." *Kay v. Venezuelan Sun Oil Co.*, 1991 OK 16, ¶ 5, 806 P.2d 648, 650. Statutes allowing the award of attorney fees are strictly construed. *See Beard v. Richards,* 1991 OK 117, ¶ 12, 820 P.2d 812, 816. Section 936 authorizes an award of attorney fees to the prevailing party and, for the reasons stated, Coffey is not the prevailing party.

IV. CONCLUSION

¶25 A prevailing party is one who prevails on the merits of the action or for whom final judgment is rendered. When the trial court dismissed the case with prejudice for lack of subject matter jurisdiction, it did not make a determination on the merits or enter final judgment. While Coffey was successful on his motion to dismiss, he has not prevailed on the merits nor has final judgment been rendered in his favor. Therefore, Coffey is not entitled to prevailing party attorney fees under 12 O.S. § 936.

ORDER OF THE DISTRICT COURT IS AFFIRMED.

CONCUR: Darby, V.C.J., Winchester, Edmondson, Colbert, and Kane, JJ.

CONCUR IN RESULT: Rowe, J.

DISSENT: Gurich, C.J., Kauger (by separate writing), and Combs (by separate writing), JJ.

1. Coffey is a former Chairman of Comanche Nation. He contends Comanche Nation filed this lawsuit to have him adjudicated a debtor and, as a result, precluded from running for office.

2. The trial court also denied Coffey's motion to settle journal entry "as no judgment was entered upon the merits and the matter was

dismissed for lack of jurisdiction of both the parties and the subject matter. A final order of dismissal was entered on the 15th day of February 2018." The denial of Coffey's motion to settle journal entry is not an issue on appeal.

3. Coffey filed this appeal using the accelerated procedure for appeals from summary adjudication, *see* Okla.Sup.Ct.R. 1.36, rather than an appeal from a final order. It has proceeded as an accelerated appeal without objection.

4. We did not rely on our prior interpretations of "prevailing party" in *Carter, Swan-Sigler, General Motors*, or *Underwriters*. Rather, this Court cited a federal district court decision that a plaintiff who has entered into a settlement of her Title VII claim is a prevailing party within the meaning of how that term is used in 42 U.S.C. § 2000e-5(k). *See Prof'l Credit Collections, Inc. v. Smith*, 1997 OK 19, n.6, 933 P.2d 307, 311 (citing *Parker v. Matthews*, 411 F.Supp. 1059 (U.S.D.C. 1976)). This Court also relied on *Kelly v. Maupin*, 1936 OK 344, ¶ 14, 58 P.2d 116, 118, where we held the right of a plaintiff to dismiss an action does not destroy a previous court order awarding attorney fees. *See Prof'l Credit*, 1997 OK 19, n.7, 933 P.2d at 311.

5. *See Tulsa Adjustment Bureau, Inc. v. Calnan*, 2018 OK 60, ¶ 4, 427 P.3d 1050 ("To qualify as such, [12 O.S. § 936] requires TAB to have prevailed on those fee-bearing claims, meaning that TAB must first have obtained a judgment in its favor on those claims before it could be eligible for an attorney-fee award."); *Sooner Builders & Invs., Inc. v. Nolan Hatcher Constr. Servs., LLC*, 2007 OK 50, ¶ 17, 164 P.3d 1063 ("Coinciding with its ordinary meaning, '**prevailing party,**' as a legal term of art, means the successful party who has been awarded some relief on the merits of his or her claim.") (emphasis original); *Tibbetts v. Sight 'n Sound Appliance Ctrs., Inc.*, 2003 OK 72, ¶ 23, 77 P.3d 1042 ("[W] e hold that here without some judgment or judicial decree that has changed the relationship between the parties so that defendant is judicially required to do something, i.e., some enforceable judgment, plaintiffs cannot be said to be the successful or prevailing parties entitled to an award of attorney fees."); *GRP of Tex., Inc. v. Eateries, Inc.*, 2001 OK 53, ¶ 7, 27 P.3d 95 ("When prevailing party status is the statutory prerequisite for awarding attorney's fees we have defined the prevailing party as the party possessing an affirmative judgment at the conclusion of the entire case."); Goodwin v. Durant Bank & Trust, 1998 OK 3, n.11, 952 P.2d 41 ("A prevailing party is one in whose favor judgment was rendered.").

6. *See, e.g., Waits v. Viersen Oil & Gas Co.*, 2020 OK CIV APP 2, 456 P.3d 1149 (survey of appellate decisions citing *Professional Credit)*; Mill *Creek Lumber & Supply Co. v. Bichsel*, 2015 OK CIV APP 26, 347 P.3d 295 (holding the defendant is not the prevailing party when, after four years of litigation, the plaintiff dismissed the case with prejudice before trial); *Austin Place, LLC v. Marts*, 2015 OK CIV APP 2, 341 P.3d 693 (holding the defendant is not the prevailing party when the plaintiff dismissed the forcible the entry and detainer claim after the trial court pronounced its ruling that the claim was barred by the statute of limitations and signed a minute order but before final judgment was entered for the defendant); *Hastings v. Kelley*, 2008 OK CIV APP 36, 181 P.3d 750 (holding the defendant is not the prevailing party when the trial court denied the plaintiff's application for a temporary injunction and, thereafter, the plaintiff dismissed the suit without prejudice).

7. *See Capital One Bank v. Parsons*, 2009 OK CIV APP 71, ¶ 5, 217 P.3d 636; *see also Waits*, 2020 OK CIV APP 2, ¶ 10 ("[T]o date, [Professional Credit] had not been positively applied in a prevailing party fee question outside of one factual situation – a dismissal by the plaintiff after a default judgment was vacated.").

8. The 2013 amendments to 12 O.S. § 684 removed the "affirmative relief" language. *See* 12 O.S.Supp.2013 § 684 (amended by Laws 2013, 1st Extr. Sess., SB 2, c. 13, § 6). The Court of Civil Appeals has questioned the continued viability of the "affirmative relief" rule from *Professional Credit*. *See Waits*, 2020 OK CIV APP 2, ¶¶ 10-14; *Mill Creek*, 2015 OK CIV APP 26, ¶ 20. In Waits, the Court of Civil Appeals aptly observed:

> We find it evident that there are limits to the reach of *Professional Credit*. If the legislature intended that any form of relief granted before dismissal of a fee-bearing case, however minimal, makes the non-dismissing party a "prevailing party" entitled to full statutory attorney fees, it has had numerous opportunities to state so. Instead, the amendment of § 684 in 2013 required only that a party who dismisses after pretrial must pay costs upon refiling. If the Legislature intended the more punitive regime that an unrestricted application of *Professional Credit* would create (dismissal after any affirmative relief require the dismissing party to pay prevailing party fees) it had a perfect opportunity to do so when it amended § 684. It did not do so.

2020 OK CIV APP 2, ¶ 20 (emphasis original).

9. We reject Coffey's suggestion that the dismissal with prejudice is the equivalent of a judgment on the merits. In *Mill Creek*, the Court of Civil Appeals accurately explained:

> [T]he cases cited for this proposition do not hold that such a dismissal constitutes an adjudication on the merits of a plaintiff's claims for all legal purposes, including recovery of prevailing party attorney fees – they clearly hold that the legal effect of such a dismissal with prejudice is the same as that of a judgment in prohibiting a plaintiff (or any claiming party) from reasserting the dismissed claims.

2015 OK CIV APP 26, ¶ 22.

10. Today's decision is consistent with the 10th Circuit Court of Appeals' decision in *GHK Exploration Co v. Tenneco Oil Co.*, 857 F.2d 1388 (10th Cir. 1988).

KAUGER, J., with whom GURICH, C.J., joins, dissenting:

¶1 I am baffled by how the trial court or this Court can consider, much less award, attorney fees if the trial court does not have jurisdiction over either of the parties. Because this cause involved an Indian tribe, and an Indian citizen in Indian Country, the trial court dismissed it because there was no subject matter jurisdiction of the parties. After the dismissal, the appellant, Wallace Coffey, sought an award of attorney fees as a prevailing party. Because of the litigants involved, the lack of subject matter jurisdiction is apparently based on the sovereign immunity of both parties. The questions become whether the parties waived sovereign immunity, and even if so, could the trial court award attorney fees after dismissing the cause because it lacked subject matter jurisdiction?

I.

OKLAHOMA IS NOT A PUBLIC LAW 280 STATE AND AS SUCH, OUR COURTS GENERALLY LACK SUBJECT MATTER JURISDICTION OVER DISPUTES BETWEEN INDIAN TRIBES AND TRIBAL OFFICIALS.

¶2 This Court has previously clearly explained that Oklahoma lacks subject matter jurisdiction over disputes between Indian Tribes and Tribal Officials. Two prominent cases explaining this are Ahboah v. Housing Authority of Kiowa Tribe of Indians, 1983 OK 20, 660 P.2d 625 and Housing Authority of Seminole Nation v. Harjo, 1990 OK 35, 790 P.2d 1098. Both cases involve disputes between tribal members with tribal housing authorities on tribal land.

¶3 The Courts' discussion of state subject matter jurisdiction is not only relevant, but it is dispositive.[1] In Ahboah, supra, the Kiowa Housing Authority sought possession and forcible entry and detainer against tenants occupying housing built on "Indian Country" allotment land. In determining whether an

Oklahoma state court has subject matter jurisdiction, the Court said:

> ¶18 Although making generalizations about the allocation of subject matter jurisdiction between federal, state and tribal governments is treacherous, certain general principles are clear. Congress has plenary power over Indians and Indian activities by virtue of the Indian commerce clause and supremacy clause of the United States Constitution. Federal power over Indian activities has always been exercised broadly, subject to few limitations.
>
> ¶19 Tribal authority over tribal members and their property is derived either through the doctrine of inherent sovereignty (Indian nations) or, as more recently articulated, from the protection afforded to tribal self-government by Congress. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665 (1980).
>
> ¶20 As a general principle, states have full authority over Indians and Indian activity outside Indian Country. Within Indian Country, state jurisdiction may be exercised only if the field has not been preempted by federal statutes, regulations and policy, and tribal authority has not been determined. In areas traditionally within the federal ambit, states may exercise authority over Indians or Indian Country only with the explicit consent of Congress.
>
> ¶21 Public Law 280 embodies express Congressional consent to state assumption of civil and/or criminal jurisdiction over Indians and Indian activities within Indian Country, provided that certain conditions are met. Public Law 280 has appeared in two forms. As originally enacted, states were divided into two groups: mandatory states (those required to assume civil and criminal jurisdiction) and optional states (which could voluntarily assume jurisdiction by affirmative legislative action). The optional states were further divided into two groups: those whose constitutions and enabling acts disclaimed all title to and interest in Indian lands within state borders and those states having no such disclaimer. Congress perceived that disclaimer clauses presented a barrier to the assumption of jurisdiction. The barrier presented by the enabling acts was removed by Congress, but disclaimer states were required to amend their constitutions "where necessary" as well as to take affirmative legislative action to assume jurisdiction. Oklahoma is among the disclaimer states.
>
> ¶22 Public Law 280 was amended by the Civil Rights Act of 1968 in two significant ways: first, the affirmative legislative action requirement was removed; second, consent by tribal referendum was required before state jurisdiction could be assumed. The Kiowa Tribe has not assented to the assumption of jurisdiction by the State of Oklahoma. Therefore Oklahoma to assume jurisdiction under Public Law 280 must have done so under the original 280 Act before the amendment by the Civil Rights Act of 1968. (Footnotes omitted)

The Court held that Oklahoma state courts lacked subject matter jurisdiction over the cause because the State of Oklahoma had not assumed such jurisdiction under Public Law 280.[2]

¶4 Similarly, a few years later in Harjo, supra, we addressed state court subject matter jurisdiction in a similar dispute. The house involved in the dispute was part of a "Dependent Indian Community." Harjo maintained that her house was part of a "dependent Indian community," located in "Indian country", and fell within federal, not state jurisdiction. The Harjo Court said:

> Under the federal constitution, Congress has exclusive authority over Indian affairs. U.S. Const., Art. I, § 8. 18 U.S.C.A. § 1151 defines "Indian country" as
>
> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation.
>
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
>
> (c) all Indian allotments, the Indian titles to which have not been extinguished. . . . (emphasis added)
>
> If indeed her house lies within Indian country then the state court was without jurisdiction to proceed in the forcible entry

and detainer action. Ahboah v. Housing Authority Kiowa Tribe, 660 P.2d 625 (Okla. 1983).

We held that state courts lacked subject matter jurisdiction to decide the matter. After Harjo alleged that the trial court also erred in awarding attorney fees to the Housing Authority when it lacked subject matter jurisdiction to decide the underlying matter, we agreed because the matter was not justiciable in state court – period. The same is true in this cause.

II.

THE ONLY WAY THE STATE OF OKLAHOMA COULD ASSERT JURISDICTION TO DECIDE THE UNDERLYING MATTER AND/OR ATTORNEY FEES IS IF THE PARTIES EXPRESSLY WAIVED SOVEREIGN IMMUNITY.

¶5 Historically, sovereign immunity must be clearly and unambiguously waived.[3] Does the filing of a lawsuit in state court automatically constitute a waiver of the Tribe's sovereign immunity? If not, what does constitute a waiver? The District Court has the duty to inquire into its jurisdiction.[4] The easiest solution would have been for the District Court to ask the tribal entity whether it clearly and unequivocally waived sovereign immunity when it first filed the lawsuit against its former chairman. This Court could issue the same show cause order. Regardless, the question is important.

¶6 Additionally, the respondent argues that the Tribe is a necessary and indispensable party that must be joined in order for the Court to determine sovereign immunity of the parties, as well as to obtain any money judgment against the respondent.[5] Regardless, the jurisdiction of the district courts of this state may have over the thirty-nine federally recognized nations of Oklahoma, and their citizens, has been the subject of litigation for the entirety of the history of this state and continues to this day.[6] Consequently, when an entity which appears to be part of the tribal government in Indian County, brings an action in the district court of Oklahoma against a former tribal leader, rather than in tribal court or in federal court, the question of jurisdiction should be addressed immediately.

¶7 Wallace Coffey, (defendant/appellant/Coffey) entered a special appearance and filed a motion to dismiss for lack of subject matter jurisdiction. He claimed that he was chair of the Comanche Nation at all times pertinent to the matter, and that he was afforded sovereign immunity. As previously noted, in Housing Authority of the Seminole Nation v. Harjo, 1990 OK 35, ¶22, 790 P.2d 1098, the Court granted certiorari to determine whether the state district court had jurisdiction over a forcible entry and detainer action involving a house built by the appellee. The Court of Appeals had held that the house was not situated in Indian country, and that the state court had jurisdiction.

¶8 However, we held that because the house was part of a "dependent Indian community" jurisdiction did not lie in the state courts. We ordered the trial court to dismiss the cause. When the appellant argued that the trial court erred by awarding attorney's fees to the Housing Authority, we agreed, stating that "**this case is not a matter properly litigable in the state courts of Oklahoma**." Thirty years ago, we held an award of attorney fees in a matter involving an intertribal conflict was not a properly litigable in the state courts of Oklahoma. It should have been brought in the Comanche Nation court system or the federal courts.[7]

¶9 Wallace Coffey resigned as the chairman of the Comanche Nation on February 5, 2016, after twenty-five years in the position.[8] The action of money judgment against Coffey was filed in the district court on October 11, 2016. The record does not indicate that the Comanche Nation, or its agents, filed a formal waiver of sovereign immunity at the time of filing. Nor are the sufficient facts in the record on appeal to determine whether a formal waiver was intended without an evidentiary hearing.

¶10 The Comanche Nation constitution is unclear as to who exactly had the authority to waive sovereign immunity. The Comanche Nation constitution, as amended November 7, 2019, does not expressly mention who has the authority to waive sovereign immunity on behalf of the Tribe or tribal official or entity. It does, however, allow the Tribal Council to transact business and hire an attorney. It provides in pertinent part:

> Article IV, Section 6. . .
>
> (e) To select and authorize tribal delegations to transact business on behalf of the tribe. When travel is involved, the terms of the resolution shall include the purpose of

> the trip and the existence of the delegation's authority. . . .
>
> Section 9. To hire an attorney to represent the tribe in legal matters.

Thus, the first questions the district court should have answered was whether the filing of the lawsuit by the Comanche Nation constituted a waiver of sovereign immunity on behalf of the tribe and a consent to jurisdiction of the district court or whether the tribe could also waive jurisdiction on behalf of the former chairman.

¶11 Because of the sovereign immunity of the parties, because the incidences giving rise to this litigation occurred on Tribal Trust Land between a sovereign nation and one of its citizens, the district court lacked subject matter jurisdiction of this cause. Even if the State of Oklahoma could entertain such causes in state court, unless the Comanche Nation waived its sovereign immunity clearly and unequivocally, no jurisdiction would exist.[9]

¶12 Evidently, the Comanche Nation Tourism Center utilized the state court system by voluntarily filing the action in the state district courts. There is no evidence that it was authorized to do so by the tribal council or that there was an express waiver of sovereign immunity. Other state and federal courts have examined this issue. In some cases, immunity may be waived by: entering into a business contract,[10] a "sue or be sued clause" in an a contract;[11] an arbitration agreement;[12] by a tribe's corporate charter;[13] if a tribal constitution allows someone other than tribal leaders to waive immunity;[14] if sovereign immunity is abrogated by Congress[15] or by tribal referendum.[16] Explicit language in the Tribe's complaint or counterclaim may expressly waive immunity.[17]

¶13 Our Court of Civil Appeals First Bank & Tr. v. Maynahonah, 2013 OK CIV APP 101, ¶1, 313 P.3d 1044 recognized that explicit language in the Tribe's constitution or by-laws may expressly waive immunity, but waiver cannot be implied by mere participation in an interpleader action. On the record presented, it is impossible to determine without further evidence or an admission by the Tribe, that it has waived its sovereign immunity.

¶14 Some courts have noted that, in some instances, the limited jurisdiction to determine attorney fees based on the court's inherent power after a lawsuit was dismissed for lack of jurisdiction.[18] The rule can be very different if the action is dismissed due to sovereign immunity where the court has no inherent power. For example, in Ex Parte Alabama Dept. of Transp., 978 So.2d 17, 25-26 (Ala. 2007), a case involving the dismissal of the Alabama Department of Transportation based on sovereign immunity, the appellant argued on appeal that, if the Alabama Supreme Court concluded that ALDOT was not a proper party, it should direct the trial court to allow amendment of the complaint to add the proper party. The Supreme Court of Alabama, with regard to dismissal due to sovereign immunity, said:

> . . . if a trial court lacks subject-matter jurisdiction, it has no power to take any action other than to dismiss the complaint. A trial court lacks subject-matter jurisdiction if the defendant is immune under the doctrine of sovereign immunity. Larkins, 806 So.2d at 364 (" 'Article I, § 14, of the Alabama Constitution of 1901 thus removes subject-matter jurisdiction from the courts when an action is determined to be one against the State.' " (quoting Lyles, 797 So.2d at 435)). Thus, this Court cannot order the trial court to allow Good Hope to amend its complaint because the trial court lacks subject-matter jurisdiction. . .
>
> . . . "Lacking subject matter jurisdiction [a court] may take no action other than to exercise its power to dismiss the action .... Any other action taken by a court lacking subject matter jurisdiction is null and void." ' " Ex parte Blankenship, 893 So.2d at 307 (quoting State v. Property at 2018 Rainbow Drive, 740 So.2d 1025, 1029 (Ala.1999), quoting in turn Beach v. Director of Revenue, 934 S.W.2d 315, 318 (Mo. Ct.App.1996)).

The same rationale applies whether the entity entitled to sovereign immunity is a State or a Native Tribe. If jurisdiction does not exist due to sovereign immunity, the court lacks jurisdiction to award attorney fees. If jurisdiction does not exist because all of the transactions occurred on Indian Trust Land between a tribe and a tribal member in which the State of Oklahoma has no jurisdiction, then any action taken such as awarding attorney fees would be null and void due to lack of jurisdiction.

¶15 Even if sovereign immunity were not an issue, in General Motors Acceptance Corp. v. Carpenter, 1978 OK 39, ¶8, 576 P.2d 1166, the Court addressed whether a trial court could

reopen a case in order to determine and award attorney fees after the plaintiff dismissed the cause. The Court held that once a party has dismissed his or her petition under §684, no jurisdiction remains in district court to go forward with the action. The Court explained that the district court's decision to reopen the case was the improper exercise of judicial discretion and the district court had no power to reassume jurisdiction over the dismissed case to award attorney fees. Federal Courts have reached similar results recognizing that fee shifting provisions themselves do not confer subject matter jurisdiction to award attorney fees.[19] The same reasoning should apply here, especially when the dismissal was for lack of subject matter jurisdiction due to sovereign immunity.

III.

PREVAILING PARTY ATTORNEY FEES.

¶16 My other concern is that although the district court lacked jurisdiction in this cause, the majority's holding will control the determination of the prevailing party in all other causes. Had this not involved questions of sovereign immunity, I could agree with the dissent that, Coffey could qualify for an award as a prevailing party within the meaning of 12 O.S. 2011 §936.[20] The dissent discusses Professional Credit Collections, Inc., v. Smith, 1997 OK 19, ¶10, 933 P.2d 307. There, we held Smith's successful motion to vacate a default judgment was a quest for affirmative relief and success placed Smith, in the status of prevailing party which entitled her to an attorney's fee award. This was so even though the plaintiff dismissed its action without prejudice prior to Smith filing an answer after the default judgment was vacated.

¶17 In Professional Credit, supra, we held the trial court's ruling in Smith's favor on her motion to vacate fully satisfied the §936 requirement that she be successful in the case. We interpreted §936 in conjunction with 12 O.S. 1991 §684.[21] Although the majority Professional Credit disapproves, it has not been overruled. The only statutory changes that occurred after Professional Credit was a change to §684 which concerned when a plaintiff could dismiss a case.[22] The language allowing a plaintiff to dismiss an action was changed from "affirmative relief" to "any time before pretrial." This change does not implicate the rationale of the cause. If the majority thinks Professional Credit was wrongly decided it should overrule it, but it has not done so. Without either following it, or overruling it, the majority has thrown confusion into what a "prevailing party" is in other cases as well.

¶18 Here, the trial court's granting of Coffey's motion to dismiss for lack of subject matter jurisdiction was *with prejudice*. In Professional Credit, the plaintiff dismissed its petition without prejudice and could refile its action. That possibility did not prevent the Court from determining prevailing party status for the purpose of awarding an attorney's fee.

CONCLUSION

¶19 The majority's holding that "[a]s an initial matter, we find the trial court had jurisdiction to adjudicate Coffey's application for attorney fees despite its lack of subject matter jurisdiction over the merits of the case" is flawed. If a court of the State of Oklahoma never had jurisdiction over matters occurring in "Indian Country," it is impossible to acquire jurisdiction later to decide attorney fees. The trial court's only option was to dismiss the case for the lack of subject matter jurisdiction.

1. Subsequent to these cases, the Court in Lewis v. Sac & Fox Tribe of Okla. Housing Authority, 1994 OK 20, 896 P.2d 503 modified the analysis to include the preliminary inquiry into nature of rights sought to be settled and noting that only that litigation that is explicitly withdrawn by Congress or that which infringes upon tribal self-government stands outside boundaries of permissible state-court cognizance.

2. Act of August 15, 1953, Ch. 505, 67 Stat. 588 amended by Public Law 90-284, Act of April 11, 1968, 82 Stat. 80.

3. Dilliner v. Seneca-Cayuga Tribe, 2011 OK 61, ¶12, 258 P.3d 516 provides:

> The standard of review for questions concerning the jurisdictional power of the trial court to act is de novo. Jackson v. Jackson, 2002 OK 25, 45 P.3d 418. As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754, 118 S.Ct.1700, 140 L.Ed.2d 981 (1998). Waiver of sovereign immunity cannot be implied but must be unequivocally expressed. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). Absent an effective waiver or consent, a state court may not exercise jurisdiction over a recognized Indian tribe. Pullayup Tribe, Inc. v. Department of Game of the State of Washington, 433 U.S. 165, 172, 97 S.Ct. 2616, 53 L. Ed.2d 667 (1977).

4. It is the duty of the Court to inquire as to the propriety of the court's jurisdiction. Independent School Dist. #52 of Oklahoma City v. Hofmeister, 2020 OK 56, ¶52, ___ P.3d__ (awaiting mandate).

5. Title 12 O.S. 2011 §2019. The lack of necessary joinder is the reason the author of the majority opinion gave as the dissenting reason that the Court could not consider our recent case of Treat v. Stitt, 2020 OK 64, ___ P.3d ___.

6. McGirt v. Oklahoma, 140 S.Ct. 2452, 2469, 207 L.Ed.2d 985 (2020).

7. www.comanchenation.com.

8. www.Indianz.com, "Wallace Coffey resigns as chair of Comanche Nation after 25 years," February 8, 2016.

9. Sheffer v. Buffalo Run Casino, PTE, Inc., 2013 OK 77, ¶22, 315 P.3d 359 states:

> Only an express grant of jurisdiction by Congress or adoption of Public Law 280 will confer civil-adjudicatory jurisdiction to the State of Oklahoma. "It is undisputed that Oklahoma was not a state which was allowed to assert civil jurisdiction over Indian Tribes under Public Law 280." Cossey, 2009 OK 6, 212 P.3d 447 (Kauger, J., concurring in part/dissenting in part ¶ 26); Okla.Tax

Comm'n v. Sac & Fox Nation, 508 U.S. 114, 125 (1993) ("Oklahoma did not assume jurisdiction pursuant to Pub.L. 280."). And IGRA did not expressly grant civil-adjudicatory jurisdiction to the State of Oklahoma, but rather, included a provision "which allowed tribes and states to negotiate an allocation of jurisdiction to the states."

10. In State ex rel. Suthers v. Cash Advance and Preferred Cash Loans, 205 P.3d 389, 400 (Colo. Ct. App. Div. II 20080 noted that a contract could waive sovereign immunity in off reservation commercial applications when certain factors are evaluated. It stated:

> . . .In determining whether an activity was conducted off the reservation, courts generally look to where (1) the contract was entered into; (2) the contract was negotiated; (3) performance is to occur; (4) the subject matter of the contract is located; and (5) the parties reside. Emerson v. Boyd, 247 Mont. 241, 242–43, 805 P.2d 587, 588 (1991); see Wood Bros. Homes, Inc. v. Walker Adjustment Bureau, 198 Colo. 444, 447–48, 601 P.2d 1369, 1372–73 (1979) (adopting same five-part test from Restatement (Second) Conflict of Laws § 193 (1971) to resolve conflict of law issues involving contracts).
>
> Here, the trial court was required to make factual findings to apply this test, and so we are faced with a mixed question of law and fact, which we review de novo. See Edge Telecom, Inc. v. Sterling Bank, 143 P.3d 1155, 1159 (Colo.App.2006)(enforcement of forum selection clause). . . .

11. Martinez v. S. Ute Tribe, 150 Colo. 504, 510, 374 P.2d 691, 694 (1962); see also Rosebud Sioux Tribe v. A & P Steel, Inc., 874 F.2d 550, 552 (8th Cir.1989); Kenai Oil & Gas, Inc. v. Dep't of Interior, 522 F.Supp. 521, 528 (D.Utah 1981), aff'd and remanded, 671 F.2d 383 (10th Cir.1982); Parker Drilling Co. v. Metlakatla Indian Cmty., 451 F.Supp. 1127, 1136 (D.Alaska 1978); Dacotah Properties-Richfield, Inc. v. Prairie Island Indian Cmty., 520 N.W.2d 167, 170 (Minn.Ct.App.1994). "[A] sue or be sued clause will only accomplish a waiver when the clause clearly expresses an intent to waive immunity," not where conditions placed on the waiver are left unmet. Sanchez v. Santa Ana Golf Club, Inc., 136 N.M. 682, 686, 104 P.3d 548, 552 (N.M.Ct.App.2004)(citing Martinez, 150 Colo. at 508–10, 374 P.2d at 693–94).

12. C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe, 532 U.S. 411, 420-22, 121 S.Ct. 1589, 149 L.E.2d 623 (2001).

13. Wright v. Colville Tribal Enterprise, 147 P.3d 1275, 1280 (Wash. 2006)..

14. Rush Creek Solutions, Inc., v. Ute Mountain Ute Tribe, 107 P.3d402, 406–07 (Colo. Ct. App. Div. II 2004).

15. Foxworthy v. Puyallup Tribe of Indian Ass'n, 141 Wash. App. 221, 227-28, 169 P.3d 53 (2007).

16. See, Lewis v. Sac & Fox Tribe of Okla. Housing Authority, note 1, supra, noting that the State may assert cognizance over Indian Country only if enrolled Indians have given their consent by tribal referendum.

17. Rupp v. Omaha Indian Tribe, 45 F.3d 1241 (8th Cir. 1995).

18. For example, in Musser v. Musser, 1998 OK CIV APP 13, ¶10, 955 P.2d 744, the court noted:

> We note that the trial court's inherent powers to manage its own affairs to achieve an orderly and timely disposition of cases are a necessary incident to the trial court's jurisdiction. Winters v. City of Oklahoma City, 1987 OK 63, 740 P.2d 724. Winters recognized that an attorney's personal liability for the opponent's attorney fees is an exercise of the trial court's inherent supervisory powers. Reimbursement, which was anticipated in the original order, is a logical exercise of the trial court's inherent powers. The instant situation is similar to the trial court's power to order an attorney, not a party in interest, to pay sanctions to the opposing party or counsel. In Bentley v. Hickory Coal Corp., 1992 OK CIV APP 68, 849 P.2d 417, this Court held that the trial court has jurisdiction, even after the case has been dismissed, to order an attorney to pay attorney fees as a sanction. The Oklahoma Supreme Court has held that the key to requiring an attorney to pay sanctions is notice and an opportunity to be heard. Helton v. Coleman, 1991 OK 43, 811 P.2d 100. We find this holding comports with our reading of Ford, supra, that lack of notice and opportunity to be heard were the principal factors in finding this Court without jurisdiction to enter the order in that case.

19. W.G. v. Senatore, 18 F.3d 60, 64 (U.S. Ct App. 2nd Cir. 1994) [Simply stated using the common law approach, when a determination is made that no jurisdiction lies, the district court has "no power to do anything but to strike the case from the docket." The Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 250, 18 L.Ed. 851 (1868). In keeping with these principles, fee shifting provisions cannot themselves confer subject matter jurisdiction. Rather, such provisions must be read in conjunction with substantive statutes to establish proper jurisdiction over fee applications. For example, in the civil rights context, 42 U.S.C. § 1988 empowers a court to award reasonable attorney's fees only to the prevailing party in a proceeding brought to enforce one of the substantive sections of the civil rights laws. Where there is no subject matter jurisdiction to proceed with the substantive claim, as a matter of law "[t]hat lack of jurisdiction bar[s] an award of attorneys fees under section 1988." Keene Corp. v. Cass, 908 F.2d 293, 298 (8th Cir.1990) (reversing district court's award of attorney's fees under § 1988 after affirming district court's conclusion that it lacked subject matter jurisdiction under § 1983); see also Smith v. Brady, 972 F.2d 1095, 1100 (9th Cir.1992) (addressing fee shifting in tax law context; failure to exhaust requisite administrative remedies precluded fee award); J.G. v. Board of Educ. of Rochester City Sch. Dist., 830 F.2d 444, 447 (2d Cir.1987) (recognizing questionable status of administrative exhaustion under IDEA's precursor, the Education of the Handicapped Act, appellate court avoided jurisdictional question by converting district court's decision on attorney's fees to an award under § 1988 in light of plaintiff's success on parallel claims brought pursuant to § 1983).]

20. Title 12 O.S. 2011 §936 provides:

> A. 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.
>
> B. In any civil action to recover unpaid fees, fines, costs, expenses or any other debt owed to this state or its agencies, as defined pursuant to Section 152 of Title 51 of the Oklahoma Statutes, unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs.

21. Title 12 O.S. 1991§684 provided;

> A plaintiff may, on the payment of costs and without an order of court, dismiss any civil action brought by him at any time before a **petition of intervention or answer praying for affirmative relief** against him is filed in the action. A plaintiff may, at any time before the trial is commenced, on payment of the costs and without any order of court, dismiss his action after the filing of a petition of intervention or answer praying for affirmative relief, but such dismissal shall not prejudice the right of the intervenor or defendant to proceed with the action. Any defendant or intervenor may, in like manner, dismiss his action against the plaintiff, without an order of court, at any time before the trial is begun, on payment of the costs made on the claim filed by him. All parties to a civil action may at any time before trial, without an order of court, and on payment of costs, by agreement, dismiss the action. Such dismissal shall be in writing and signed by the party or his attorney, and shall be filed with the clerk of the district court, the judge or clerk of the county court, or the justice, where the action is pending, who shall note the fact on the proper record: Provided, such dismissal shall be held to be without prejudice, unless the words "with prejudice" be expressed therein. (Emphasis supplied)

22. In 2013, Title 12 O.S. Supp. 2013 §684 was amended and it now provides:

> A. An action may be dismissed by the plaintiff **without an order of court by filing a notice of dismissal at any time before pretrial.** After the pretrial hearing, an action may only be dismissed by agreement of the parties or by the court. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice.
>
> B. Except as provided in subsection A of this section, an action shall not be dismissed at the plaintiff's request except upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaims can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this subsection is without prejudice.
>
> C. For failure of the plaintiff to prosecute or to comply with the provisions of this section or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.
>
> D. The provisions of this section apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to subsection A of this section shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

> If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.(Emphasis supplied).

COMBS, J., dissenting.

¶1 The majority opinion holds that Coffey was not the prevailing party within the meaning of 12 O.S. §936, and therefore, he should be denied a reasonable attorney's fee. I believe even under a strict construction of this section, Coffey was the prevailing party. Section 936 provides, "[i]n any civil action to recover . . . on an open account . . . the prevailing party shall be allowed a reasonable attorney fee." I would not limit the meaning of prevailing party to only those who succeed on the merits of the open account action itself. Coffey filed a motion to dismiss within a civil action to recover on an open account. He prevailed on his motion because the district court lacked subject matter jurisdiction due to tribal sovereign immunity. The final order granting the motion to dismiss thereby dismissed *this action* with finality, subject to appeal, and therefore he was the prevailing party.

¶2 In A*mphastar Pharm. Inc. v. Aventis Pharma SA*, the Ninth Circuit noted it had previously established a two part test to determine whether attorney's fees may be awarded when the underlying action is dismissed for lack of subject matter jurisdiction. 856 F.3d 696, 708-09 (9th Cir. 2017). The test was established in *Branson v. Nott*, 62 F.3d 287 (9th Cir. 1995). The test provides: (1) Does the fee-shifting provision contain an independent grant of subject matter jurisdiction? (2) If so, did the winning party "prevail?" In deciding the first question, the court acknowledged it had found independent grants of jurisdiction in some cases and not in others. *Amphastar,* at 710. But it also found, "[w]e have been more willing to allow a district court to award attorneys' fees when the underlying issues concerned whether the district court had jurisdiction – since a court always has jurisdiction to determine its own jurisdiction." *Id.* (citation omitted). The court observed that in *Latch v. United States,* 842 F.2d 1031, 1033 n.4 (9th Cir. 1988), it found a defendant could be awarded its attorney's fees because it "prevailed on the only issue over which the district court properly had jurisdiction, i.e., the determination that it had no jurisdiction." *Amphastar,* at 709; *See also Weiss (Herbert), Estate of Weiss (Roberta) v. Comm'r of Internal Revenu*e, 88 T.C. 1036, 1040 (1987).

¶3 As to the second prong of the test, the court noted Branson had determined attorney's fees were only available to a party who had prevailed on the merits. *Id. Branson* held when a defendant wins because the action is dismissed for lack of subject matter jurisdiction he is never the prevailing party. *Id*., at 710. However, the *Amphastar* court concluded the United States Supreme Court had recently and effectively overruled that determination in *Branson. Id.* In *CRST Van Expedited Inc., v. E.E.O.C*., ___U.S. ___, 136 S.Ct. 1642, 1646, 194 L.Ed.2d 707 (2016), the Supreme Court explained a favorable ruling on the merits is not a necessary predicate to find that a defendant has prevailed. *Id.* at 709. The Supreme Court had reversed an Eighth Circuit decision that declined to award attorneys' fees because the defendant did not win on the merits. *Id.; CRST,* at 1650, 1654. The Court elaborated at length concerning why defendants who prevail for various non-meritorious reasons should still be deemed the prevailing party. *Id.; CRST,* at 1650-1654. The *Amphastar* court found that the Supreme Court included an example where defendants prevailed on jurisdictional reasons and it never indicated jurisdictional and non-jurisdictional victories should be treated differently. *Id.* at 709-10. The court concluded that after dismissal for lack of jurisdiction the district court retained subject matter jurisdiction over the attorney's fee issue and the moving party was the prevailing party. *Id.* at 711.

¶4 I agree with the United States Supreme Court that a prevailing party does not necessarily mean only those who win on the merits of a case. Section 936 of Title 12 of the Oklahoma Statutes does not define prevailing party. There is no indication that the Legislature intended that defendants should be eligible to recover attorney's fees only when courts dispose of claims on the merits. *See CRST,* at 1651-1652. As the *Weiss* court found, "an order of dismissal for lack of jurisdiction is a final order, appealable as such, and surely is either a 'judgment' or a 'decision.'" *Weiss,* at 1040. I agree with the majority opinion that a court retains jurisdiction to award attorney's fees after it dismisses a case for lack of subject matter jurisdiction. However, I am perplexed *under its analysis* how anyone in that situation would be able to recover those fees pursuant to §936. The majority opinion makes it clear a defendant who obtains a dismissal for lack of subject matter jurisdiction is not entitled to prevailing party attorney's fees. It makes little sense for a

defendant to have to raise an affirmative defense, prevail on that defense, the action is dismissed with finality in that court, and then have no recourse to receive his or her attorney's fees.

¶5 In *Professional Credit Collections, Inc., v. Smith,* we held the defendant's successful motion to vacate a default judgment was a quest for affirmative relief and such success placed the defendant, Smith, in the status of prevailing party which entitled her to an attorney's fee award. 1997 OK 19, ¶10, 933 P.2d 307. This was so even though the plaintiff dismissed its action without prejudice prior to Smith filing an answer after the default judgment was vacated. In an opinion authored by Justice Opala, we held the trial court's ruling in Smith's favor on her motion to vacate fully satisfied the §936 requirement that she be successful in the case. *Id. Professional Credit* has not been overruled and its holding is in line with the other opinions cited herein. Here, there is even clearer finality than that existing in *Professional Credit*. The trial court's granting of Coffey's motion to dismiss for lack of subject matter jurisdiction was *with prejudice*. In *Professional Credit*, the plaintiff dismissed its petition without prejudice and therefore could refile its action. That possibility did not prevent this Court from determining prevailing party status for the purpose of awarding an attorney's fee. The same is true in the present case. Here, the Appellee could refile its action in the proper jurisdiction, but that fact does not prevent this court from finding Coffey is the prevailing party when he was successful in his quest for affirmative relief, i.e., success on his motion to dismiss for lack of subject matter jurisdiction. I agree with the holding in *Professional Credit* and find the majority's attempt to diminish its value to be specious.

¶6 The majority concludes "a prevailing party is one who prevails on the merits of the action or for whom final judgment is rendered." Here, I would hold that Coffey was the prevailing party in ***this*** action as he is the party who has received a final judgment by the trial court's action in granting the motion to dismiss with prejudice. As such, Coffey is entitled to his attorney's fees pursuant to §936. To hold otherwise invites frivolous lawsuits and unnecessary and costly expenses to a defendant.

House of Delegates Actions

Friday, November 13, 2020
President-Elect Mike Mordy, Presiding

Election to Board of Governors (uncontested positions)

President-Elect: James R. Hicks, Tulsa

Vice President: Charles E. Geister III, Oklahoma City

SC Judicial District One: Michael R. Vanderburg, Ponca City

SC Judicial District Six: Richard D. White Jr., Tulsa

SC Judicial District Seven: Benjamin R. Hilfiger, Muskogee

Election to Board of Governors (voting by ballot)

Kara I. Smith, Oklahoma City

Title Examination Standards

Revisions and additions to the Oklahoma Title Examinations Standards published in the OBJ 91 1239 (Oct. 16, 2020) and posted online at www.okbar.org/annualmeeting were approved and are effective immediately.

2020 OK CR 12

JAMES MAHDAVI, Appellant, v. STATE OF OKLAHOMA, Appellee

Case No. F-2018-298. November 12, 2020

OPINION

HUDSON, JUDGE:

¶1 James Mahdavi, hereinafter "Appellant", was tried and convicted at a jury trial in Tulsa County District Court, Case No. CF-2016-6320, of two counts of Murder in the First Degree, in violation of 21 O.S.Supp.2012, § 701.7(A). The jury recommended sentences of life imprisonment without the possibility of parole for both counts. The Honorable William J. Musseman, Jr., District Judge, presided at trial and sentenced Appellant in accordance with the jury's verdicts. Judge Musseman ordered the sentences to run consecutively. Appellant now appeals.

¶2 The State's evidence in this case showed that sometime around 9:30 p.m. on November 18, 2016, Appellant shot two men at the Holiday Express Motel located at 3220 West Charles Page Boulevard in Tulsa. Surveillance video shows Appellant walked up to the first victim, Rodney McGee, in the motel parking lot and shot him in the head. The video shows Appellant fired off a single gunshot, killing McGee. The video next shows that Appellant walked around the corner of the motel building and shot through the window of Room 102.

¶3 With this gunshot, Appellant killed Leroy Coleman, the motel's maintenance man. Leroy lived in Room 102 with his wife, Chanel. The couple heard the first gunshot. According to Chanel, her husband was sitting on the edge of the bed inside Room 102, in front of the window, when he pulled back the curtains to look outside and investigate. It was at that moment Leroy was shot in the neck. Leroy initially survived the shooting but died two days later.

¶4 The evidence showed Appellant got into an argument with McGee and Garland Funkhouser, Appellant's uncle, in Room 103 earlier that evening at the motel. This argument occurred while a group of people sat around Room 103 drinking and using drugs. Appellant was asked to leave by Rodney Brummett, the man who lived in the motel room, because of the argument. Appellant complied. Later, Levi Dunkin opened the front door to Room 103 and witnessed Appellant shooting into Room 102 when he killed Coleman. Dunkin testified at trial that Appellant looked at him when he opened the door; that he was able to see Appellant face-to-face and that he was approximately two or three feet away when he saw Appellant open fire on Room 102. Dunkin further testified Appellant used a .22 pistol to shoot into Room 102. The surveillance video corroborates Dunkin's account. So too did Funkhouser who was inside Room 103 and heard a "pop" outside. Funkhouser described for the jury how Dunkin looked outside the front door of Room 103 and shouted immediately after the shooting that "Jay did it." The record shows "Jay" is the nickname used by Appellant.

¶5 Additional facts will be presented below as necessary.

ANALYSIS

¶6 **Propositions I and II**. Appellant challenges the identification testimony at trial of Levi Dunkin, Rodney Brummett and Garland Funkhouser. Appellant claims their respective identifications of Appellant at trial were unreliable because the pretrial identification procedures used by police were unnecessarily suggestive and violated his right to due process. Appellant applies the constitutional test for reliability for eyewitness identifications to all three witnesses' testimony in support of his claim.[1]

¶7 Appellant made no contemporaneous objection on this ground to any of the challenged testimony. Our review is thus limited to plain error. *Hammick v. State*, 2019 OK CR 21, ¶ 8, 449 P.3d 1272, 1275; *Postelle v. State*, 2011 OK CR 30, ¶ 26, 267 P.3d 114, 130. To show plain error, Appellant must show an actual error, which is plain or obvious, affected his substantial rights. This Court will only correct plain error if the error seriously affected the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Lamar v. State*, 2018 OK CR 8, ¶ 40, 419 P.3d 283, 294; 20 O.S.2011, § 3001.1.

¶8 Appellant fails to show actual or obvious error. Dunkin was an eyewitness to the shooting. When questioned by detectives, Dunkin initially denied knowing who the shooter was because he didn't want to get involved in the police investigation and said the shooter was an Indian male. Dunkin eventually identified "Jay" as the shooter. Dunkin was shown a six-man photo lineup by investigators and selected Appellant's photo as the one depicting the shooter. At trial, Dunkin unequivocally identified Appellant as the man he observed at the motel shooting into the window of Room 102. Dunkin testified he was two or three feet away from Appellant when it happened, that he saw Appellant's face and instantly recognized him. Dunkin also identified for the jury both himself and Appellant on the motel surveillance video as the shootings unfolded during the playing of the video.

¶9 State and federal evidence rules and statutes typically govern the admissibility of evidence in criminal trials in the United States. *Perry v. New Hampshire,* 565 U.S. 228, 237 (2012). The trier of fact – in this case a jury – is responsible for determining the reliability of evidence presented at trial. *Id.* The Due Process Clause, however, provides an additional overlay of protection concerning eyewitness identification testimony. The basic due process standard of fundamental fairness embodied within the Fourteenth Amendment underlies this inquiry. *E.g., Perry,* 565 U.S. at 245; *Manson v. Brathwaite,* 432 U.S. 98, 113 (1977).

¶10 Convictions based on "'eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" *Postelle,* 2011 OK CR 30, ¶ 28, 267 P.3d at 130 (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)). If the procedure is found to be unnecessarily suggestive, we determine based on the totality of the circumstances whether the "improper police conduct created a 'substantial likelihood of misidentification.'" *Perry,* 565 U.S. at 239 (quoting *Neil v. Biggers*, 409 U.S. 188, 201 (1972)). "[R]eliability is the linchpin in determining the admissibility of identification testimony[.]" *Brathwaite,* 432 U.S. at 114. The factors we consider in evaluating the likelihood of misidentification include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." *Brathwaite,* 432 U.S. at 114; *Biggers,* 409 U.S. at 199-200.

¶11 Appellant contends the six-man photo lineup presented to Dunkin was impermissibly suggestive. The record does not support his claim. The six-man photo lineup presented to Dunkin was introduced into evidence as State's Exhibit 34. This lineup included color photographs of Appellant and five other similar men. *See Brathwaite,* 432 U.S. at 117 (discussing the model photographic array as containing "so far as practicable . . . a reasonable number of persons similar to any person then suspected whose likeness is included in the array.") (internal quotation omitted). Dunkin testified that he selected and initialed the number three photograph in the lineup as the shooter. The number three photograph in the lineup contained Appellant's photo.

¶12 We have held that "although participants in pretrial photo displays should possess the same general physical characteristics as the accused, . . . substantial compliance with physical similarity guidelines will suffice." *Webb v. State,* 1987 OK CR 253, ¶ 7, 746 P.2d 203, 205 (internal quotation omitted). We have reviewed State's Exhibit 34 and find the photographic lineup presented to Dunkin was not impermissibly suggestive. The participants were substantially similar in their physical characteristics. All six photographs were of white males featuring close-up shots of their head and shoulders against a blue or grey background. The general build, height and weight of these men were mostly indeterminable but their facial structure, hair and ages appear reasonably similar. All six men have similar hair styles with similar hair length and only slight variations in hair color. All six men too have visibly high foreheads. Only one of the men has facial hair which consisted of light facial stubble.

¶13 Two of the men in the lineup had some greying hair. "However, neither this circumstance nor any other circumstances surrounding the photographic display[ ] made the lineup[ ] so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification." *Webb,* 1987 OK CR 253, ¶ 9, 746 P.2d at 206. We observe too there is no evidence in the record the

detectives suggested which if any of the photographs were of the shooter. All things considered, Appellant's challenge to the purported suggestiveness of the pretrial identification procedures surrounding Dunkin's eyewitness identification testimony does not demonstrate actual or obvious error and, thus, there is no plain error. There was no due process violation arising from Dunkin's eyewitness identification testimony.

¶14 Appellant's challenge to Brummett's and Funkhouser's identification testimony also lacks merit. Neither Brummett nor Funkhouser were eyewitnesses to the shootings. Brummett testified he left the motel grounds after asking Appellant to leave Room 103. He heard gunshots while walking to a nearby convenience store. When Brummett returned he found both victims laying outside on the ground at the motel.

¶15 During his police interview, the detectives told Brummett someone had said Jay was the killer. The detectives then showed Brummett still photographs from the motel surveillance video of the shooter. Brummett identified the man shown in the photos as Appellant after being shown a photograph depicting the killer's shoes.

¶16 At trial, Brummett identified for the jury the man shown on the surveillance video leaving Room 103, then returning to the motel and shooting both victims, as Appellant. Brummett also identified both himself and Dunkin on the video during the events surrounding both shootings. Brummett testified he had known Appellant for fourteen years.

¶17 Funkhouser was inside Room 103 during the shootings. Funkhouser is Appellant's uncle and has known Appellant since he was a baby. Funkhouser was present when Appellant was asked to leave Room 103 by Brummett because of the argument. Funkhouser described how Dunkin arrived inside Room 103 after Appellant left and how he, Funkhouser, heard a "pop" outside. According to Funkhouser, Dunkin stepped in the doorway to Room 103, looked outside and said "Jay did it." According to Funkhouser, "Jay" is Appellant's nickname.

¶18 Funkhouser did not speak to authorities about this case until two days before his trial testimony, after he was arrested on a material witness warrant. Prior to his testimony Funkhouser met with the prosecutor, viewed the surveillance video and identified Appellant as the shooter. Funkhouser was appointed counsel before speaking with the prosecutor. Funkhouser's counsel was present during his interview with the State in which he identified Appellant on the video. At trial, Funkhouser once again viewed the surveillance video and identified Appellant.

¶19 On appeal, Appellant challenges the identification by Brummett and Funkhouser of Appellant on the video. The Supreme Court's constitutional due process cases relating to identification testimony do not apply to Brummett and Funkhouser's testimony. Those decisions are concerned with police misconduct resulting in the identification of a criminal suspect by an eyewitness to the crime. *Perry,* 565 U.S. at 238-239; *Brathwaite*, 432 U.S. at 112. These situations typically involve a witness's "encounter with a total stranger under circumstances of emergency or emotional stress. The witness'[s] recollection of the stranger can be distorted easily by the circumstances or by later actions of the police." *Brathwaite,* 432 U.S. at 112. *See, e.g., Greene v. State,* 229 A.3d 183, 190 (Md. 2020) ("The focus of the Supreme Court's 'identification law' jurisprudence is upon the imposition of due process limitations on efforts by the police to obtain from an eyewitness to the crime the identification of a criminal suspect.").

¶20 The same concerns do not arise from Brummett and Funkhouser's identifications of Appellant on the surveillance video. This amounted to appropriate lay opinion testimony concerning the shooter's identity based upon their familiarity with Appellant and their respective perceptions of the video. *See* 12 O.S. 2011, §§ 2401-2403, 2701, 2704; *United States v. Contreras*, 536 F.3d 1167, 1170-1171 (10th Cir. 2008); *United States v. Ingram,* 600 F.2d 260, 261-262 (10th Cir. 1979). All things considered, Appellant was not deprived of a fundamentally fair trial in violation of due process from the admission of this testimony. *Spencer v. Texas,* 385 U.S. 554, 563-564 (1967); *Lisenba v. California*, 314 U.S. 219, 228 (1941). Because there was no actual or obvious error from the admission of the challenged evidence, there is no plain error. Propositions I and II are denied.

¶21 **Proposition III**. Appellant complains the trial court erred in admitting Funkhouser's testimony that Dunkin said "Jay did it" after hearing the "pop" and looking outside through the open door of Room 103. The record shows

Funkhouser is hard of hearing and relies to an unknown extent on lip reading. Appellant complains the trial court should have required the State to demonstrate Funkhouser's proficiency as an expert in lip reading before allowing him to testify to Dunkin's statement about Appellant being the shooter.

¶22 Appellant did not object to Funkhouser's testimony and our review is for plain error. *Coddington v. State*, 2006 OK CR 34, ¶ 52, 142 P.3d 437, 451; *Bowen v. State*, 1984 OK CR 105, ¶ 42, 715 P.2d 1093, 1103. Appellant fails to show actual or obvious error. Funkhouser was a fact witness who was entitled to testify concerning his observations and interactions inside Room 103 the night of the murders. 12 O.S.2011, §§ 2601-2603. Upon taking the stand, Funkhouser was questioned by the trial judge concerning his hearing impairment and whether Funkhouser could hear. The prosecutor then laid a foundation for Funkhouser's testimony at the start of direct examination. Funkhouser acknowledged having difficulty hearing but testified if the prosecutor moved closer to him on the stand, he could read her lips and hear enough to answer questions. The record shows Funkhouser thereafter responded appropriately for the most part to the questions posed both by the State and defense counsel. This was true even when Funkhouser was asked to view the video monitor in the courtroom during his identification of Appellant on the surveillance video.

¶23 The trial court was in the best position to observe Funkhouser's testimony along with his ability to understand and respond to the questions presented. The record shows neither the parties nor the trial court had insurmountable difficulty communicating with Funkhouser after the disclosure about his hearing impairment and his ability to read lips for comprehension. Neither party suggested an interpreter was necessary to facilitate Funkhouser's testimony in light of his hearing impairment. *See* 12 O.S. 2011, § 2604.

¶24 Defense counsel thoroughly cross-examined Funkhouser on his ability to actually make out and understand what Dunkin had said. On cross, Funkhouser testified he heard Dunkin "hollering" the statement about seeing Appellant and was also able to read his lips. Funkhouser testified similarly he could hear defense counsel's questions (albeit with some difficulty) in addition to reading counsel's lips. The record shows Funkhouser could hear some things, that he used lip reading to overcome his hearing impairment and communicate with others and that he was competent and capable of testifying. At best, the question of Funkhouser's ability to understand what Dunkin said was a question of fact for the jury. We note too that Dunkin himself admitted earlier in the trial to saying virtually the same thing reported by Funkhouser. Under the total circumstances, there was no actual or obvious error and, thus, no plain error, from admission of the challenged testimony. Proposition III is denied.

¶25 **Proposition IV**. Appellant challenges as hearsay testimony from Tulsa Police Sergeant David Walker that Brummett identified the shooter as Appellant after being shown by detectives a still photograph taken from the motel surveillance video. Appellant acknowledges our decision in *Davis v. State*, 2018 OK CR 7, 419 P.3d 271, authorizing the admission as substantive evidence of extrajudicial identification testimony from third parties present at the prior identification "so long as the declarant testifies at trial and is subject to cross-examination concerning the statement." *Id.*, 2018 OK CR 7, ¶ 26, 419 P.3d at 280-281. Appellant tells us *Davis* should not apply to his case, however, because it was handed down after his trial and was not given retroactive effect by this Court.

¶26 First, Appellant did not object to the challenged testimony limiting our review to plain error. *Davis*, 2018 OK CR 7, ¶ 14, 419 P.3d at 278. Second, Appellant's argument ignores *Davis*'s holding. We held in *Davis* that statutory amendments to the Oklahoma Evidence Code years earlier authorized the admission of third party testimony relating extrajudicial identification testimony. *Id.*, 2018 OK CR 7, ¶¶ 21-27, 419 P.3d at 279-281 (citing 12 O.S.2011, §§ 2801-2802). We further held the effect of these statutory amendments was "to undermine the limits placed on the admission of extrajudicial identification testimony by this Court" in previous cases. *Id.*, 2018 OK CR 7, ¶ 26, 419 P.3d at 280-281.

¶27 There was no need for this Court to make *Davis* retroactive in light of the governing statutes. These statutory amendments, which occurred in 1991 and 2002, predated Appellant's trial in the present case as in *Davis.* Appellant thus fails to show actual or obvious error from the admission of the challenged tes-

timony which complied with those statutory amendments.

¶28 Third, Appellant's suggestion that an exception to *Davis* should apply here because Brummett did not actually witness the shooting, and thus did not identify Appellant after "perceiving" him, lacks merit. Brummett's pretrial identification of Appellant from a still photograph of the surveillance video fits comfortably within the express terms of 12 O.S.2011, § 2801(B)(1)(c).[2] Brummett made the extrajudicial identification of Appellant after perceiving him in person inside Room 103 before the shootings and in still photographs from the surveillance video shown to Brummett during a police interview. As mentioned earlier, Brummett testified at trial and was subject to cross-examination concerning the prior identification. Sgt. Walker's testimony concerning Brummett's out-of-court identification of Appellant thus was not hearsay and there was no actual or obvious error from its admission. Proposition IV is denied.

¶29 **Proposition V**. Appellant contends his Sixth Amendment right to confront the witnesses against him was violated by the medical examiner's testimony. The record shows Dr. Joshua Lanter conducted the autopsy on Rodney McGee and testified to his findings concerning McGee's injuries, cause of death and manner of death. Dr. Lanter also sponsored two photographs showing McGee's injuries. The record shows Dr. Andrea Weins performed the autopsy of Leroy Coleman. By the time of trial, however, she was no longer employed by the Office of Chief Medical Examiner. Prior to trial, Dr. Lanter reviewed all of the records contained within the medical examiner's case file for Coleman's autopsy. This included the report of investigation by medical examiner, investigative narrative, report of autopsy, autopsy diagram, archived autopsy photographs, radiographs, toxicology report, medical records and police reports surrounding Coleman's death. Dr. Lanter was asked "to come up with [his] own opinion on [the] cause and manner of death" for Coleman based on this information.

¶30 Dr. Lanter described for the jury the external and internal injuries observed for Coleman as reflected in the autopsy report, photographs and other documents in the case file. This included a description of the gunshot's entry wound in the left lateral neck and the bullet's path inside Coleman's body. Dr. Lanter observed too based on his notes from the autopsy that Coleman died two days after being shot. Dr. Lanter opined the mechanism of death resulted from a combination of things but mostly bleeding from the injury to Coleman's left lung caused by the bullet's path as well as tissue damage to the lung itself. Dr. Lanter observed that, according to the autopsy report and photographs, Coleman received medical treatment for his gunshot wound including support from "all kinds of devices that were used to try to keep him alive" including a chest tube. Dr. Lanter opined the treatment seemed appropriate based on Coleman's condition. Dr. Lanter explained how the autopsy report showed Coleman had a left hemothorax, meaning there was blood in his left chest cavity. Coleman had approximately 400 milliliters of blood in the left chest cavity which was consistent with the use of a chest tube to remove the blood.

¶31 Dr. Lanter was not surprised Coleman lived a couple of days despite his injury because it is not instantaneously lethal but can be over time. Dr. Lanter opined Coleman would not necessarily lose consciousness instantly from this gunshot wound. Dr. Lanter acknowledged that Coleman's injuries acted somewhat like suffocation by drowning because of blood and fluid in the lungs replacing air. Dr. Lanter acknowledged reviewing the photographs from the autopsy and sponsored the admission of three such photographs collectively showing the entrance wound on Coleman's left neck and the location on Coleman's left back where the bullet was removed.

¶32 Dr. Lanter concluded in his expert opinion, based on his review of the materials in the case file, that Coleman's cause of death was a gunshot wound to the neck. Further, Dr. Lanter opined the manner of death was homicide. Notably, defense counsel conducted no cross-examination. During a short bench conference immediately before passing the witness, defense counsel told the trial court he was foregoing cross-examination of Dr. Lanter because "I don't have any need to get into it, quite honestly."

¶33 On appeal, Appellant contends Dr. Lanter's testimony concerning Coleman's autopsy violated the Confrontation Clause because it regurgitated Dr. Weins's findings and conclusions. Appellant contends his Sixth Amendment right to confront the witnesses against him was violated because Dr. Weins was not declared an unavailable witness and Appellant

did not have a previous opportunity to cross-examine her. 12 O.S.2011, § 2804(A), (B)(1). Our review of this claim is limited to plain error because Appellant did not object to Dr. Lanter's testimony. *Tafolla v. State*, 2019 OK CR 15, ¶ 22, 446 P.3d 1248, 1259.

¶34 Appellant fails to show actual or obvious error with this claim. The accused in a criminal prosecution has a constitutional right to cross-examine the witnesses against him. *See Crawford v. Washington*, 541 U.S. 36, 61–62 (2004); U.S. Const. amend. VI; Okla. Const. art. 2, § 20. The Supreme Court held in *Crawford* that the Confrontation Clause prohibits the admission of testimonial hearsay unless 1) the witness is unavailable; and 2) the defendant had a prior opportunity to cross-examine the witness. *Crawford*, 541 U.S. at 68; *Willis v. State,* 2017 OK CR 23, ¶ 14, 406 P.3d 30, 34.

¶35 There is no dispute that Dr. Weins's autopsy report is a testimonial statement for Sixth Amendment purposes. *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 35, 241 P.3d 214, 228. Dr. Weins's report, however, was not admitted as an exhibit at Appellant's trial. Nor was Dr. Lanter offered as a witness to present Dr. Weins's findings and conclusions. All of his testimony was based upon his own review of the medical examiner's files concerning Coleman's death. Dr. Lanter's opinion testimony concerning the cause and manner of Coleman's death was admissible expert testimony. 12 O.S. 2011, §§ 2702-2704. There was no Sixth Amendment violation from this aspect of Dr. Lanter's testimony because he was available for cross-examination about those opinions. *Cuesta-Rodriguez,* 2010 OK CR 23, ¶ 39, 241 P.3d at 229.

¶36 Dr. Lanter's disclosure of the facts underlying his expert opinion was likewise permissible to explain the basis for his testimony. 12 O.S.2011, §§ 2703, 2705; *see also Miller v. State,* 2013 OK CR 11, ¶ 113, 313 P.3d 934, 973-974, *overruled on other grounds, Harris v. State,* 2019 OK CR 22, ¶ 69, 450 P.3d 933, 958; *Marshall v. State,* 2010 OK CR 8, ¶ 30, 232 P.3d 467, 475-476. To the extent Dr. Lanter may have relayed Dr. Weins's conclusions and findings from the original autopsy report itself, such would constitute an actual or obvious Confrontation Clause violation. *Cuesta-Rodriguez,* 2010 OK CR 23, ¶ 39, 241 P.3d at 229; *Marshall,* 2010 OK CR 8, ¶ 31, 232 P.3d at 475-476. Any error was harmless beyond a reasonable doubt, however, considering both defense counsel's failure to cross-examine Dr. Lanter and that the cause and manner of Coleman's death was never in dispute at trial.[3] *Chapman v. California, 386 U.S.* 18, 24 (1967); *Cuesta-Rodriguez,* 2010 OK CR 23, ¶ 40, 241 P.3d at 230. Proposition V is denied.

¶37 **Proposition VI**. Appellant contends that the alleged cumulative presentation of evidence to the jury warrants relief. Specifically, Appellant complains the jury was shown the motel surveillance video four times during the State's case in chief and a fifth time during closing argument. The record shows the State introduced and published a portion of the video during Detective Ronnie Leatherman's testimony. The prosecutor observed this was by agreement with the defense. Det. Leatherman provided no comment or narrative when the video was published. The prosecutor later showed an excerpt from the video to Dunkin, Brummett and Funkhouser during their respective testimony. These witnesses each identified Appellant on the video as the shooter. Dunkin and Brummett also identified themselves when they appeared on the video.

¶38 Evidentiary rulings are left to the trial court's broad discretion. *See Wall v. State*, 2020 OK CR 9, ¶ 5, 465 P.3d 227, 231-232. Appellant admits that he did not object at trial to the playing of the surveillance video with these witnesses. Our review is therefore limited to plain error. *See Williams v. State*, 2008 OK CR 19, ¶ 71, 188 P.3d 208, 223. Appellant fails to show actual or obvious error. The real complaint here is Appellant's belief that the surveillance video should not have been shown during the testimony of Dunkin, Brummett and Funkhouser. The challenged identification testimony from Dunkin, Brummett and Funkhouser was highly relevant both to corroborate their testimony and to identify Appellant as the killer. 12 O.S. 2011, §§ 2401-2402. Relevant evidence may be disallowed "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise." 12 O.S.2011, § 2403. The Court "gives proposed evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." *Hammick*, 2019 OK CR 21, ¶ 18, 449 P.3d at 1277.

¶39 Applying this standard, the probative value of the surveillance video was not outweighed by the danger of unfair prejudice,

confusion of the issues or misdirection of the jury. Appellant was not deprived of a fundamentally fair trial with this testimony. There was no actual or obvious error from playing portions of the video for each of these witnesses. We likewise find no error from the prosecutor's use of the video during closing argument. Appellant was not deprived of a fundamentally fair trial with this particular portion of the State's argument which represented reasonable comment on the record evidence. There was no actual or obvious error and thus no plain error from the prosecutor's use of this exhibit during closing. *See Alverson v. State,* 1999 OK CR 21, ¶ 39, 983 P.2d 498, 513. Proposition VI is denied.

¶40 **Proposition VII**. During the trial's bifurcated sentencing phase, the State introduced evidence of Appellant's three prior felony convictions as alleged in the Page Two supplemental Information,[4] pursuant to 21 O.S.Supp.2013, § 701.10-1.[5] Notably, Appellant made no effort to challenge the State's evidence concerning his prior convictions. Instead, defense counsel asked simply for mercy from the jury in requesting a sentence of life imprisonment with the possibility of parole. Appellant complains that § 701.10-1 does not allow for the admission of mitigating evidence to rebut the State's admission of what can only be deemed aggravating evidence from the prior felony convictions. Appellant argues this circumstance violates his fundamental right to due process and that § 701.10-1 is unconstitutional.

¶41 Appellant did not raise this same argument below, and did not attempt to introduce mitigating evidence at sentencing, thus waiving review on appeal of all but plain error. There is no actual error because we previously rejected this same argument in *Vanderpool v. State*, 2018 OK CR 39, ¶¶ 40-48, 434 P.3d 318, 327-329. Applying that decision here, we find Appellant was not deprived of a fundamentally fair sentencing proceeding in violation of due process. The State provided Appellant notice of the prior felony convictions it intended to prove in the supplemental Information. Appellant too was afforded the opportunity to challenge the State's evidence as to the existence or validity of his prior felony convictions during the trial's bifurcated sentencing stage. Both parties had the opportunity to introduce relevant evidence concerning these priors. This is so despite the Legislature's failure to authorize the introduction of mitigating evidence in noncapital murder trials. There was no error, plain or otherwise, arising during the sentence phase. Proposition VII is denied.

¶42 **Proposition VIII**. Appellant alleges several instances of prosecutorial misconduct during closing argument. This Court will not grant relief for prosecutorial misconduct unless, when viewed in the context of the entire trial, the misconduct rendered the trial fundamentally unfair such that the jury's verdict is unreliable. *Darden v. Wainright*, 477 U.S. 168, 181 (1986); *Tryon v. State,* 2018 OK CR 20, ¶ 137, 423 P.3d 617, 654. Our review is further limited here because none of the challenged remarks by the prosecutor drew an objection at trial. We review Appellant's prosecutorial misconduct claims for plain error only. *Bramlett v. State,* 2018 OK CR 19, ¶ 36, 422 P.3d 788, 799. Appellant fails to show actual or obvious error. The challenged comments do not represent prosecutorial misconduct but instead reasonable comment on the record evidence. *See Chadwell v. State*, 2019 OK CR 14, ¶ 10, 446 P.3d 1244, 1247 ("Both sides have wide latitude to discuss the evidence and reasonable inferences therefrom."). Appellant was not deprived of a fundamentally fair trial from the State's closing argument and there is no plain error. Proposition VIII is denied.

¶43 **Proposition IX**. Appellant contends his trial counsel was constitutionally ineffective. To prevail on an ineffectiveness claim, Appellant must show both that counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See Harrington v. Richter*, 562 U.S. 86, 104 (2011) (discussing *Strickland* two-part test).

¶44 Appellant contends trial counsel failed to present or utilize available evidence to discredit the identification testimony of Dunkin and Brummett. Appellant complains trial counsel was ineffective for failing to introduce into evidence the video of Det. John Brown's interview of Dunkin. Appellant says the video shows Dunkin's pretrial identification of his photo from the six-man photo lineup was impermissibly suggestive and "clearly shows that Dunkin's pre-trial identification of [Appellant] was elicited by police suggestion, at best, and by police coercion, at worst."

¶45 Appellant claims too that defense counsel should have confronted Sgt. Walker and/or Brummett with statements contained in a

police report detailing Brummett's interview with police. Appellant believes the report would further demonstrate the suggestive nature of Brummett's pretrial identification of Appellant. Appellant further asserts that trial counsel was ineffective for failing to call Tyler Jones to testify concerning Dunkin's statement that he did not like Appellant and that he would be released from jail if he testified for the State.

¶46 These claims are based on evidence outside the trial record. Appellant tenders the video recording of Dunkin's police interview, the police report concerning Brummett's police interview and an affidavit from Tyler Jones as exhibits to his application for evidentiary hearing.[6] Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020) allows an appellant to request an evidentiary hearing when it is alleged on appeal that trial counsel was ineffective for failing to utilize available evidence which could have been made available during the course of trial. *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905-906. This Court reviews the application along with supporting affidavits to see if it contains sufficient evidence to show this Court by clear and convincing evidence that there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence. Notably, this standard is less demanding than the test imposed by *Strickland. Id.*

¶47 In the present case, Appellant fails to show by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence. He is thus not entitled to an evidentiary hearing for his ineffective assistance of counsel claims which are based on non-record evidence. Rule 3.11(B)(3)(b)(i), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2020). Appellant's application for evidentiary hearing on his ineffectiveness claims is **DENIED**.

¶48 Finally, Appellant complains trial counsel was ineffective for failing to object on the grounds raised in Propositions III, IV, V, VI and VIII. We denied relief above for these various claims. Trial counsel thus was not ineffective for failing to raise meritless claims. *See Logan v. State,* 2013 OK CR 2, ¶ 11, 293 P.3d 969, 975 ("The omission of a meritless claim … cannot constitute deficient performance; nor can it have been prejudicial."). Proposition IX is denied.

¶49 **Proposition X**. We deny relief based on Appellant's claim of cumulative error in this case. Appellant has not proven the existence of two or more errors in this appeal that we can cumulate. *See Bosse v. State,* 2017 OK CR 10, ¶ 93, 400 P.3d 834, 866. Review of the record shows this is simply not a case where numerous irregularities during Appellant's trial tended to prejudice his rights or otherwise deny him a fair trial. *See Tryon,* 2018 OK CR 20, ¶ 144, 423 P.3d at 655. Proposition X is denied.

DECISION

¶50 The Judgments and Sentences of the District Court are **AFFIRMED**. Appellant's Application to Supplement the Appeal Record or, In the Alternative, Request for Evidentiary Hearing Pursuant to Rule 3.11 on Sixth Amendment Claim of Ineffective Assistance of Counsel is **DENIED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY

THE HONORABLE WILLIAM J. MUSSEMAN, JR., DISTRICT JUDGE

APPEARANCES AT TRIAL

Mark Cagle, Stephen Lee, Attorneys at Law, 115 W. 3rd St., Tulsa, OK 74103, Counsel for Defendant

Julie Doss, John Tjeerdsma, Asst. District Attorneys, Tulsa County Courthouse, 500 S. Denver Ave., Ste. 900, Tulsa, OK 74103, Counsel for the State

APPEARANCES ON APPEAL

Raymond E. Denecke, Okla. Indigent Defense System, P.O. Box 926, Norman, OK 73070, Counsel for Appellant

Mike Hunter, Attorney General of Oklahoma, Katherine R. Morelli, Asst. Attorney General, 313 N.E. 21st St., Oklahoma City, OK 73105, Counsel for Appellee

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

KUEHN, V.P.J., CONCURRING IN RESULT:

¶1 I agree with the Majority that Appellant's convictions and sentences should be affirmed, and thus concur in result.

¶2 I write separately to address the issue raised in Proposition VII. First, I note that Appellant objected to the admission of evidence of his prior convictions in the sentencing stage of trial; defense counsel clearly objected on the basis that the State should not put on evidence that might act as a sentencing enhancement for first degree murder. The Majority suggests that Appellant waived this claim in part by failing to try and introduce evidence in mitigation. As no law would permit admission of such evidence, and in fact it is plainly barred in a non-capital jury sentencing proceeding, I cannot fault defense counsel for failing to present it.

¶3 Appellant raises this as a constitutional issue, arguing that the statute allowing the State to present evidence of his prior convictions violates due process. Because Appellant attacks the constitutionality of a statute, I review the claim *de novo. Weeks v. State*, 2015 OK CR 16, ¶ 16, 362 P.3d 650, 654. To succeed on a facial challenge, Appellant must typically establish that no set of circumstances exists under which the law would be valid, or that the statute lacks any plainly legitimate sweep. *United States v. Stevens*, 559 U.S. 460, 472 (2010). Where a constitutional question is squarely raised, we must decide it. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 375 (2010) (Roberts, C.J., concurring). Reviewing the claim *de novo,* I would find Section 701.10-1 does not violate due process. I would further find that Appellant was not entitled to present mitigating evidence in the second stage of this noncapital case.

¶4 The Majority summarily rejected this claim, relying on our previous discussion in *Vanderpool v. State,* 2018 OK CR 39, 434 P.3d 318. Upon further review, I have concluded that, although the *Vanderpool* result was correct – 21 O.S. § 701.10-1 does not violate due process – its approach was based on a misunderstanding of the statute. This misunderstanding is shared by both Appellant and the Majority here, who discuss the issue as one of presentation of evidence in aggravation or mitigation of the charged crime. It is not.

¶5 Appellant's claim is based on the mistaken premise that Section 701.10-1 allows the State to present aggravating evidence, similar to that allowed in capital cases, and thus as in capital cases defendants should be allowed to present a wide range of mitigating evidence to counter this. This is a serious misreading of the statute. The Legislature has enacted individualized sentencing proceedings allowing for aggravating and mitigating circumstances in capital cases, and specific individualized sentencing proceedings are also required in juvenile life without parole cases. 21 O.S.Supp.2013, § 701.10; *Stevens v. State,* 2018 OK CR 11, ¶ 16, 422 P.3d 741, 746; *Luna v. State*, 2016 OK CR 27, ¶ 21, 387 P.3d 956, 962-63. There are no other provisions allowing for individualized sentencing in noncapital cases, and Section 701.10-1 does not so provide. *Ashton v. State*, 2017 OK CR 15, ¶ 53, 400 P.3d 887, 900, *overruled on other grounds by Williamson v. State*, 2018 OK CR 15, 422 P.3d 752.

¶6 Despite Appellant's arguments otherwise, Section 701.10-1 is a sentencing enhancement statute. The general sentencing enhancement statute provides that a jury may impose a greater punishment on a defendant if it finds that the defendant has prior felony convictions. 21 O.S.Supp.2018, § 51.1. This is true of other, more specialized enhancement statutes as well. *See, e.g.*, 63 O.S.Supp.2018, § 2-401(F). Here, the Legislature determined that in noncapital first degree murder cases, the sentencing range of life or life without parole may be affected by a defendant's past acts, in the form of prior felony convictions. That is, the Legislature determined that the sentencer may have discretion to determine and enhance a sentence based on a very narrow category of evidence.

¶7 There is no due process violation. As *Vanderpool* recognized, if prior convictions are al-leged a defendant may present evidence challenging the existence or validity of those convictions. *Vanderpool,* 2018 OK CR 39, ¶ 46, 434 P.3d at 328; *see also, e.g., Roney v. State*, 1991 OK CR 114, § 10, 819 P.2d 286, 288 (defendant has the burden to challenge evidence of prior convictions). Thus, the State is limited to presenting a limited category of evidence – prior convictions – and a defendant has the right to challenge that specific evidence, within those limitations. This is all that due process requires.

¶8 The limited evidence permitted under § 701.10-1 is not, as Appellant claims, a broad attack on a defendant's character; nor is it evidence in aggravation of the charged crime. It would be unnecessary and inappropriate to

allow a defendant to counter evidence of prior convictions with broad mitigating evidence showcasing his character or particular circumstances. That would only be appropriate in an individualized sentencing proceeding – proceedings which the Legislature has not established for adult noncapital felonies. *Ashton*, 2017 OK CR 15, ¶ 53, 400 P.3d at 900; *Malone v. State*, 2002 OK CR 34, ¶ 7, 58 P.3d 208, 210. The statute is constitutional, and Appellant was not entitled to present evidence in mitigation of the crime.

¶9 I also note that I review the claim in Proposition V for plain error. Because Appellant did not object to the medical examiner's testimony, I do not consider whether the error was harmless beyond a reasonable doubt, as discussed in *Chapman v. California*, 386 U.S. 18, 24 (1967) and *Neder v. United States*, 527 U.S. 1, 17 (1999). In those cases, the constitutional error was preserved for appellate review by timely objection at trial. I agree with the Majority that there was no error in the testimony, and thus no plain error.

1. In Proposition I, Appellant challenges the reliability of all three witnesses' identification testimony. In Proposition II, Appellant specifically challenges the police photo lineup presented to Levi Dunkin as being impermissibly suggestive.

2. Section 2801(B)(1)(c) provides in pertinent part the following:

> B. A statement is not hearsay if:
>
> 1. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:
>
> * * *
>
> c. one of identification of a person made after perceiving the person[.]

3. Defense counsel told the jury during opening statement that "two men lost their lives. Nobody is contesting that fact. Two men were murdered that night."

4. Appellant's prior felony convictions were for Attempted First Degree Burglary in Tulsa County; Robbery with a Dangerous Weapon in Okfuskee County; and Felon in Possession of Firearm and Ammunition in federal court.

5. Title 21 O.S.Supp.2013, § 701.10-1 provides in pertinent part the following:

> Upon conviction or adjudication of guilt of a defendant of murder in the first degree, wherein the state is not seeking the death penalty but has alleged that the defendant has prior felony convictions, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to life imprisonment without parole ora life imprisonment, wherein the state shall be given the opportunity to prove any prior felony convictions beyond a reasonable doubt. The proceeding shall be conducted by the trial judge before the same trial jury as soon as practicable without presentence investigation.

6. *See* Application to Supplement the Appeal Record or, In the Alternative, Request for Evidentiary Hearing Pursuant to Rule 3.11 on Sixth Amendment Claim of Ineffective Assistance of Counsel, filed with this Court by Appellant on November 19, 2018.

2020 OK CR 20

BRET KEVIN SPLAWN, Appellant, v. THE STATE OF OKLAHOMA, Appellee.

Case No. F-2019-587. November 5, 2020

SUMMARY OPINION

ROWLAND, JUDGE:

¶1 Appellant Bret Kevin Splawn appeals his Judgment and Sentence from the District Court of Comanche County, Case No. CF-2017-739, for First Degree Murder, in violation of 21 O.S.Supp.2012, § 701.7.[1] The Honorable Scott D. Meaders, District Judge, presided over Splawn's jury trial and sentenced him in accordance with the jury's verdict to life imprisonment and a $10,000.00 fine.[2] Splawn raises two claims on appeal:

(1) whether the district court erred in failing to submit a jury instruction on exculpatory statements; and

(2) whether he received effective assistance of counsel.

¶2 We find relief is not required and affirm the Judgment and Sentence of the district court.

FACTS

¶3 Around midnight on October 29, 2017, Splawn reported to a 911 operator that he had shot his wife's uncle in the Lawton home they shared. During both the 911 call and his police interview, Splawn insisted the shooting was accidental and transpired when he dislodged a bullet from the victim's .380 caliber handgun with a screwdriver. Splawn was adamant that he did not pull the trigger and that the gun was pointed at the ground away from the victim when the gun misfired. Although Splawn said he and the victim were not arguing that day, the lead detective sensed Splawn's hostility toward the victim because of the victim's sporadic ability to meet his financial obligations, lack of hygiene, and frequent alcohol consumption.

¶4 Forensic evidence and expert testimony amply refuted Splawn's accidental misfire explanation. The evidence showed that the victim was shot in the head at close range with a .45 caliber hollow point round. Police found a spent .45 caliber shell casing near the victim's body. Police also found the murder weapon, a .45 caliber handgun, hidden behind books in a nearby bookshelf. The handgun had the vic-

tim's blood on the grip and bottom of the magazine, a hair on the end of the barrel, and fragments of flesh on and inside the barrel. Other facts will be discussed as they become relevant to the propositions of error raised for review.

1. Exculpatory Statement Instruction

¶5 Splawn claims the district court committed plain error and violated due process by failing to instruct the jury on the law concerning exculpatory statements of fact. He failed to request the exculpatory statement instruction or object to its omission below, waiving review of this claim for all but plain error. *See Tafolla v. State*, 2019 OK CR 15, ¶ 37, 446 P.3d 1248, 1261. Splawn has the burden in plain error review to demonstrate 1) the existence of an actual error (i.e., deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. Even where this showing is made, this Court will correct plain error only where the error seriously affected the fairness, integrity or public reputation of the judicial proceedings or represented a miscarriage of justice. *Id.*; 20 O.S.2011, § 3001.1.

¶6 The "exculpatory statement of fact rule" was first cited with approval by this Court in *Taylor v. State,* 1952 OK CR 15, 95 Okl.Cr. 98, 105, 240 P.2d 803, 812. The Court stated:

> Where the state introduces in evidence the confession of accused, it is bound by exculpatory statements contained therein unless they are shown by the evidence to be untrue; but the falsity of such exculpatory statements may be shown by circumstantial as well as by direct evidence.

Id. (quoting 22 C.J.S., Criminal Law, § 842, p. 1478).

¶7 In *Dean v. State*, 1963 OK CR 18, ¶ 15, 381 P.2d 178, 182, this Court further explained the contours of this rule: "In a case where an admission tends to exculpate the defendant and the rule applied, it should be limited to some tangible, affirmative, defensive, factual matter capable of specific disproof; and not extended to a mere recitation of innocence embroidered in the plea of not guilty." *See also Cannon v. State*, 1998 OK CR 28, ¶ 33, 961 P.2d 838, 848 (explaining an exculpatory statement is a statement made by the defendant regarding a tangible factual matter capable of specific disproof which tends to clear the defendant of guilt or justify his or her actions).

¶8 The uniform exculpatory statement instruction provides that "[w]here the State introduces in connection with a confession or admission of a defendant an exculpatory statement which, if true, would entitle him/her to an acquittal, he/she must be acquitted unless such exculpatory statement has been disproved or shown to be false by other evidence in the case." Instruction No. 9-15, OUJI-CR(2d); *see also Stiles v. State*, 1992 OK CR 23, ¶¶ 25-26, 829 P.2d 984, 990-91. Hence a defendant must be acquitted based on his or her exculpatory statement, unless the State disproves the statement through direct or circumstantial evidence. *Cannon v. State*, 1995 OK CR 45, ¶ 34, 904 P.2d 89, 103. We will not disturb a jury verdict where there is sufficient evidence to disprove the defendant's exculpatory statement. *See Black v. State,* 2001 OK CR 5, ¶¶ 34-38, 21 P.3d 1047, 1062-64 (rejecting sufficiency of the evidence challenge because evidence refuted defendant's exculpatory statement). Nor will we find error based on the omission of an exculpatory statement instruction where the evidence sufficiently disproved the defendant's exculpatory statement. *See Kinchion v. State*, 2003 OK CR 28, ¶ 14, 81 P.3d 681, 685 (holding district court did not abuse its discretion in refusing to give jury instruction on exculpatory statements because defendant's statement to police was disproved by other evidence); *Cannon*, 1998 OK CR 28, ¶ 33, 961 P.2d at 848-49 (finding district court committed no error in failing to instruct the jury on exculpatory statements because "the State presented circumstantial evidence refuting Appellant's statement"); *Rogers v. State,* 1995 OK CR 8, ¶ 18, 890 P.2d 959, 971 (finding "[t]he State presented circumstantial evidence refuting [Appellant's] statement," and therefore the "trial court did not err in neglecting to *sua sponte* instruct the jury on exculpatory statements").

¶9 According to Splawn's statements, the victim handed him a .380 caliber handgun because a bullet was lodged in the chamber. After Splawn extracted the bullet with a screwdriver, he placed the bullet back in the gun at the victim's request. Splawn claimed the gun was directed at the ground, and that the gun misfired when he pulled the slide back. Splawn said that he was in the den and that the victim was sitting at the top of the den stairs in a

wheelchair, ten to fifteen feet away when the gun misfired.

¶10 The State, however, provided considerable direct and circumstantial evidence disproving Splawn's accidental misfire claim. The physical evidence showed the victim was shot in the right temple with a .45 caliber hollow point round rather than a .380 pistol as Splawn maintained. The trajectory was downward indicating the shot came from a standing, upright position rather than from his seated position at the bottom of the stairs as Splawn claimed. According to the lead detective and the State's firearms expert, a person with Splawn's military and security experience in firearms would easily recognize the difference between the .45 caliber and the .380 caliber handguns. The firearms expert also testified that the safety features of the .45 caliber handgun made it impossible for the gun to fire with the slide pulled back in the manner Splawn described. According to the expert in blood spatter analysis and shooting reconstruction, the victim could not have been shot in the manner Splawn claimed because the star-shaped entrance wound contained the presence of lead and soot from the bullet inside the wound, with a muzzle imprint next to the wound and a zigzag split of the skin at the back of the skull, all demonstrating that the shot occurred from a close distance. The blood spatter expert further testified that the blood spatter on the .45 caliber handgun was a mist indicative of a close-range shot, and that no gunshot wound resembling that of the victim's had come from a distance greater than a foot.

¶11 The record in the instant case shows the State provided more than ample evidence disproving Splawn's accidental shooting/misfire defense. Based on the case law cited above, we find that the district court did not err in excluding an exculpatory statement instruction. *See Hogan*, 2006 OK CR 19, ¶ 39, 139 P.3d at 923 (stating, "[t]he first step in plain error analysis is to determine whether error occurred"); *Rogers*, 1995 OK CR 8, ¶ 18, 890 P.2d at 970-71 (holding when the State disproves a defendant's statement, the district court commits no error by not submitting an exculpatory statement instruction). Moreover, Splawn can establish no prejudice because the district court properly instructed the jury on the State's burden of proof, the presumption of innocence, and the voluntariness of his statements. *See Hogan*, 2006 OK CR 19, ¶ 47, 139 P.3d at 926 (holding district court did not err in refusing exculpatory statement instruction because defendant's statement was disproved by other evidence and absence of the instruction was not prejudicial because the jury was instructed on the State's burden of proof, the presumption of innocence, and the voluntariness of his statement). Because Splawn has not shown error from the omission of an exculpatory statement instruction, we deny this claim.

2. Ineffective Assistance of Counsel

¶12 Splawn claims he is entitled to relief because of ineffective assistance of trial counsel. He faults defense counsel for failing to request a jury instruction on exculpatory statements. Splawn also complains that defense counsel failed to act as a zealous advocate during opening statement and failed to marshal the evidence on his behalf during closing argument. This claim is without merit.

¶13 This Court reviews claims of ineffective assistance of counsel to determine: (1) whether counsel's performance was constitutionally deficient; and (2) whether counsel's performance prejudiced the defense so as to deprive the defendant of a fair trial with reliable results. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. This Court need not determine whether counsel's performance was deficient if there is no showing of harm. *See Malone*, 2013 OK CR 1, ¶ 16, 293 P.3d at 207.

¶14 Splawn's claim must fail for lack of prejudice. As discussed in Proposition I, *supra*, the district court did not err in failing to submit an exculpatory statement instruction because the State's evidence refuted Splawn's exculpatory statement. Because Splawn cannot show error from the omission of an exculpatory statement instruction, he cannot meet his burden to show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 693; *Head v. State*, 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148.

¶15 Splawn's claim that defense counsel was ineffective for failing to act as a zealous advocate and to marshal the evidence during closing argument is likewise unavailing. The evidence overwhelmingly supported a finding that Splawn intentionally shot the victim and that the shooting was no accident. Defense counsel fashioned a defense and closing argument acknowledging the strength of the evidence

against Splawn while pointing out weaknesses in the prosecution's case. If defense counsel had failed to acknowledge the State's evidence that wholly refuted Splawn's claim of accident, he would have undermined his credibility with the jury. *See Hale v. State,* 1988 OK CR 24, ¶ 48, 750 P.2d 130, 142 (noting ignoring the overwhelming evidence against the defendant would have destroyed counsel's credibility with the jury); *Thompson v. State,* 2007 OK CR 38, ¶ 31, 169 P.3d 1198, 1208 (finding counsel's closing argument was a reasonable strategic decision since facts and evidence did not support the initial defense claim). Notwithstanding the overwhelming evidence against Splawn, defense counsel's strategy resulted in the imposition of the minimum sentence. *See Thompson*, 2007 OK CR 38, ¶ 31, 169 P.3d at 1208 (stating, "[defendant] cannot establish prejudice, as the evidence against him was too overwhelming"). Based on this record, Splawn cannot show a reasonable probability that the outcome of his trial would have been different had defense counsel presented the points in opening statement and closing argument in the manner he argues on appeal. For these reasons, we find that Splawn has not established the necessary prejudice to prevail and that his ineffective assistance of counsel claim must be denied.

DECISION

¶16 The Judgment and Sentence of the district court is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2020), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY, THE HONORABLE SCOTT D. MEADERS, DISTRICT JUDGE

APPEARANCES AT TRIAL

Larry Corrales, Teressa Williams, Austin Rabon, Attorneys at Law, 1309 W. Gore, Lawton, OK 73501, Counsel for Defendant

Christine Galbraith, Evan Watson, Asst. District Attorneys, Comanche Co. Courthouse, 315 S.W. 5th St., Lawton, OK 73501, Counsel for State

APPEARANCES ON APPEAL

Maria T. Kolar, Appellate Defense Counsel, P.O. Box 926, Norman, OK 73070, Counsel for Appellant

Mike Hunter, Atty. General of Oklahoma, Keeley L. Miller, Asst. Attorney General, 313 N.E. 21st St., Oklahoma City, OK 73105, Counsel for Appellee

OPINION BY: ROWLAND, J.
LEWIS, P.J.:Specially Concur
KUEHN, V.P.J.:Concur
LUMPKIN, J.:Concur
HUDSON, J.:Concur

LEWIS, PRESIDING JUDGE, SPECIALLY CONCURRING:

¶1 I commend Judge Rowland for a thorough and academic presentation of the law on the instruction regarding a defendant's exculpatory statements of fact as found at OUJI CR (2d) 9-15. The opinion, however, offers nothing new on the law; it merely restates established precedent.

¶2 The instruction was not requested by any party and obviously was not given by the trial court *sua sponte*. Trial judges are not required to submit "an instruction on every possible question of law that might be involved, particularly where the defendants are represented by able counsel, as in this case." *Hopkins v. State,* 1924 OK CR 322, 231 P. 97, 98.

¶3 Whether or not this instruction would have been given matters not one iota to the outcome of this case. The self-serving statements of the defendant were overwhelmingly refuted by the evidence. Based on the overall facts of the case, the instruction was unnecessary. Moreover, the instructions given, as a whole, covered the salient features of the law necessary to this case. *See Hogan*, 2006 OK CR 19, ¶ 39, 139 P.3d at 923.

¶4 There was no error, plain or otherwise, in the failure to instruct the jury on exculpatory statements of fact.

ROWLAND, JUDGE:

1. In addition to First Degree Murder, the State charged Splawn with two misdemeanors, namely Possession of Controlled Dangerous Substance (Count 2), in violation of 63 O.S.Supp.2017, § 2-402, and Unlawful Possession of Drug Paraphernalia (Count 3), in violation of 63 O.S.2011, § 2-405. Splawn pleaded guilty to the misdemeanor crimes prior to jury trial for Count 1. The district court sentenced him to a $100.00 fine on Count 2 and a $50.00 fine on Count 3. Splawn appeals only his felony conviction.

2. Under 21 O.S.Supp.2015, § 13.1, Splawn must serve 85% of his sentence of imprisonment before he is eligible for parole consideration.

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2020 OK CIV APP 54

VALERIE SHRECK, Plaintiff/Appellee, vs. BRENT REED, Defendant/Appellant.

Case No. 117,967. April 9, 2020

APPEAL FROM THE DISTRICT COURT OF BLAINE COUNTY, OKLAHOMA

HONORABLE PAUL K. WOODWARD, TRIAL JUDGE

AFFIRMED

Anthony S. Moore, CHRISTENSEN LAW GROUP, P.L.L.C., Clinton, Oklahoma and

J. Clay Christensen, Lisa M. Molsbee, Jonathan M. Miles, Brock Z. Pittman, CHRISTENSEN LAW GROUP, P.L.L.C., Oklahoma City, Oklahoma, for Plaintiff/Appellee

Ryan A. Meacham, MEACHAM LAW FIRM, Clinton, Oklahoma, for Defendant/Appellant

JANE P. WISEMAN, CHIEF JUDGE:

¶1 Defendant Brent Reed appeals a trial court order granting Plaintiff Valerie Shreck's petition for partition of certain property finding the parties owned equal shares in the land.[1] After review, we conclude that no questions of material fact remain in dispute and the trial court's partition decision was correct as a matter of law. We affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 On May 16, 2018, Plaintiff filed her petition for partition alleging that "Plaintiff and Defendant are the sole owners as tenants in common of, and each of them is exercising control and asserting possession in and to, the following-described real property situated in Blaine County, State of Oklahoma . . . :"

> SURFACE ONLY IN AND TO:
> Lots One (1), Seven (7) and Eight (8) in Section Thirty-Six (36), Township Thirteen (13) North, Range Twelve (12) West of the Indian Meridian, Blaine County, Oklahoma . . . .

In the petition, Plaintiff claims she and Defendant own "an undivided one-half (1/2) fee simple interest, tenancy in common" and asks the trial court for an order of partition and the appointment of commissioners.

¶3 Defendant in his answer admitted some allegations and denied others. He also counterclaimed alleging he "is the owner, in fee simple, of the real property located in Blaine County" and Plaintiff has no estate or interest in the property. Saying that he has "good and valid title" to the property, Defendant asked that Plaintiff be barred from asserting any claim to the real estate adverse to his title.

¶4 Plaintiff filed a "motion for order determining ownership interests in the subject property" pursuant to 12 O.S.2011§ 1505.[2] She sets out a "statement of uncontested material facts" and argues "Plaintiff and Defendant are the owners of the [s]ubject [p]roperty as tenants in common," and "[t]he right of a cotenant to partition property is absolute and not to be defeated by the mere unwillingness of a party to have property partitioned." Plaintiff asks the trial court to enter "an order specifying the interest of the parties," arguing that although Defendant disputes Plaintiff's ownership, he provides no evidence supporting his position. Plaintiff argues that even if Defendant paid more than "fifty percent (50%) of the ad valorem taxes and mortgage payments owed by Plaintiff's predecessor-in-interest," these payments do not affect title to the property. Plaintiff states such "claims are properly heard in a partition suit *after* determination of ownership interest and appraisal of the property."

¶5 In his response, Defendant agrees that the two parties were tenants in common but disputes the allegation that the property is owned in equal proportionate shares. Defendant argues that ownership interest in the tenancy in common shifted as a matter of equity before Plaintiff was deeded the property by Bruce Reed, Defendant's brother.

¶6 Defendant says that when the tenancy in common was created between him and his brother Bruce, his brother "had only paid $35.00 toward the expenses associated with the property." Defendant claims that when the property was conveyed to him and Bruce Reed, he had paid $3,895.42 in expenses. When

Plaintiff received the property from Bruce Reed, Bruce had paid only $2,628.45 while Defendant had paid $41,381.12 in taxes, insurance, and mortgage payments. Defendant sets out "additional material facts" arguing "the Quit Claim Deed from Bruce Reed to [P]laintiff, recorded at Book 1319, Page 118, was for zero consideration" and Defendant "paid 94 percent of the expenses associated with the purchase and maintenance of the subject property."

¶7 After considering the submissions of the parties, the court concluded Plaintiff and Defendant were tenants in common owning equal, proportionate shares of the property as stated in the court's order filed March 4, 2019. In its order filed April 11, 2019, the court reiterated these ownership interests, ordered partition, and appointed "Commissioners to make partition of the Property between the owners according to their respective interests" and if partition could not be made between them without great and manifest injury, to "make return of appraisement of the Property."

¶8 The three Commissioners concluded the property could not be partitioned according to the owners' respective interests without manifest injury to the owners. The Commissioners proceeded to appraise the property at $1,950 per acre.

¶9 Defendant appeals.

STANDARD OF REVIEW

¶10 Having been assigned by the Supreme Court to the accelerated docket governed by Supreme Court Rule 1.36, 12 O.S. Supp. 2019, ch. 15, app. 1, this proceeding is subject to the same standard of review as a summary judgment. "The standard for appellate review of a summary judgment is *de novo* and an appellate court makes an independent and nondeferential review testing the legal sufficiency of the evidential materials used in support and against the motion for summary judgment." *Boyle v. ASAP Energy, Inc.*, 2017 OK 82, ¶ 7, 408 P.3d 183. "Summary judgment will be affirmed only if the [appellate court] determines that there is no dispute as to any material fact and that the moving party is entitled to judgment as a matter of law." *Lind v. Barnes Tag Agency,* Inc., 2018 OK 35, ¶ 9, 418 P.3d 698. "All inferences and conclusions to be drawn from the materials must be viewed in a light most favorable to the nonmoving party." *Id.* "Summary judgment is improper when reasonable persons may reach different inferences or conclusions from the undisputed facts." *Boyle,* 2017 OK 82, ¶7.

ANALYSIS

¶11 Defendant argues the trial court's conclusion that Plaintiff is entitled to 50 percent ownership of the property is inequitable because he has paid 94 percent of the concomitant expenses for maintenance, mortgage and taxes. Plaintiff says, "[Defendant's] contention is that ownership interest is lessened if the other tenant in common expends more in the maintenance of the land." But according to Plaintiff, "Such a contention is not supportable under the law."

¶12 "'Where a deed conveys to two or more grantees title to property therein conveyed is vested in such grantees as tenants in common ….'" *Kilgore v. Parrott,* 1946 OK 144, ¶ 7, 168 P.2d 886 (quoting *Clinton v. Clinton*, 1940 OK 115, ¶ 0, 101 P.2d 609 (syl. no. 2 by the Court)). In obtaining a tenancy in common interest, cotenants receive "a joint interest in [the] property, the only essential element of which is a unity of right of possession." *Matthews v. Matthews*, 1998 OK 66, ¶ 11, 961 P.2d 831. "One who stands in cotenancy relation to another may not act or claim 'in derogation of' the latter's interest." *Id*. (footnotes omitted). "This means that a cotenant is not allowed to *lessen* or *diminish* the *value* or *effect* of the other cotenant's right, title, interest, or status in land." *Id.*

¶13 Under modern practice, partition, which combines "'both the equitable and common law remedies, is defined as follows: a division between two or more persons of real . . . property which they own as . . . tenants in common, effected by the setting apart of such interests so that they may enjoy and possess the same in severalty.'" *Prusa v. Cermak*, 1966 OK 89, ¶ 6, 414 P.2d 297 (quoting *North v. Coffey*, 1948 OK 67, ¶ 8, 191 P.2d 220). In a less periphrastic sense, "'Partition is the act or proceeding by which co-owners of property cause it to be divided into as many shares as there are owners, according to their interest therein, or if that cannot be equitably done, to be sold for the best obtainable price and the proceeds distributed.'" *Thomason v. Thompson*, 1926 OK 865, ¶ 4, 253 P. 99 (quoted citation omitted). "The right to partition is absolute and the proceeding is one of equitable cognizance; therefore, equitable principles apply." *Dewrell v. Lawrence*, 2002 OK CIV APP 105, ¶ 9, 58 P.3d 223;

see also Chesmore v. Chesmore, 1971 OK 49, ¶ 6, 484 P.2d 516.

¶14 Without dispute, Plaintiff and Defendant own the property as tenants in common. The record shows no change in that shared ownership from the time Plaintiff acquired her interest in the property. Plaintiff included the relevant deeds to the property in her motion for a property interest determination. On the face of these deeds, it is clear a tenancy in common has been maintained since on or before November 19, 1998. Plaintiff relies on the uncontroverted fact that as tenants in common, she and Defendant each own an undivided half-interest in the property. In response, Defendant does not dispute that the deeds convey a half-interest, but he maintains that the tenancy in common interest shifted in his favor because he was responsible for the vast majority of money expended for the property, including the mortgage, maintenance expenses and ad valorem taxes.

¶15 We can see no basis for reversing the trial court's determination of ownership interest. The law of tenancy in common dictates the result reached by the trial court, and no evidentiary support has been presented to lead to a different outcome, or even to present a disputed issue of fact on the question of ownership. Defendant's unequal expenditure of funds in regard to the property does not change the undivided one-half interest each party has in the property as a tenant in common. Despite this being an equitable proceeding, principles of equity do not dictate that an owner may recoup his disproportionate payment of related expenses by overriding the clear language of the deed of conveyance to the parties. If this were the law, much mischief could result, as Plaintiff points out. Recovery of these expenditures must be left for another day and another mechanism.

¶16 Defendant also argues that under the doctrine of owelty, he is entitled to a pecuniary sum to equalize the shares of the parties. *See generally, Chesmore*, 1971 OK 49, ¶ 4. "In making divisions along natural and practical lines the allotments cannot always be made of equal area or value, and when an allotment is made to a party which is in excess of his share, the court may require him to pay such excess, which is called owelty, to the other co-tenants." *Id*. ¶6. "It would seem more equitable, in a proper case, to require the payment or receipt of a reasonable sum of money than to require lands to be sold as a whole, where a proportionately small sum is required to equalize the shares." *Id.* "The object of partition is a division of the property; a sale of the lands is justified only when partition in kind, with or without owelty, is impractical." *Id*. However, "[t]he general rule of equity requiring the payment of owelty does not give [d]efendants an absolute right to receive a share of the land set off to them in kind and pay owelty to equalize the share awarded to [p]laintiffs." *Id.* ¶7. "It may be the court will conclude that owelty is not practicable." *Id.*

¶17 Although owelty is available to a court when exercising its equitable powers, the doctrine only applies when the property lends itself to partition in kind and the division by partition requires the payment of money to equalize the shares. *See Barth v. Barth*, 1995 OK CIV APP 83, ¶¶ 8, 14, 901 P.2d 232. In this case, partition in kind has been found to be unworkable and the land will be subject to sale. Because the doctrine of owelty applies when the property is being partitioned in kind, it is not applicable here.

¶18 Based on the record before us, we find no issue of material fact is in dispute, and the trial court followed the law and properly granted Plaintiff's motion. The trial court's order for partition is affirmed.

CONCLUSION

¶19 As a matter of law, the trial court's order for partition is without error and is affirmed.

¶20 **AFFIRMED**.

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

JANE P. WISEMAN, CHIEF JUDGE:

1. Plaintiff filed a motion to convert this case into an accelerated appeal which the Oklahoma Supreme Court granted. It is assigned to the accelerated docket pursuant to Oklahoma Supreme Court Rule 1.36, 12 O.S. Supp. 2019, ch. 15, app. 1, and is reviewed without appellate briefing.

2. This section states: "After the interests of all the parties shall have been ascertained, the court shall make an order specifying the interests of the respective parties, and directing partition to be made accordingly." 12 O.S.2011 § 1505.

2020 OK CIV APP 55

MINERAL ACQUISITIONS, LLC and SUE ANN ARNALL, Plaintiffs/Appellants, vs. HAROLD GLENN HAMM, Defendant/Appellee.

Case No. 118,255. July 28, 2020

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE DON ANDREWS, TRIAL JUDGE

AFFIRMED

Amy L. Alden, Jack S. Dawson, MILLER DOLLARHIDE, Oklahoma City, Oklahoma, for Plaintiffs/Appellants

Michael Burrage, WHITTEN BURRAGE, Oklahoma City, Oklahoma, and

Julia C. Rieman, Craig L. Box, GUNGOLL, JACKSON, BOX & DEVOLL, P.C., Enid, Oklahoma, for Defendant/Appellee

STACIE L. HIXON, JUDGE:

¶1 Sue Ann Arnall (Arnall) appeals summary judgment in favor of Harold Hamm (Hamm) on her claims of breach of fiduciary duty, breach of contract, intentional interference with prospective economic advantage, actual or constructive fraud, and unjust enrichment. Mineral Acquisitions, LLC, appeals summary judgment in favor of Hamm on its claims of breach of fiduciary duty and demand for winding up and distribution of assets.

¶2 The appeal was assigned to the accelerated docket pursuant to Oklahoma Supreme Court Rule 1.36, 12 O.S. Supp. 2019, ch. 15, app.1.

¶3 Upon review of the record and the parties' briefing, the record in the underlying case, and applicable law, we affirm the trial court's Order of August 20, 2019.[1]

BACKGROUND

¶4 Arnall and Hamm divorced on November 10, 2014, by separate proceeding, *Hamm v. Hamm*, Case No. FD-2012-2048 (District Court of Oklahoma County). That protracted proceeding required the disposition of the parties' considerable assets, including the task of valuing Hamm's marital contributions to Continental Resources, Inc. (CRI). Hamm founded the company prior to his marriage to Arnall in 1988, and, at the time of the divorce, was its majority shareholder.

¶5 As part of the valuation, the court considered and addressed an Oklahoma limited liability company formed by Hamm called Mineral Acquisitions, LLC, in 2001. According to that entity's Operating Agreement, he and Arnall were its only members, each owning 50% of that entity. In turn, Mineral Acquisitions was the sole member of Jolette Oil (USA), LLC, formed in 2002.[2] Jolette was formed to unobtrusively acquire certain mineral interests in an area known as the Bakken field in North Dakota and to operate a particular well. Once acquired, CRI purchased all of Jolette's assets at book value for $4.5 million in 2005. Hamm caused Mineral Acquisitions to be dissolved on June 26, 2006, and ceased filing its annual reports, certificates, or fees, with the Oklahoma Secretary of State. Jolette was subsequently dissolved.

¶6 The parties' assets acquired during marriage were distributed in the divorce. Among other assets, Arnall was awarded half of the purchase price for Jolette's assets. The value of Hamm's marital contribution to CRI was a significant issue in the divorce, and included consideration of the value of the assets CRI acquired from Jolette. Arnall was awarded a portion of the value of Hamm's marital contributions to CRI, among other assets, which she appealed. The Oklahoma Supreme Court dismissed that appeal on April 28, 2015, finding Arnall accepted Hamm's payment of the full judgment, while the appeal was pending. Hamm dismissed his own counter-appeal in the divorce proceeding. Judgment entered in the divorce is final.

¶7 On August 20, 2015, Arnall filed the underlying suit on her own behalf against Hamm for breach of fiduciary duty, breach of contract arising from breach of Mineral Acquisitions' Operating Agreement, intentional interference with prospective economic advantage, actual or constructive fraud, and unjust enrichment. She asserted derivative claims on behalf Mineral Acquisitions for breach of fiduciary duty/self dealing, and seeking wind up and distribution of its only asset, the mineral interests acquired by Jolette and transferred to CRI.

¶8 The crux of these claims was Arnall's contention that Hamm improperly transferred Jolette's assets at book value to CRI, depriving her of her share of their market value, and dissolved Mineral Acquisitions without her knowledge or consent. Arnall alleged that she did not learn of her interest in Mineral Acquisitions until discovery in the divorce case. She contended that the market value of the mineral interests transferred to CRI was in excess of $900 million.

¶9 The trial court granted summary judgment to Hamm on the claims of Arnall and Mineral Acquisitions in their entirety, finding that Arnall's claims in the underlying action were or could have been asserted in the divorce proceeding, and were barred by res judicata or claim preclusion.

¶10 The trial court also concluded that Arnall had actual and/or constructive knowledge of public filings made on behalf of Mineral Acquisitions for a period of nine years prior to filing of the suit, and that Arnall's claims were barred by the statute of limitations "up to and not exceeding five (5) years in duration." Finally, the trial court determined that Mineral Acquisitions was no longer a corporation in good standing, was deemed cancelled as a matter of law in 2009, and did not have standing to sue Hamm.[3]

¶11 Arnall appeals.

STANDARD OF REVIEW

¶12 "Although a trial court in making a decision on whether summary judgment is appropriate considers factual matters, the ultimate decision turns on purely legal determinations, i.e., whether one party is entitled to judgment as a matter of law because there are no material disputed factual questions." *Carmichael v. Beller,* 1996 OK 48, ¶ 2, 914 P.2d 1051, 1052. "Therefore, as the decision involves purely legal determinations the appellate standard of review of a trial court's grant of summary judgment is *de novo. Id.* The Court will "examine the pleadings and evidentiary materials to determine what facts are material to plaintiff's cause of action, and to determine whether the evidentiary materials introduced indicate whether there is a substantial controversy as to one material fact and that this fact is in the movant's favor." *Ross by and through Ross v. City of Shawnee,* 1984 OK 43, ¶ 7, 683 P.2d 535, 536. All inferences and conclusions to be drawn therefrom are viewed in the light most favorable to the nonmoving party. *Id*.

ANALYSIS

1. Arnall's Claims

a. Res judicata or claim preclusion

¶13 The trial court concluded Arnall's claims were barred by the doctrine of res judicata, now called claim preclusion,[4] upon the following facts held undisputed:

> 6. Extensive discovery was conducted by ARNALL and HAMM in the Divorce Proceeding relating to MINERAL ACQUISITIONS and Jolette Oil (USA), LLC.
>
> 7. On April 13, 2014, ARNALL and her counsel of record were aware of Jolette Oil (USA) and MINERAL ACQUISITIONS' asset transfers to Continental Resources, Inc. and acknowledged claims that AR-NALL could assert against HAMM in the Divorce Proceeding.
>
> 8. ARNALL called witnesses that testified in the trial of the Divorce Proceeding that assets transferred from Jolette Oil (USA) and MINERAL ACQUISITION [sic] to Continental Resources, Inc. were done so at book value and not market value; that ARNALL's damages equaled $916,799,000.
>
> 9. Claims sought by ARNALL in the Divorce Proceeding and ruled upon by the Trial Court, are the same claims asserted in the instant case.
>
> 10. Claims sought by ARNALL in the appeal of the Divorce Proceeding are the same claims asserted in the instant case.
>
> 11. ARNALL's appeal of the Divorce Proceeding was dismissed by the Oklahoma Supreme Court on June 19, 2015.[5]

¶14 In essence, the trial court concluded that Arnall's interest in the assets of Mineral Acquisitions, and dispute of wrongful transfer or dissolution, was determined or could have been determined in the divorce proceeding. Arnall disagreed, and contended her claims were based not on the disposition of assets, but sought damages for distinct claims of Hamm's alleged wrongful conduct.

¶15 "Under the principle of claim preclusion, a final judgment on the merits of an action precludes the parties from relitigating not only the adjudicated claim, but also any theories or issues that were actually decided, or could have been decided, in that action." *Miller v. Miller*, 1998 OK 24, ¶ 23, 956 P.2d 887, 896. The purpose of the doctrine is to prevent "piecemeal litigation" caused by splitting a single claim into separate suits. *Id*. "When claim preclusion is asserted, the court must analyze the claim involved in the prior action to ascertain whether it is in fact the same as that asserted in the subsequent action." *Id.* "The doctrine requires an identity of subject matter, of the

parties and their privies, of the capacity of the parties and of the cause of action." *Barker v. State Ins. Fund,* 2001 OK 94, ¶ 11, 40 P.3d 463.

¶16 "Whether preclusion doctrine will apply in any particular case is sometimes a question of law and in others a mixed question of law and fact." *Feightner v. Bank of Okla, N.A.*, 2003 OK 20, ¶ 3, 65 P.3d 624. Claim preclusion is a question of law if the facts are undisputed, the question can be answered solely by reviewing the previous judgment, or by inspection of the record in the previous proceeding. *Id*.

¶17 There is no dispute that the parties, or their privies, are the same in both actions. However, on summary judgment, Arnall contended that her tort claims for damages cannot be considered part of the claim or cause of action at issue in a divorce proceeding, relying on *Miller,* 1998 OK 24. Specifically, Arnall relied almost entirely on Miller's comment upon the definition of "claim" provided by *Retherford v. Halliburton,* 1977 OK 178, 572 P.2d 966:

¶18 In *Retherford,* [the Oklahoma Supreme Court] defined claim[6] as:

> "a legal concept which has no separate existence in the natural order of things. It is what makers of legal policy, the Legislature and the courts say it is. It exists to satisfy the needs of plaintiffs for a means of redress, of defendants for a conceptual context within which to defend an accusation, and of the courts for a framework within which to administer justice."
>
> Considering in light of this definition the claim pressed in the divorce action and that advanced in this tort case, we conclude that the two lawsuits do not tender the same claim. A civil action in tort is fundamentally different in a divorce proceeding. The purpose of a tort action is to establish liability for a legal wrong and to recover damages. The purpose of a divorce action is to end the marital relationship of a husband and wife, to determine the parties' rights and responsibilities to each other and to any children, and to divide marital assets. The divorce action did not involve any allegations of tortious behavior of the kind asserted here. The two actions being distinct, claim preclusion is not invocable.

Miller, 1998 OK 24, at ¶¶23-24 (quoting *Retherford,* 1977 OK 178, at ¶ 9).

¶19 While Arnall interprets this language as conclusively establishing that a tort claim for damages and matters addressed in a divorce action are at all times distinct, we do not interpret *Miller* as restrictively. *Miller* concerned a husband's suit against his former wife and her parents for misrepresenting he was the father of a child, only to reveal after the divorce that the child was not his. Though the divorce decree recited there was a child born to the parties, its purpose was not to determine the paternity, and that issue was plainly distinct from the purposes of the divorce. *Miller* must be read in context.

¶20 As *Miller* also recognizes, one of the purposes of the divorce action is to divide property acquired from the joint industry of spouses during the marriage. The question is whether division of marital property that included assets of Jolette, as the apparent sole asset of Mineral Acquisitions, transferred to CRI, comprises the same cause of action as Arnall's claim for breach of contract and tort damages arising from wrongful disposition of those same assets and subsequent dissolution of Mineral Acquisitions.

¶21 Hamm relied on *Jones v. Jones*, 1968 OK 84, 442 P.2d 319, in support of his argument for claim preclusion.[7] *Jones* was a divorce action between two equal owners of shares in a corporation. *Id*. at ¶ 6. The wife alleged that the husband transferred most of his shares to his mother shortly before the divorce to defraud wife of her interest in the corporation. The trial court initially awarded wife only her individual shares. On request for clarification by the husband, the trial court added husband's mother to the action, conducted a second trial, and awarded the wife all of the corporation's stock based on claims of fraudulent transfer, through an order nunc pro tunc. *Id*. at ¶ 7.

¶22 On appeal, the Supreme Court vacated the judgment. Noting that the wife had raised the fraudulent transfer in the divorce, though demanding no relief on that ground, the Court explained:

> It appears to this court under these circumstances the question of ownership of the stock and plaintiff's right thereto would be effectively disposed of, since the decree describes and disposes of all the corporate shares, and releases any restraint imposed upon defendants as to the stock held by them. However, we need not determine

> this exact question. The question of stock ownership and plaintiff's rights therein was presented by plaintiff's petition and by the restraining order, and was a matter germane to the divorce, alimony and division of the property between the parties. It was a matter that could have been litigated in the divorce action.

Id. at ¶ 19. "Until properly set aside, a judgment is conclusive not only concerning all questions actually decided but also as to all germane issues that might have been litigated." *Id*. at ¶ 21.

¶23 *Jones* holds that matters germane or relevant to the allocation of property in the divorce should be litigated in the divorce or will be barred. We look to *Feland v. High*, 1937 OK 247, 67 P.2d 967, for instruction in applying claim preclusion to separate tort or contract theories of action.

¶24 In *Feland*, a wife won judgment against her former husband for converting her separately held stock. Husband contended a previous divorce and property settlement barred the conversion action. Wife knew by time of trial in the divorce case that her stock was missing and had conducted discovery on that issue. The judgment purported to dispose of all property rights, but did not address her rights to the stock. Acknowledging statutory requirements that a divorce settle all property rights and restore spouses' individual property,[8] the Court determined the disposition of property in the divorce action operated as claim preclusion as to the conversion action. The Court stated:

> Plaintiff's actions in giving a receipt in full settlement; in serving defendant in the divorce case with a notice to take depositions in Guthrie; and in testifying at the time of the divorce she knew that the defendant had used the stock for his own purposes, preclude her from claiming that the matter is not settled by the decree of divorce.

Feland, 1937 OK 247, at ¶ 17.

¶25 The rule applied in *Feland* or *Jones* applies to claims for damages in tort that are germane to distribution of marital property. In more modern parlance, determination of rights to marital property in a divorce proceeding may preclude later claims in tort or contract, if those theories arise from the cause of action, as defined in *Retherford*, i.e., the same wrongful act or transaction. If the transfer of assets or dissolution of an entity must be, or is, resolved to determine the parties' rights to marital property, claim preclusion applies, regardless of legal theory.

¶26 Other jurisdictions' application of this principle under similar facts is persuasive. For instance, in *Hofsommer v. Hofsommer Excavating, Inc*., 488 N.W.2d 380 (N.D. 1992), the court reversed a wife's award of back wages for work during the marriage against her former husband's closely-held corporation, as barred by judgment in their previous divorce proceeding. *Id.* at 385. The court reasoned that both the closely-held corporation and claim for back wages were marital property subject to disposal in the divorce. *Id.* "Viewed either as an asset of Susan's or a debt of HEI's, Susan's unasserted claim for back wages certainly affected the value of the marital estate." *Id*. "As such, Susan's claim for back wages arose out of the same facts and circumstances surrounding the parties' valuation of the marital estate and subsequent stipulated property distribution finalized in the divorce judgment." *Id*.

¶27 In *Trahan v. Trahan*, 839 A.2d 1246 (Vt. 2003), a husband and wife disputed the value of their payroll company during their divorce. At that time, the company held significant assets in trust, which the family court determined likely belonged to the payroll company's clients (though not clear), a key issue in the divorce. Later, the wife discovered a significant amount of the funds in trust had been transferred, possibly improperly, before the divorce was final, and filed a shareholder derivative action. *Id.* at 1247. The trial court dismissed the wife's claims under the doctrine of issue preclusion. On appeal, the wife argued the issue in her subsequent suit considered the distinct issue of the husband's wrongful conduct. The appellate court disagreed, stating, "The key issue here is whether the funds that were placed in trust belonged to [company] and its shareholders or were the property of the company's clients. . . ," litigated in the divorce proceeding. *Id.* at 1248. Though wife argued she did not know about the transfer during the divorce, the court determined she had adequate opportunity to contest ownership of the funds when the marital estate was distributed. *Id.* at 1248-49.

¶28 *Dahn v. Dahn,* 346 S.W.3d 325 (Mo. Ct. App. 2011) considered a wife's appeal of the dismissal of claims for conversion, negligence

and breach of fiduciary duty against her former husband for conversion of distribution checks payable to her individually, as barred by claim preclusion. Husband and wife were joint owners of a corporation. During the divorce, the wife alleged that, by diverting her distributions, the husband deprived her of business income, violated corporate bylaws, and diverted corporate assets. She argued that "[f]or a complete, fair and equitable division of the marital estate and for complete relief to be granted" the diverted funds should be restored to her. Id. at 328-29. The parties settled. The judgment dissolving the marriage disposed of all property and debts, and awarded the husband the stock and bank account containing diverted funds.

¶29 On appeal, the court affirmed dismissal of the wife's subsequent suit, stating:

> . . .the dissolution court was empowered to afford Wife meaningful relief concerning the checks, either by ordering Husband to reimburse her for the value of this misappropriated marital property, or by imputing the value of the absent funds to Husband in any property division. The parties' marital estate at the time of the dissolution judgment appears to have been substantial enough to have enabled the court to fully compensate Wife for any misappropriated marital property. While Wife's current legal theories may entitle her to different or broader relief than was available in the dissolution action, the differing legal theories, and the differing relief available, are not enough to differentiate the "claim" asserted in both actions. Moreover, to the extent Wife desired relief beyond that available in dissolution, she was entitled to join her current tort claims, as separate causes of action, with her petition seeking dissolution of marriage.

Id. at 333.[9] *See also Jones v. Porter*, 2020 WL 620270, __ F.Supp.3d __ (D. Me. Feb. 10, 2020) (wife's claim for breach of contract barred by divorce judgment; adjudication of agreements was necessary to define marital estate and spouses' contributions thereto).

¶30 We find these cases persuasive in our application of Oklahoma law to hold Arnall's claims for breach of contract and in tort against Hamm arise from the same cause of action as disposition of assets in the divorce proceeding. Though Arnall now asserts different legal theories, identification and award of the individual and joint property of Arnall and Hamm were at issue in the divorce proceeding, including Arnall's interest in assets of Jolette, and hence Mineral Acquisitions, transferred to CRI. That interest was itself a marital asset or debt against the marital estate, which should have been and was raised in the divorce proceeding.

¶31 Arnall's briefing acknowledged her counsel's "aggressive" discovery regarding Jolette and Mineral Acquisitions during the divorce proceedings. Arnall did not dispute that she proposed findings of fact in the divorce proceeding that acknowledged her 50% interest in Mineral Acquisitions, and hence Jolette; that Jolette's assets were transferred for book value to CRI in 2005; and that Jolette received no consideration for the reserve value of its leases, which Arnall contended exceeded $900 million. Arnall does not dispute that, like *Dahn*, she requested the divorce court find:

> The Court concludes that Respondent's inmarriage disposition of business interests owned by Petitioner for less than the fair value thereof is relevant to the determination of what is an equitable division of property.[10]

Hamm's alleged wrongful disposition of Arnall's assets was at issue and decided in the decree disposing of each party's equitable share of marital property. The divorce decree references Arnall's ownership in Mineral Acquisitions, the transfer of Jolette's interest to CRI and book value, and the value of those assets in the hands of CRI. Even if these issues were not considered, Arnall's claims here would impact the value of the marital estate and should have been raised in the action purporting to dispose of all separate and joint marital property of the parties. Accordingly, Arnall's claims in the underlying action are precluded by the doctrine of claim preclusion.

b. Jurisdiction of the special judge.

¶32 Arnall also argued that the divorce judgment does not bar her claims, because claim preclusion requires a determination before a court of "competent jurisdiction." She reasons that the special judge who ruled in the divorce proceeding was limited in jurisdiction to actions for recovery of money damages not exceeding $10,000, and could not have resolved her tort claims, if raised. *See* 20 O.S. 2011, § 123(A)(1).

¶33 This argument is without merit. The decree dividing property in the divorce case was within the special judge's authority under section 123 and has preclusive effect on Hamm's claims for damages, even if contract and tort theories of recovery were not raised in that action. There cannot be an objection now that the judge was unauthorized to render judgment in that case. *See generally, Kellenberger v. Guaranty Loan and Inv. Corp. of Tulsa,* 1974 OK CIV APP 23, 530 P.2d 574.[11]

¶34 Further, Arnall's claims were brought in the District Court of Oklahoma County, a court of indisputably competent and general jurisdiction to hear her claims. *See* Okla. Const., Art. 7, § 7. Among other subjects, section 123 provides special judges may hear actions for recovery of money that do not exceed $10,000, *unless* the parties agree. We do not know whether Arnall would have agreed and decline to speculate. However, had she asserted those theories, while the case might have been transferred to another judge, any claim she raised would be heard in a court of competent jurisdiction – the District Court of Oklahoma County.

¶35 In summary, Arnall's claims for damages against Hamm arise from the same transaction or occurrence which was considered and determined in the property distribution resolved in the divorce proceeding. The trial court's grant of summary judgment based on undisputed material facts that Arnall's claims were barred by claim preclusion was therefore correct.

2. Statute of Limitations

¶36 The trial court also determined that Arnall had actual or constructive knowledge of her claims for approximately nine years before filing suit and held her tort and breach of contract claims were barred by even the longest potential statute of limitations of five years applicable to her breach of contract claim.

¶37 "A statute of limitations begins to run when a cause of action accrues." *Wille v. Geico Cas. Co.*, 2000 OK 10, ¶ 10, 2 P.3d 888. "This happens when a litigant can first maintain an action to a successful conclusion." *Id*. Tort claims generally accrue at the time the injury to the plaintiff occurs. *Stephens v. General Motors Corp.,* 1995 OK 114, ¶ 12, 905 P.2d 797. Breach of contract claims accrue when the party asserting them first acquires the right to sue. *Kinzy v. State ex rel. Okla. Firefighters Pension and Retirement System*, 2001 OK 24, ¶ 11, 20 P.3d 818. Fraud claims are deemed to have accrued upon discovery of the fraud. 12 O.S. 2011, § 95(3).

¶38 Arnall's claims arise from the sale of Jolette's assets to CRI in 2005 and subsequent dissolution of Mineral Acquisitions in 2006. Unless the discovery rule or another method of tolling applies, Arnall could first have sued for the wrongful sale of Jolette's assets at less than market value in 2005, and for wrongful disposition of Mineral Acquisitions in 2006. Arnall contended she did not know of her interest in Mineral Acquisitions or of the transfer of Jolette's mineral interests at book value until her divorce proceeding in 2013. She relied on the discovery rule and the doctrine of "adverse domination," and offered no other grounds for tolling the statute of limitations.[12]

¶39 First, Arnall asserted claims both in tort and contract. While the trial court determined that Arnall's breach of contract claim accrued within five years of when she knew or could have known of the breach, Oklahoma law does not appear to apply the discovery rule to breach of contract. *Samuel Roberts Noble Foundation, Inc. v. Vick*, 1992 OK 140, ¶¶ 11-12, 840 P.2d 619; *Kirby v. Jean's Plumbing Heat & Air,* 2009 OK 65, ¶ 17, 222 P.3d 21, 25.[13] "[T]he Court is not bound by the trial court's reasoning and may affirm the judgment below on a different legal rationale." *Hall v. GEO Group, Inc*., 2014 OK 22, ¶ 17, 324 P.3d 399. Arnall's allegations of breach concerned disposition of Jolette's assets at less than fair market value, making it impossible for Mineral Acquisitions to conduct its ordinary business and concerned the unauthorized dissolution of Mineral Acquisitions.[14] These claims accrued at the time of breach and are time-barred.

¶40 We next consider Arnall's knowledge and/or constructive notice of her claims in relation to when her tort claims accrued. The trial court found the following facts undisputed:

> 17. ARNALL had actual and/or constructive knowledge of public filings made on behalf of MINERAL ACQUISITIONS and other related entities for a period of nine (9) years prior to filing this lawsuit.
>
> 18. The "Adverse Domination Doctrine" and the "Discovery Rule" do not toll the applicable statutes of limitation herein since ARNALL had actual knowledge of public filings made on behalf of MINERAL ACQUISITIONS and other related entities.

> 19. Specifically, ARNALL's breach of contract action relating to MINERAL ACQUISITIONS' Operating Agreement must have been filed within five (5) years following her knowledge of the breach.

(Citations omitted). In support of Fact No. 19, the court also stated:

> ARNALL maintains that she was not aware of the existence of MINERAL ACQUISITIONS' Operating Agreement until it was produced during the discovery stage of her divorce proceeding. However, her signature appears on numerous business records related to MINERAL ACQUISITIONS from the beginning of its existence, to which ARNALL was aware. It was incumbent upon her to determine whether MINERAL ACQUISITIONS' [sic] existed, especially once filings became a matter of public record.

Order, p. 4, n.25.

¶41 We examine whether the record supports a determination of Arnall's undisputed actual or constructive notice. Arnall did not dispute that she knew of the existence of Mineral Acquisitions and Jolette, or their acquisition of mineral interests when she was working at CRI in early 2000.[15] While Arnall contends she did not know of her interest in Mineral Acquisitions until her divorce, her disputes of Hamm's proposed undisputed facts are unaccompanied by evidence.[16] However, Arnall did cite testimony from the divorce case in her response to Hamm's brief on summary judgment, where she remarked she did not know of Mineral Acquisitions without reference to time period or context. [17]

¶42 We need not determine whether this testimony, without more, creates a dispute of fact regarding Arnall's knowledge of her interest in Mineral Acquisitions. Mineral Acquisitions' Operating Agreement bears the signature of members Harold Hamm and "Sue Ann Hamm."[18] Jolette's Operating and Member Control Agreement bears the signature of "Sue Ann Hamm, Vice President." Arnall's briefing acknowledged she signed Mineral Acquisitions' Operating Agreement, at the very least.[19] "[S]omeone who signs an agreement is presumed to know its contents and one with an opportunity to read the contract which he signs cannot escape liability under the contract." *Chaney v. Chevrolet,* 2015 OK CIV APP 55, ¶ 13, 350 P.3d 170 (citing *Mayfield v. Fidelity State Bank of Cleveland*, 1926 OK 665, 249 P. 136).[20]

¶43 Arnall is presumed to have knowledge that she held an interest in Mineral Acquisitions. However, did Arnall have actual knowledge or constructive notice of Hamm's transfer of Jolette's assets at book value, and/or dissolution of Mineral Acquisitions? The trial court appears to have determined that Arnall's actual or constructive notice was established through CRI's public SEC filings and/or public filing of Articles of Dissolution.

¶44 On summary judgment, Hamm presented a prospectus filed by CRI with the SEC on May 16, 2007, and offered by Arnall as an exhibit in the divorce trial, which stated:

> Mineral Acquisitions, LLC ("Minerals"), wholly owned by our principal shareholder and his wife, owns royalty interests in the Cedar Hills North Unit operated by us . . . . Minerals also owns 100% of Jolette Oil (USA) LLC ("Jolette"), a company formed to acquire underdeveloped acreage in the North Dakota Bakken area. In August 2005, we purchased all the assets of Jolette at their book value of $4.5 million. These assets consisted of undeveloped acreage and one producing well in the North Dakota Bakken area.

Hamm presented at least nine other filings between March 2006 and May 2007 which Arnall did not dispute contained the same information. However, she claimed the Prospectus was misleading, because it did not alert Mineral Acquisitions was dissolved. She also argued her cause of action did not begin to accrue because she was not aware at the time that she was to be deprived of her rightful share of the value of assets transferred to CRI.

¶45 We are unpersuaded by these arguments. The SEC filings are sufficient to apprise Arnall of a potential claim as a member of Mineral Acquisitions that she was deprived of the market value of Jolette's leases, if they served as actual or constructive notice.[21] On summary judgment, Arnall did not dispute, in response to Hamm's proposed statements of undisputed facts, that she had access to and was familiar with "all" public filings and documents of CRI. Her admission supports the trial court's determination that Arnall had actual notice of facts supporting her claims related to transfer of Jolette's assets at book value by 2005.

¶46 Arnall is correct that the SEC filings do not alert that Mineral Acquisitions was dissolved thereafter. However, Arnall did not dispute that

Mineral Acquisitions filed articles of dissolution with the Secretary of State, though she disputed they were valid. Those filings were required by public law to be kept, involved Arnall's interest in Mineral Acquisitions, regarding the very transaction at hand (dissolution) and serve as constructive notice to begin the run of the statute of limitations upon her tort claims, if any, arising from dissolution of Mineral Acquisitions. *Fidelity & Cas. Co. of N.Y.,* 1959 OK 139, ¶ 13. *See also supra,* n.22.

¶47 For similar reasons, we find the trial court did not err by determining the discovery rule and the rule of adverse domination did not apply. The discovery rule "tolls the statute of limitations until an injured party knows of, or *in the exercise of reasonable diligence,* should have known of or discovered the injury, and resulting cause of action." *Weathers v. Fulgenzi,* 1994 OK 119, ¶ 12, 884 P.2d 538 (citation omitted). "In other words, under the discovery rule, the . . . statute of limitations is tolled until such time as a reasonable person under the circumstances of the case would have discovered the injury and resulting cause of action." *Id.* "Consequently, the rule does not apply to a plaintiff who was aware of the wrong done to them." *Id*. Arnall's actual and/or constructive knowledge addressed above is dispositive of her reliance on the discovery rule as a matter of law.

¶48 Similarly, Arnall did not raise a dispute of material facts necessary to toll her claims under the "adverse domination" rule. "It is settled law that when a statutory bar of limitation is properly invoked, the burden devolves upon the party seeking to avoid its effect to show the fact or acts which operate to either arrest, suspend, toll or waive the limitation period." *Beatty v. Scott,* 1961 OK 140, ¶ 5, 362 P.2d 699.

¶49 "Adverse domination is an equitable doctrine which tolls statutes of limitations for claims by corporations against its officers, directors, lawyers and accountants while the corporation is controlled by those acting against its interest." *Resolution Trust Corp v. Grant,* 1995 OK 68, ¶ 4, 901 P.2d 807. "It applies only in the context of an attempt to avoid the bar of statute of limitations on a cause of action by a corporation against its wrongdoing officers and directors." *Id.* The doctrine rests on the presumption that "those who engage in fraudulent activity likely will make it difficult for others to discover their misconduct," and therefore applies in Oklahoma only in situations involving fraudulent conduct. *Id.* at ¶¶ 12-13.

¶50 Arnall asserted a claim for actual or constructive fraud based on Hamm's transfer of Jolette's assets for alleged below market value, but she has not offered evidence of any concealment of the transaction (and could not, given public filings). Assuming these allegations may nevertheless serve as a basis to apply the rule, "[t]he application of the doctrine of adverse domination presupposes that there has not been notice sufficient to apprise an interested party of the facts needed to bring about a suit." *Id*. at n.24. "The proper notice to the appropriate party negates the necessity of application of the doctrine." *Id.* at n.24. Arnall had notice of the alleged wrongful conduct at issue. Further, the doctrine appears to be only available to the corporation. *See Resolution Trust Corp. v. Greer,* 1995 OK 126, ¶ 20, 911 P.2d 257.

¶51 Therefore, while Arnall's claims were barred by the doctrine of claim preclusion, we find the trial court did not err by alternately granting summary judgment based on the running of the statute of limitations.

3. Derivative Claims of Mineral Acquisitions

¶52 Arnall also brought derivative claims on behalf of Mineral Acquisitions based on the same transfer of Jolette's assets and dissolution of Mineral Acquisitions as her individual claims. Mineral Acquisitions claimed that, because Mineral Acquisitions was not wound up, it could not be considered dissolved. It contended Arnall should be granted authority to wind-up and distribute Mineral Acquisitions' only asset, Jolette's mineral interests. The trial court held Mineral Acquisitions did not have standing to bring suit because it had ceased to be in good standing with the Oklahoma Secretary of State and was deemed cancelled by operation of law.

¶53 Under the Oklahoma Limited Liability Company Act (OLLCA), an LLC may not bring suit if it is not in good standing, through filing of annual certificates and fees, provided by 18 O.S. 2011, § 2055.2(F). It was undisputed that Mineral Acquisitions filed Articles of Dissolution on June 26, 2006, and made no further filings with the Secretary of State.

¶54 Much of the parties' dispute centers upon whether Mineral Acquisitions was dissolved under section 2012.1(A) thereafter, without winding up. However, the trial court's

holding was not based on a determination that Mineral Acquisitions was dissolved, or whether it might exist after dissolution for purposes of winding up. The court determined that Mineral Acquisitions was deemed cancelled three years after its last filing with the Oklahoma Secretary of State, and no reinstatement was sought before Mineral Acquisitions brought suit.

¶55 Dissolution and cancellation of an LLC's Articles of Organization are addressed in 18 O.S. § 2012.1 (2004).[22] At the time Mineral Acquisitions was dissolved, and/or ceased to exist, the statute provided for dissolution and cancellation in one of several ways:

> A. The articles of organization shall be canceled upon the dissolution and the completion of winding up of a limited liability company, *or as provided in subsection B of this section*, or upon the filing of a certificate of merger or consolidation if the limited liability company is not the surviving or resulting entity in a merger or consolidation, or upon the conversion of a domestic limited liability company approved in accordance with Section 2054.2 of this title.
>
> B. The articles of organization of a domestic limited liability company shall be deemed to be canceled if the domestic limited liability company shall fail to pay the annual fee provided in Section 2055.2 of this title or a registered agent fee to the Secretary of State due under Section 2055 of this title for a period of three (3) years from the date it is due, the cancellation to be effective on the third anniversary of the due date.

18 O.S. § 2012.1 (2004)(Emphasis added).[23]

¶56 Mineral Acquisitions relied on multiple provisions of the OLLCA to assert that an entity is not dissolved until winding up, or that the entity may continue and bring suit after dissolution to carry out winding up. However, even accepting Mineral Acquisitions' interpretation for the sake of argument, the statutes distinguish between dissolution and cancellation. Section 2012.1 clearly contemplated *cancellation* by operation of law, or following winding up dissolution. Nothing in section 2012.1(B) suspends cancellation of an LLC's articles of organization, or provides the entity continues in existence, pending winding up.

> [O]nce three years have passed from the due date for the fee or certificate, the Act plainly provides for a more serious penalty. That date triggers cancellation of the LLC. Indeed, following cancellation, filing the annual certificate is no longer required. 18 O.S.Supp.2004 § 2055.2(B). This indicates the Legislature's intent that cancellation means the LLC no longer exists.

AT&T Advertising, L.P. v. Winningham, 2012 OK CIV APP 521, ¶ 11, 280 P.3d 360. *See also In re Midpoint Development*, 466 F.3d 1201, 1204 (10th Cir. 2006); *In re White*, 556 B.R. 489 (N.D. Okla. 2016).

¶57 Only one provision cited by Mineral Acquisitions refers to winding up after cancellation, 18 O.S. Supp. 2011, § 2004(B)(1). That statute provides that an LLC's existence as a separate legal entity "continues until cancellation of the limited liability company's articles of organization and completion of its winding up, if any." However, as acknowledged by the trial court, that language became effective in 2010, *after* Mineral Acquisitions was deemed cancelled. The 2004 version provided only that the entity continues "until cancellation of the limited liability company's articles of organization." 18 O.S. § 2004 (2004).

¶58 Similarly, the 2010 version of 18 O.S. 2011, § 2037 provides that a "limited liability company continues in existence after dissolution, regardless of whether articles of dissolution are filed, but may carry on only activities necessary to wind up its business or affairs and liquidate its assets under Sections 2039 and 2040 of this title." This language, too, was not found in the prior version of the statute and, in any event, refers to dissolution, not cancellation.

¶59 We agree with the persuasive holding of *In re Midpoint Dev., LLC*, 466 F.3d 1201, 1206 (10th Cir. 2006), that, under the statutes in effect during the relevant time period, the OLLCA required winding up to be completed *before* filing articles of dissolution. Thereafter, section 2012.1(A) provides for cancellation of the LLC's articles of organization. We also agree with the trial court's determination that amendments relied on by Mineral Acquisitions do not apply to lend it standing to bring suit now. "Generally, a statute or its amendments will have only prospective effect unless it clearly provides otherwise." *Williams Companies, Inc. v. Dunklegod*, 2012 OK 96, ¶ 18, 295 P.3d 1107. Further, statutes which are substantive, not procedural or remedial, may not operate retroactively to "create, enlarge, diminish,

or destroy vested rights. . . ." of parties afforded by those statutes. *See Forest Oil Corp.v. Corporation Com'n of Okla.*, 1990 OK 58, ¶ 11, 807 P.2d 774; *Sudbury v. Deterding*, 2001 OK 10, ¶ 19, 19 P.3d 856. "A purely procedural change is one that affects the remedy only, not the right." Forest Oil, 1990 OK 58, ¶ 11. The sections relied upon by Mineral Acquisitions, if interpreted as it urges, negate Mineral Acquisitions' cancellation, and revive its rights and liabilities without further action, after it had already ceased to exist by operation of law, and may not be applied retroactively.

¶60 Additionally, to ascertain legislative intent, we review the statute's language, related statutes, and any subsequent enactments, and construe them to give effect to the whole. *See Ashby v. Harris*, 1996 OK 70, ¶ 11, 918 P.2d 744. To hold that an LLC cannot be deemed cancelled and ceased to exist unless and until it is wound up wholly negates section 2012.1(B). Such a determination would afford no finality to a defunct LLC or its members and is plainly contrary to the statute's purpose to facilitate cancellation in circumstances other than where the members wind up and dissolve.

¶61 The trial court did not err in its determination that Mineral Acquisitions was cancelled and ceased to exist on June 26, 2009. The issue, therefore, is whether Mineral Acquisitions could nevertheless bring a derivative action. The versions of sections 2012.1 and 2055.2 in effect during the relevant time period did not provide a method to reinstate an entity whose articles of organization were cancelled. We find no authority from the Oklahoma Supreme Court which considers whether an entity may be reinstated, absent statutory authorization. However, persuasive authority considering a similar circumstance suggests that members may seek to nullify or revoke a certificate of cancellation and must do so to acquire standing to pursue a derivative action. *See e.g., Meissner v. Yun*, 55 N.Y.S.3d 163, 163-64 (N.Y. App. Div. 2017)(plaintiff who never commenced action in jurisdiction where LLC was organized to nullify or revoke its certificate of cancellation lacked standing to assert derivative claim on behalf of LLC); *Matthew v. Laudamiel*, 2012 WL 605589 (Del. Ch. Feb. 21, 2012) (after cancellation, LLC must be revived by obtaining revocation of certificate of cancellation before bringing suit directly or derivatively by its members). *See also Metro Communication Corp. BVI v. Advanced MobileComm Technologies, Inc.*, 854 A.2d 121 (Del. Ch. 2004)(acknowledging cause of action to apply to nullify a certificate of cancellation, if wound up in violation of applicable law).[24]

¶62 Here, neither Mineral Acquisitions nor Arnall, as a 50% member, sought to reinstate Mineral Acquisitions or nullify its cancellation. Mineral Acquisitions did not exist when the underlying action was filed, and did not have standing to bring suit.

¶63 Aside from these issues, we find Mineral Acquisitions' claims are barred, even if it retained standing to sue. The statute of limitations began to run when the party bringing the derivative action on Mineral Acquisitions' behalf, Arnall, had notice of the facts giving rise to her claims, and barred the derivative suit as well. *See also Bilby v. Morton*, 1925 OK 360, 247 P. 384.

¶64 Further, the disposition of assets in the divorce proceeding precluded claims of Mineral Acquisitions' claims as well. Claim preclusion resolves claims between parties or their privies. "In order for the 'privity' rule to apply, the party in privity must actually have the same interest, character, or capacity as the party against whom the prior judgment was rendered." *Hildebrand v. Gray*, 1993 OK CIV APP 182, ¶ 6, 866 P.2d 447. Arnall was the only other member of Mineral Acquisitions aside from Hamm, and shared an identity of interest in disposition of its assets and dissolution.

¶65 Neither Arnall nor Hamm, the only two owners of Mineral Acquisitions, raised an objection to treatment of Mineral Acquisitions, or assets ultimately transferred to CRI, as marital property during the divorce. Arnall asserted that the transfer of Jolette's assets, and dissolution of her interest in Mineral Acquisitions should be considered in the equitable division of marital property. Like Arnall's claims, Mineral Acquisitions' claims are barred by claim preclusion as a result of disposition in the divorce case. *See e.g., Mosley v. Builders South, Inc.*, 41 So.3d 806 (Ala. Ct. App. 2010).

¶66 We are free to affirm the trial court on a different rationale than stated in its Order. The trial court did not err in granting summary judgment in favor of Hamm on Mineral Acquisitions' claims.[25]

CONCLUSION

¶67 The undisputed material facts demonstrate that the claims of Arnall and Mineral Acquisitions concern marital property and claims of wrongful disposition raised and resolved in the divorce proceeding. The undisputed facts also demonstrate that the claims asserted by both Arnall and Mineral Acquisitions are time-barred, and that Mineral Acquisitions did not have standing to bring derivative claims.

¶68 We affirm the trial court's Order of August 20, 2019, granting summary judgment to Hamm.

¶69 **AFFIRMED**.

WISEMAN, C.J., and THORNBRUGH, P.J., concur.

STACIE L. HIXON, JUDGE:

1. Much of the record in the underlying action was filed under seal pursuant to an Agreed Protective Order. These filings, many voluminous, were submitted in over a dozen separate, sealed manilla envelopes. None of the briefing or documents contained therein was stapled or fastened. For future reference, though inside an envelope, pleadings should nevertheless be fastened to facilitate efficient review by the Court, should need arise.

2. Arnall originally brought a derivative claim on behalf of Jolette, as well as Mineral Acquisitions and Jolette is referenced in the August 20, 2019 order on appeal. However, a Second Amended Petition dropped Jolette as a party on November 7, 2017.

3. The trial court's order also references that Mineral Acquisitions was deemed cancelled six years before suit was filed, and that Arnall's "breach of contract claim relating to MINERAL ACQUISITIONS' Operating Agreement" must have been brought within five years of Arnall's knowledge of the breach, as an additional grounds for summary judgment.

4. Though prior case law references this doctrine as "res judicata," more recent authority employs the term "claim preclusion," which we use here.

5. Order of August 20, 2019 (citations omitted).

6. *Miller* refers to "claim." However, the definition afforded above is supplied in *Retherford* for "cause of action." *Retherford* went on to state:

> As demonstrated by the prior decisions of this Court ... this jurisdiction is committed to the wrongful act or transactional definition of a "cause of action." Thus, no matter how many "rights" of a potential plaintiff are violated in the course of a single wrong or occurrence, damages flowing therefrom must be sought in one suit or stand barred by the prior adjudication. We feel this approach to the concept of a cause of action best accomplishes the goals the idea was originally conceptualized to serve without sacrificing the rights of any party or the public, in the efficient administration of justice, to the interests of either plaintiffs or defendants as a class of litigants.

Retherford, 1977 OK 178, ¶ 13, 572 P.2d 966

7. *Hamm* also relied on *Garrett v. Gordon*, 2013 OK CIV APP 96, 314 P.3d 264, which held that a judgment in a divorce disposing of real property precluded a subsequent quiet title suit concerning the same property brought by the spouse's father. The father was named in, but not served in the divorce action. *Garrett* concerned additional issues not raised here of whether the determination in the divorce could be binding against the father. Claim preclusion applied to disposition of the property at issue in both actions, though not brought under the same legal theory. *Garrett* does not expressly address whether separate tort or breach of contract claims similar to Arnall's must be raised in the divorce action, or are precluded by disposition of the property in the divorce action, though that application may be implied.

8. The Court relied on statutes now modified in part, and recodified as 43 O.S. 2011, §§ 121 and 122. Section 121 provides that the court's divorce decree will confirm "in each spouse the property owned by him or her before marriage and the undisposed-of property acquired after marriage by him or her in his own right." Section 122 provides that "[a] divorce granted at the instance of one party shall operate as a dissolution of the marriage contract as to both, and shall be a bar to any claim of either party to the property of the other, except in cases where actual fraud shall have been committed by or on behalf of the successful party."

9. Arnall acknowledges she could have brought additional claims in the divorce action, but contends it was not required. *See e.g., Roesler v. Roesler*, 1982 OK 21, 641 P.2d 550.

10. Hamm's Summary Judgment Motion, p. 9, at ¶ 31; Arnall's Response, at ¶ 31.

11. In *Kellenberger*, the plaintiff argued a consent judgment was void, because it went beyond the jurisdiction of a special judge to rule upon issues outside of the forcible entry and detainer action the judge was authorized by statute to handle. The Court stated, "[t]his argument overlooks the scheme of distribution of power to the District Court in Oklahoma. The District Court has jurisdiction in all civil cases. For administrative purposes, certain of those cases are assigned by statute to special judges while others are assigned to associate or district judges." *Id.* at ¶ 10 (emphasis in original). "However all the judges are judges of the district court and the statutory allocation of cases among them is not accomplished by limiting the jurisdiction of the special judge or others but by merely designating the cases he may handle as a matter of administrative convenience." *Id.* "Consequently in the absence of objection, any judgment rendered by a special judge which could have been rendered by the district court is valid." *Id.*

12. Arnall's briefing on summary judgment argued the discovery rule, but did not raise or address the issue of adverse domination. Hamm raised that issue preemptively in his briefing, arguing it did not apply. We address the issue because the trial court found in Hamm's favor on that issue, and Arnall has now raised it as a point of error on appeal.

1.3 While these actions concerned a construction contract, we find no Oklahoma Supreme Court authority adopting the discovery rule in breach of contract claims. *See also Kiamichi Elec. Co-op. v. Underwood*, 1992 OK CIV APP 72, ¶ 6, 842 P.2d 358 (in action for breach of contract, noting that discovery rule applies in tort cases); *Goodall v. Trigg Drilling Co., Inc.*, 1997 OK 74, ¶ 7, 944 P.2d 292 (Summer, J., concurring)("[w]e don't have a 'discovery rule' for breach of contract.")

14. Second Amended Petition, Count Five.

15. Arnall is an attorney, and was employed by CRI for a portion of the parties' marriage.

16. Arnall's Response to Hamm's statements of fact on this issue cite to Arnall's Answer to Hamm's Interrogatory No. 13 in the divorce action. That Answer makes no mention of Arnall's knowledge or lack thereof, but simply lists Hamm's contributions to the value of CRI during the parties' marriage.

17. Arnall had testified she did not know if she had ever owned stock in a Continental entity, and counsel asked whether she would not have wanted to know that fact. Her answer, though not entirely responsive, was that she did not know of her ownership in Mineral Acquisitions.

18. Sue Ann Hamm was Arnall's married name.

19. Arnall's briefing stated that she did not appreciate the import of what she signed, asserting that Hamm commonly placed signature pages before her "to do what most marginally-involved spouses do – sign them" citing her deposition testimony in the divorce action. However, that testimony does not state that Hamm gave her only the signature pages for matters pertaining to Mineral Acquisitions or support the assertion in her brief. In fact, it states, "Q. So all he ever gave you were signature pages, ma'am . . . ? THE WITNESS: I'm saying there were times I got signature pages throughout our marriage and I signed."

20. While this presumption can be overcome by fraud, Arnall made no such argument. As referenced *supra*, n.17, she argued she had no understanding of what she signed and/or that she frequently was presented only signature pages, but did not present evidence she was prevented from reviewing the contents of the agreement she signed.

21. To establish constructive notice on summary judgment, it must be able to be inferred as a matter of law from established facts. *See T.L.I. ex rel. Irick v. Board of County Commissioners of County of Pottawatomie*, 2016 OK CIV APP 12, ¶ 25, 376 P.3d 930 (citing *Cooper v. Flesner*, 1909 OK 137, ¶ 8, 103 P. 1016). Notice may be inferred from "notice of circumstances sufficient to put a prudent [person] upon inquiry as to a particular fact . . . ." *T.L.I.*, 2016 OK CIV APP 12, ¶ 27; *Scott v. Peters*, 2016 OK 108, ¶ 15, 388 P.3d 699. "In general, where constructive notice has been applied, there has been some circumstance, or circumstances, which should excite inquiry and that inquiry, if diligently pursued would lead to actual notice and knowledge of the facts." *T.L.I.*, 2016

OK CIV APP 12, at ¶ 27 (citing *DeWeese v. Baker-Kemp Land Trust Corp.*, 1940 OK 184, 102 P.2d 884). Further, "[w]here the means of discovering fraud are in the hands of the party defrauded and the defrauding party has not covered up his fraud to the extent that it would be impossible to discover, the party defrauded will be deemed to have notice of the fraud. . . ." *Eaves v. Busby*, 1953 OK 240, ¶ 17, 268 P.2d 904 (citation omitted). Oklahoma law generally provides that "public records, required by law to be kept, which involve the very transaction in hand, and the interests of the parties to the litigation, the public records themselves are sufficient constructive notice of the fraud" to set the statute of limitations in motion. *Eaves,* 1953 OK 240, ¶ 14. S*ee also Fidelity & Cas. Co. of N.Y. v. Board of County Com'rs of Tulsa County,* 1959 OK 139, 342 P.2d 547. We agree that SEC filings can serve as constructive notice sufficient to trigger a shareholder's claim for breach of fiduciary duty or fraud. *See e.g., Hamilton v. Deloitte, Haskins & Sells*, 417 S.E.2d 713 (Ga. Ct. App. 1992); *Eckstein v. Balcor Film Investors*, 58 F.3d 1162 (7th Cir. 1995); *In re Tyson Foods, Inc.*, 919 A.2d 563 (Del. Ch. 2007); *Hutton v. McDaniel,* 264 F.Supp.3d 996 (D. Ariz. 2017). We question whether SEC filings of CRI could serve as constructive notice to the shareholder of a separate entity in all cases, absent circumstances to place Arnall on inquiry notice that she should search CRI's records for the transaction, which are not addressed in the record before us. However, Arnall's admission that she was familiar with all of CRI's SEC filings resolves that issue with respect to the transfer of Jolette's assets.

22. Section 2012.1, in addition to other portions of the OLLCA, was amended in 2008. However, due to a constitutional challenge, those amendments were not effective until 2010.

23. Section 2012.2 was amended, effective January 1, 2010, to include subpart (C), authorizing a limited liability company whose articles of organization have been cancelled under 18 O.S. § 2055.2(G) to apply for reinstatement. 18 O.S. § 2055.2(G)(2012). These provisions have been moved to 18 O.S. Supp. 2016, § 2055.3. We do not examine whether these statutes may be applied to an entity deemed cancelled in 2009. No reinstatement was sought.

24. *Metro Communications* concerned an LLC's failure to comply with a statute requiring it to provide for compensation of claims against the LLC known at the time of dissolution.

25. Mineral Acquisitions also argued on summary judgment that Hamm should be equitably estopped from furthering a fraud by claiming Mineral Acquisitions is not a legal entity entitled to bring suit. The trial court did not address this argument. We need not reach the issue of whether Mineral Acquisitions, a non-existent entity, can yet have standing to pursue a claim against Hamm in which it no longer has a cognizable interest. "Estoppel is an affirmative plea which must be proved by the party asserting it." *Sullivan v. Buckthorn Ranch Partnership*, 2005 OK 41, ¶ 30, 119 P.3d 192. Equitable estoppel requires (1) a false representation or concealment of fact; (2) made with knowledge, actual or constructive, of the real facts; (3) to a party without knowledge, or means of knowledge of the truth; (4) with the intent it be acted upon; (5) and which the party to whom it was made relied upon it to his detriment. *Id*. at ¶ 31. The false representation on which Mineral Acquisitions rests its estoppel argument is the sale of Jolette's mineral interests for book value, and dissolution of Mineral Acquisitions thereafter. These same transactions, and Arnall's notice thereof, triggered the statute of limitations and are also subject to claim preclusion.

2020 OK CIV APP 56

LARRY DAVIDSON and JANE DAVIDSON, Plaintiffs/Appellants, vs. POINTE VISTA DEVELOPMENT, LLC, Defendant/Appellee.

Case No. 118,381. May 12, 2020

APPEAL FROM THE DISTRICT COURT OF MARSHALL COUNTY, OKLAHOMA

HONORABLE WALLACE COPPEDGE, TRIAL JUDGE

AFFIRMED

Thomas Marcum, BURRAGE LAW FIRM, PLLC, Durant, Oklahoma, for Plaintiffs/Appellants

Michael K. Avery, MCAFEE & TAFT, A PROFESSIONAL CORPORATION, Oklahoma City, Oklahoma, for Defendant/Appellee

DEBORAH B. BARNES, PRESIDING JUDGE:

¶1 In this breach of contract action, Larry Davidson and Jane Davidson appeal from the trial court's grant of summary judgment to Pointe Vista Development, LLC. Based on our review of the summary judgment record and applicable law, we affirm.

BACKGROUND

¶2 The parties are largely in agreement about the material facts. The Davidsons lease certain property (subject lease) from the State of Oklahoma located in the Lake Texoma State Park area and upon which they previously operated a fun park. The record indicates the Davidsons' subject lease expires with Oklahoma on October 17, 2021. Pointe Vista contracted to purchase property owned by the State of Oklahoma through the Department of Tourism (Tourism) as part of a planned resort development and, as part of that planned development, agreed to purchase or contract to purchase certain leases owned by vendors, including the subject lease owned by the Davidsons. The property Pointe Vista sought to purchase from Tourism is referenced by the parties as the Leased Premises. In April 2008, Pointe Vista and the Davidsons and Tourism executed an "Agreement Concerning Concessionaire Agreement" (2008 Agreement) in which Pointe Vista agreed to purchase the subject lease from the Davidsons and the fun park and its assets (lease assets) under certain conditions. Paragraph (C)(1) of the 2008 Agreement states, in part, as follows:

> Agreement to Assign the Lease and Transfer the Assets; Non Assumption of Liabilities. In exchange for a cash payment by [Pointe Vista] of $800,000 plus $2800.00 per month from Effective Date (as defined in Section 15 of this Agreement[1]) to Closing (the "Purchase Price") of which upon the Effective Date (a) subject to the provisions of paragraph 5,[2] [Pointe Vista] will pay the Davidsons $40,000 which amount shall be a nonrefundable advance payment of a portion of the Purchase Price (the "Advance Payment"), and (b) [Pointe Vista] will place in escrow $40,000 (5% of the initial purchase price of $800,000 which is referred herein, as the "Earnest Money") . . . . At the Closing, the Davidsons shall upon payment of full purchase price ($800,000, less

the Advance Payment and the Earnest Money, plus $2,800.00 per month from Effective Date to the Closing) assign all of their right, title and interest in and to the [subject lease and lease assets] . . . .

¶3 "Closing" is defined in the 2008 Agreement as follows:

> The closing date of this contract (the "Closing Date") shall be prior to or in conjunction with the closing of the purchase of the land from Tourism by [Pointe Vista] as set out in paragraph B above. The parties acknowledge and agree that [Pointe Vista] may, in its sole discretion, elect to accelerate the purchase and sale contemplated hereby prior to the acquisition of the Leased Premises, in which case the [subject lease] shall be assigned and [the subject assets] transferred. Despite any representations to the contrary, the parties intend that this contract shall close on or before December 31, 2009. In the event [Pointe Vista] shall wrongfully fail to close on or before December 31, 2009, the parties agree that the Davidsons shall be entitled to terminate the contract and retain the Advance Payment and the Earnest Money as full and complete liquidated damages, not as a penalty. In the event, however, the closing under this contract has not occurred by December 31, 2009 as the closing on the acquisition of the Leased Premises contemplated by paragraph B above has not occurred by such date, other than on account of a wrongful refusal to close by [Pointe Vista], the parties agree that [Pointe Vista] may, at that time, elect to terminate this contract (in which event the Earnest Money shall be returned to [Pointe Vista] but the Davidsons may retain the Advance Payment as that payment is nonrefundable), or extend the Closing Date to a date not later than December 31, 2010. In the event of a failure of closure on or before December 31, 2010, the Davidsons shall be entitled to terminate this contract and retain the Advance Payment and the Earnest Money as full and complete liquidated damages, not as a penalty. At the Closing, the parties shall take such actions and deliver such documents as may be reasonabl[y] necessary to close the purchase and sale . . . .

¶4 Paragraph (C)(8) of the 2008 Agreement, entitled Notices, states: "All notices or other communications required or contemplated under [the 2008] Agreement shall be in writing and shall be deemed to have been given when" hand delivered, delivered by mail, or delivered by recognized overnight delivery service within designated periods.

¶5 Pointe Vista's acquisition of the Leased Premises took longer than contemplated. Thus, in August 2010, the parties executed an amendment (First Amendment) to the 2008 Agreement "to accommodate for such delays and to memorialize the parties' agreement with respect to certain payments to be made by [Pointe Vista] to the Davidsons in connection with this First Amendment and to otherwise amend the [2008] Agreement in certain other respects." In paragraph 1, entitled Consideration for Execution of the First Amendment; Termination by [Pointe Vista], the First Amendment provides:

> In exchange for the execution of the First Amendment, (a) [Pointe Vista] authorizes the release of the Earnest Money from escrow, and (b) agrees to pay the Davidsons $2,800 per month commencing in January 2011, which payments shall continue so long as the [2008] Agreement, as amended by this First Amendment, remains in effect and shall be made on or before the tenth (10th) day of every month (collectively, the "Monthly Cash Payments"). At any time after December 31, 2010, [Pointe Vista] may elect to terminate the [2008] Agreement, as amended by this First Amendment, by giving notice of such election to the Davidsons, at which time neither party shall have any further rights or obligations under the [2008] Agreement, as amended by the First Amendment, and the Davidsons shall be entitled to retain the Advance Payment, the Earnest Money and any Monthly Cash Payments made by [Pointe Vista] through the date of such termination.

¶6 In addition to other amendments of the 2008 Agreement, the First Amendment further provides that "[f]or purposes of this Agreement, the 'Purchase Price' shall be equal to $800,000 plus $85,243 (which represents $2,800 per month from June 18, 2008 through December 31, 2010) plus the sum of the Monthly Cash Payments payable though the Closing." The First Amendment further provides the amount of the Purchase Price at Closing would be equal to the Purchase Price less the Advance Payment of $40,000, the Earnest Money and

Monthly Cash Payments made through Closing.

¶7 The First Amendment also amended "Closing" as follows: "[The Closing Date] shall be prior to or in conjunction with the closing of the purchase by [Pointe Vista] of the Leased Premises from Tourism as set out in paragraph B above. The Closing shall occur on any day designated by [Pointe Vista] on or after December 31, 2010 but prior to December 31, 2013 provided that [Pointe Vista] gives the Davidsons at least thirty (30) days advance notice of such Closing Date. . . ." The First Amendment stipulated that except for the amendments made by the First Amendment, the "[2008] Agreement is in full force and effect according to its terms and conditions."

¶8 In January 2014, the parties executed another amendment (Second Amendment) to the 2008 Agreement as amended by the First Amendment, and the parties again expressly acknowledged their

> desire to move back the Closing Date reflected in the [2008 Agreement as amended by the First Amendment] to accommodate for [delays in Pointe Vista's acquiring of title to the Leased Premises] and to memorialize the parties' agreement with respect to certain payments to be made by [Pointe Vista] to the Davidsons in connection with this Second Amendment and to otherwise amend the [2008 Agreement as amended by the First Amendment] in certain other respects.

The Second Amendment states that in consideration for execution of the Second Amendment Pointe Vista agrees to pay the Davidsons $2,800 per month beginning in January 2014 "which payments shall continue so long as the [2008 Agreement as amended by the First Amendment], as amended by this Second Amendment, remains in effect . . . (which payments shall be 'Monthly Cash Payments' as defined in the First Amendment)." Similar to the consideration paragraph in the First Amendment, the Second Amendment provides:

> At any time after the Second Amendment Effective Date, [Pointe Vista] may elect to terminate the [2008 Agreement as amended by the First Amendment], as amended by this Second Amendment, by giving notice of such election to the Davidsons, at which time neither party shall have any further rights or obligations under the [2008 Agreement as amended by the First Amendment] as amended by the Second Amendment, and the Davidsons shall be entitled to retain the Advance Payment, the Earnest Money and any Monthly Cash Payments made by [Pointe Vista] through the date of such termination.

¶9 As to Closing, the Second Amendment provides:

> [The Closing Date] shall be prior to or in conjunction with the closing of the purchase by [Pointe Vista] of the Leased Premises from Tourism as set out in paragraph B above. The Closing shall occur on any day designated by [Pointe Vista] on or after December 31, 2013 but prior to December 31, 2016 provided that [Pointe Vista] gives the Davidsons at least thirty (30) days advance notice of such Closing Date. . . .

The Second Amendment stipulated that except for the amendments made by the Second Amendment, the "[2008 Agreement as amended by the First Amendment] is in full force and effect according to its terms and conditions."

¶10 No amendment to the Notice provision of the 2008 Agreement was made in either the First Amendment or the Second Amendment and each contain the statement that except as amended, "the [2008] Agreement is in full force and effect according to its terms."

¶11 On September 5, 2018, the Davidsons filed their petition alleging Pointe Vista breached the terms of the 2008 Agreement as amended. The Davidsons allege Pointe Vista failed to close on or by December 31, 2016, pursuant to the Second Amendment, claim they have been damaged and request specific performance of the 2008 Agreement or, in the alternative, a judgment in an amount equal to the damages they sustained as a result of Pointe Vista's failure to close.

¶12 In its answer, Pointe Vista, among other denials, denies it is in breach of the contract because it did not close by December 31, 2016, and denies the Davidsons have suffered any damages. Among its alleged defenses, Pointe Vista alleges the 2008 Agreement as amended was "terminable at will by Pointe Vista and this precludes a judgment in favor of the Davidsons."

¶13 Pointe Vista moved for summary judgment.[3] As to specific performance, Pointe Vista argues it is a well-established rule that equity will not require a party who has the absolute right to terminate a contract to specifically perform that contract: "Because Pointe Vista had the right to terminate the Agreement,[4] the Davidsons 'enjoy[ed] no legally enforceable right to performance' by Pointe Vista." As to the Davidsons' alternative theory of recovery for damages for breach of contract, Pointe Vista argues that, again, this argument is unavailing because there can be no breach of contract where one has an absolute right to terminate the contract. Pointe Vista argues it can demonstrate it terminated the contract but it is not required to do so and whether it can demonstrate it terminated the contract does not change the analysis for purposes of summary judgment. It relies on the following reasoning:

> It is the settled rule that damages for the refusal to perform a contract which is terminable on specified conditions are limited to the amount which the defendant would have been required to pay upon an election to terminate. Since the contract here was terminable by either party without compensation to the other, the damage sustained by the plaintiff on account of the defendant's refusal to perform the contract amounted to nothing at all.[5]

¶14 While Pointe Vista relies on its right to terminate and its ability, if needed, to show it did terminate the 2008 Agreement, the Davidsons argue Pointe Vista does not address the stipulation in the First Amendment and Second Amendment that it was required to give "notice of [its] election" to terminate. They further argue the default provision of the 2008 Agreement states that in the event either party "fail[s] to perform any of their obligations under this Agreement owed to the other party, the nondefaulting party shall have all rights and remedies provided for in equity or law . . . ."[6]

¶15 The Davidsons rely on *Osborn v. Commanche Cattle Industries, Inc.*, 1975 OK CIV APP 67, 545 P.2d 827, in which the service contract between the parties "unquestionably permitted either party to terminate at any time 'by giving thirty (30) days advance notice.'" *Id*. ¶7. In that case, it was uncontroverted that formal notice had never been given by the defendant to the plaintiff, but the defendant argued notice was given because the plaintiff at some point acquired actual notice of termination. In holding "the trial court correctly concluded that the option to terminate was never exercised and that [the plaintiff] had a cause of action for total breach of contract," the *Osborn* Court reasoned:

> When businessmen bargain for an option to terminate their contractual relationship, each is entitled to expect that the other will either perform or terminate exactly as agreed. They are entitled also to expect that they will be compensated for the breach of such a contractual obligation. Accordingly, the weight of authority is clearly to the effect that notice to terminate a contract must be in accordance with the contract's express terms. No particular form of notice is prescribed by the contract in the instant case but it clearly requires thirty days advance notice. At no time after the execution of the contract did [the defendant] give such advance notice.

Osborn, ¶ 8 (citation omitted). The Davidsons argue that in this case while no period of notice is provided, the failure to give that notice was a total breach of the 2008 Agreement and amendments and thus they are entitled to "all rights and remedies provided for in equity or law[.]"

¶16 A hearing on the motion was held at the conclusion of which the court announced its decision to grant summary judgment to Pointe Vista because "as a matter of law [the Davidsons] can't get anything greater than the contract would provide. And under the terms of the contract this Court finds that they can't force closing."

¶17 From the trial court's entry of its order granting summary judgment in favor of Pointe Vista, the Davidsons appeal.

STANDARD OF REVIEW

> The appellate standard of review of a summary judgment is de novo. The evidentiary materials will be examined to determine what facts are material and whether there is a substantial controversy as to any material fact. All inferences and conclusions to be drawn from the materials must be viewed in a light most favorable to the nonmoving party. Even when the facts are not controverted, if reasonable persons may draw different conclusions from the facts summary judgment must be denied. Summary judgment is proper only if the record reveals uncontroverted material

facts failing to support any legitimate inference in favor of the nonmoving party.

Tiger v. Verdigris Valley Elec. Coop., 2016 OK 74, ¶ 13, 410 P.3d 1007 (citations omitted).

ANALYSIS

¶18 During the hearing on the motion, the parties more fully explained the basis of their legal arguments, particularly with respect to the *Osborn* Court's reasoning and its applicability to this case. The parties agree that the *Osborn* Court determined the defendant in that case was in breach of the parties' contract because while the contract was terminable at will, it required notice of termination and no such notice was given. The Court further held, however, that the plaintiff was only entitled to the damages he incurred during the thirty-day notice period, not the full three-year contract term because the contract was terminable at will.

¶19 The *Osborn* Court explained:

> The courts of other jurisdictions are virtually unanimous in holding that breach of a contract terminable at any time upon notice entitles the aggrieved party to recover only those net profits which he could have earned during the notice period; he may not recover profits for the entire term of the contract.
>
> The courts have advanced different reasons for so narrowly circumscribing the period of recovery. . . . [Some] rely on the more persuasive reasoning . . . that the plaintiff should not "by reason of the defendant's breach, acquire rights greater than those which the contract gave it." . . . [T]he concern has been that a party to a contract terminable by either party upon notice is never assured of performance for any time longer than the period of notice for which he bargained.
>
> The law of damages permits recovery of lost profits to protect the injured promisee's "expectation interest," his prospect of net gain from the contract. This interest is given legal protection to achieve the paramount objective of putting the promisee injured by the breach in the position in which he would have been had the contract been performed. But the protection of the promisee's expectation interest extends no further; he may not recover more than the amount he might have gained by full performance. We think that the only legally protectable expectation interest in the party to a contract terminable by either party upon notice is the prospect of profit over the length of the notice period. Since his assurance of performance never extends beyond the length of the notice period neither does his prospect of net gain. And allowing him under such circumstances to recover the profit he purportedly could have gained over the maximum life of the contract would be contrary to the whole purpose of permitting recovery of lost profits.

1975 OK CIV APP 67, ¶¶ 11-13 (citations omitted).

¶20 As explained by the Oklahoma Supreme Court in *Florafax International, Inc. v. GTE Market Resources Inc.*, 1997 OK 7, 933 P.2d 282, the "sound" rule applied in *Osborn* was essentially the rule codified in 23 O.S. 1991 [now 2011] § 96 that "no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides[.]" 1997 OK 7, ¶¶ 34, 36. The Oklahoma Supreme Court explained the rule applied in *Osborn*

> because full or complete performance under the contract could have been supplied by defendant simply giving the agreed-to notice and, therefore, plaintiff's expectation interest could have been no greater than the prospect of profit over the length of the notice period. In that plaintiff was never assured of performance by the breaching party beyond the length of the notice period his prospect of net gain, likewise, could never extend beyond this period of time. Plaintiff could not recover more than thirty (30) days lost profits because he could not recover more in profits than he might have made from full performance. In other words, in *Osborn* it was absolutely certain plaintiff could not establish lost profits for any greater period of time because the defendant had an absolute right to terminate the contract upon giving the agreed notice and exercise of this right would have provided full performance on the defendant's part.

Florafax, ¶ 36 (citation omitted).

¶21 Pointe Vista argues it did terminate the 2008 Agreement as amended but it offers no proof of what it did to terminate because, it argues, what it did to terminate is irrelevant; as

a matter of law, it has the right to terminate at any time. Pointe Vista's argument is that it terminated the 2008 Agreement and that even if it did not give notice to the Davidsons of termination as required by the First Amendment and Second Amendment, it had an absolute right to terminate at any time. Thus, it argues, it is not in breach. It further argues, in effect, that even if it is in breach because it did not give notice of its intent to terminate, if it fully complied – that is, gave notice of its intent to terminate – the Davidsons have no expectation interest, no damages.

¶22 The Davidsons, on the other hand, argue the breach was Pointe Vista's failure to close on December 31, 2016, without having given them notice of its election to terminate the 2008 Agreement as amended. Thus on that date, when no closing occurred and no notice was given by Pointe Vista that it elected to terminate, they argue their full expectation interest of specific performance accrued and Pointe Vista's right to terminate ended. The Davidsons, thus, appear to argue that "termination" is something other than or different from "closing."

¶23 While the Davidsons' argument appears tenable, it overlooks another provision of the 2008 Agreement as amended that defeats their argument. For purposes of the summary judgment record, we must assume Pointe Vista did not give the Davidsons notice of its intention to elect to terminate and it did not close the purchase on December 31, 2016. We are, however, also provided no evidentiary materials from the Davidsons that they gave the required 10-day notice to Pointe Vista and "opportunity to cure" its "fail[ure] to perform any of [its] obligations under this Agreement[.]"[7] They do not allege or argue that they gave such notice.[8] Thus, contrary to the Davidsons' argument that their full expectation interest accrued once closing arrived and Pointe Vista did not close, that full expectation interest did not accrue until notice of the failed obligation and opportunity to cure occurred pursuant to the terms of the 2008 Agreement as amended. By the terms of the 2008 Agreement, Pointe Vista's right to terminate at any time was not automatically extinguished upon the occurrence of a failure to perform an obligation it owed to the Davidsons. By the terms of the 2008 Agreement, when Pointe Vista failed to give notice and the closing date arrived and Pointe Vista failed to close, the Davidsons had all the rights and remedies provided for in equity or law "provided" something else occurred.

¶24 Summary judgment was properly granted to Pointe Vista because the record reveals uncontroverted material facts that fail to support any legitimate inference in favor of the Davidsons. *Tiger v. Verdigris Valley Elec. Coop.*, 2016 OK 74, ¶ 13. In our view, it would be unreasonable to infer the Davidsons were unaware of what Pointe Vista would do if it had been given such notice and the opportunity to cure. If the breach was Pointe Vista's failure to give notice of the intent to elect to terminate, it is unreasonable to infer it would not have cured the failure within its contract period to cure the failure by giving that notice. If the breach was its failure to close on a date certain without having given that notice of its election to terminate, as urged by the Davidsons, it is unreasonable to infer Pointe Vista would not have cured that failure within its contract period to cure the failure by exercising its right to give notice of its intent to terminate and thus not close. The 2008 Agreement as amended gave Pointe Vista the right to terminate "at any time"; nothing in the parties' agreement excludes the date of closing as coming within that time frame.[9]

¶25 We are led to conclude that whether Pointe Vista failed to give notice to terminate or failed to close without having given notice to terminate, that as of the date of closing, Pointe Vista retained its right to terminate and the Davidsons' contract right was not enlarged to extinguish that right. As of that date, the Davidsons were not entitled to specific performance of the agreement or money damages for Pointe Vista's failure to close. Consequently, we conclude the trial court properly granted summary judgment to Pointe Vista.

CONCLUSION

¶26 For the reasons discussed herein, we conclude the trial court correctly determined that Pointe Vista was entitled to judgment as a matter of law because its right to terminate the contract at any time was not extinguished on the date of closing and while Pointe Vista did not give notice of termination, the Davidsons were not entitled to a right greater than that which the contract gave them had Pointe Vista given that notice. Accordingly, we affirm.

¶27 **AFFIRMED**.

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

DEBORAH B. BARNES, PRESIDING JUDGE:

1. Paragraph (C)(15) provides: "Effective Date. The 'Effective Date' for purposes of this Agreement shall be the date on which the Tourism Agreement has been fully executed." Pursuant to paragraph B, the Tourism Agreement is an agreement entered into by Pointe Vista and the State "pursuant to which, among other things, [Pointe Vista] contracted to purchase the Leased Premises under the Lease." The Tourism Agreement was apparently executed the same day as the 2008 Agreement.

2. Paragraph (C)(5), entitled Default, provides:

> If [Pointe Vista] or the Davidsons fail to perform any of their obligations under this Agreement owed to the other party, the nondefaulting party shall have all rights and remedies provided for in equity or law provided that such nondefaulting party shall give the defaulting party ten days notice and opportunity to cure such failure. If the Davidsons default, the Advance Payment of $40,000 and Earnest Money paid under paragraph [(C)(1)] as a nonrefundable advance payment will be converted into a refundable advance and immediately returned to [Pointe Vista].

3. According to the parties, Pointe Vista had previously filed a motion to dismiss, but the trial court denied the motion and gave the Davidsons an opportunity to conduct discovery. The only evidentiary materials attached to the summary judgment motion and the Davidsons' response, however, are the 2008 Agreement and the First Amendment and Second Amendment attached to Pointe Vista's motion.

4. We understand Pointe Vista to be referencing the 2008 Agreement as amended. The 2008 Agreement gave Pointe Vista the right to accelerate, but the right to terminate was qualified as stated in paragraph 4 (Closing). That section provides, in part, that Pointe Vista could terminate if it had not closed on the Leased Premises with Tourism, by the Closing Date of December 31, 2009, and if Pointe Vista had not wrongfully refused to close on the Leased Premises.

5. *Chatham Plan, Inc. v. Clinton Trust Co.*, 246 A.D. 498, 500 (N.Y. App. Div. 1936) (citations omitted).

6. The First Amendment made a change to the 2008 Agreement default provision, but not to the provision upon which the Davidsons rely.

7. 2008 Agreement ¶ 5 (emphasis added).

8. We are not here concerned with the failure to give Pointe Vista notice as evidence of a breach of contract by the Davidsons; thus, we are not deciding a question of whether their breach is excused by Pointe Vista's breach. *See, e.g., Anderson v. Pickering*, 1975 OK CIV APP 42, ¶ 19, 541 P.2d 1361 ("The plaintiffs, having failed to perform the condition in the contract cannot now complain that the defendants breached. A party to a contract cannot put the other party in default by his own failure to perform. *Padberg v. Rigney,* [1950 OK 169,] 227 P.2d 661."). The question is whether the 2008 Agreement as amended was still in effect on the date of closing and Pointe Vista's right to terminate and right to cure any failure of obligations it owed to the Davidsons were still in effect on that date.

9. We also note and agree with the Davidsons' observation that Pointe Vista's failure to give notice of its election to terminate is factually distinguishable from the circumstances in *Chatham*, 246 A.D. 498, a case upon which Pointe Vista relies. However, that factual difference leads to no different result. In *Chatham*, as quoted by Pointe Vista, the court reasoned:

> The realist must at once feel, even if he does not see, that there is something wrong in such a paradox [the plaintiff's claim that the contract was repudiated and not terminated so rules governing terminable at will contracts did not apply], especially when it is considered that the consequences to the plaintiff of a refusal to recognize the contract were exactly the same as an election to terminate. The reasons for the defendant's refusal to perform are not important. What is important is that the defendant gave notice to the plaintiff that it would not undertake to act as trustee and that concededly it had that right. It is the settled rule that damages for the refusal to perform a contract which is *terminable on specified conditions are limited to the amount which the defendant would have been required to pay upon an election to terminate.* Since the contract here was terminable by either party without compensation to the other, the damage sustained by the plaintiff on account of the defendant's refusal to perform the contract amounted to nothing at all.

246 A.D. at 500 (emphasis added) (citations omitted). "Where a contract is terminable at any time on notice and it is terminated without notice, the damages that the aggrieved party may recover are limited to the notice period." 25 C.J.S. Damages § 124 (footnotes omitted). Here, Pointe Vista's right to give notice to elect to terminate "at any time" continued through the closing date and its ability to fully perform – to give notice of the election – was not extinguished on the closing date.

2020 OK CIV APP 57

GRILLO VENTURES, LLC, Plaintiff, vs. THUY THU THI VU, ROBERT L. FINLEY, DEBORAH, A. FINLEY, FAN DISTRIBUTION COMPANY, AND CAPITAL ONE BANK (USA), NA, Defendants, THUY THU THI VU, Third Party Plaintiff/Appellant, vs. FORREST "BUTCH" FREEMAN, OKLAHOMA COUNTY TREASURER, BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF OKLAHOMA, Third-Party Defendants/Appellees.

Case No. 118,666. October 2, 2020

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE CINDY H. TRUONG, JUDGE

AFFIRMED

Edward F. Simmons, HUFF, SIMMONS & DAVILA, Oklahoma City, Oklahoma,

B.J. Brockett, Oklahoma City, Oklahoma, for Third-Party Plaintiff/Appellant

Rodney J. Heggy, Oklahoma City, Oklahoma, for Third-Party Defendants/Appellees

Bay Mitchell, Presiding Judge:

¶1 The third-party plaintiff, Thuy Thu Thi Vu, seeks to recover, via writ of mandamus, the excess proceeds of a tax sale that the Oklahoma County Treasurer erroneously paid to a prior owner. We find that, although the Treasurer may be liable to Ms. Vu for negligently paying the prior owner, and that the prior owner may be liable for its apparently fraudulent conduct, Ms. Vu has no clear legal right to payment of the excess proceeds from the county because those funds are no longer in the hands of the county. "[M]andamus will not lie to compel performance of the impossible." *Town of New Wilson v. Davis,* 1938 OK 516, ¶7, 83 P.2d 399, 400.

BACKGROUND

¶2 The pertinent facts of this case are undisputed and, we hope, unique. In 2002, Robert and Deborah Finley, who were defendants below but are not parties to this appeal, purchased a vacant lot in Oklahoma City for the then-outstanding delinquent taxes, being $388.84. The lot is located near the present-day Plaza District, northwest of downtown Okla-

homa City. The Finleys never developed the lot and failed to pay real estate taxes from 2015 through 2018.[1] A tax sale was set for June 10, 2019. The Finleys were sent notice of the sale, via certified mail, on April 4, 2019.

¶3 On April 20, 2019, barely a month before the scheduled tax sale and just sixteen days after the Finleys were sent notice of the sale, the Finleys sold the lot via warranty deed to Ms. Vu. According to the record, the sale appears to have been a rather informal affair, without any title search conducted by Ms. Vu. According to Ms. Vu's answer, she paid $38,000 in cash and cash equivalents for the property in exchange for the Finleys' warranty deed. Ms. Vu claims the Finleys told her nothing of the outstanding liens or pending tax sale. The warranty deed was duly recorded on May 20, 2019, however, Ms. Vu did not notify the county treasurer's office of the sale, attempt to pay delinquent taxes, or satisfy the outstanding lienholders.

¶4 The tax sale went ahead as scheduled on June 10, 2019. The original plaintiff, Grillo Ventures LLC, also not a party to this appeal, was the high bidder, paying $83,000 for the still-vacant lot. The county executed a resale deed in Grillo's favor on the date of the tax sale, and it was recorded the following day. The sum of $986.35 was withheld by the county for the outstanding taxes and other expenses related to the sale, leaving $82,013.65 in the hands of the county as excess proceeds of the sale.

¶5 It is this $82,013.65 in excess proceeds that forms the basis of this appeal. By statute, the county is to hold those proceeds in a separate fund for "the record owner," as follows:

> When any tract or lot of land sells for more than the taxes, penalties, interest and cost due thereon, the excess shall be held in a separate fund for the record owner of such land, as shown by the county records as of the date said county resale begins, to be withdrawn any time within one (1) year. No assignment of this right to excess proceeds shall be valid which occurs on or after the date on which said county resale began. At the end of one (1) year, if such money has not been withdrawn or collected from the county, it shall be credited to the county resale property fund.

68 O.S. Supp. 2014 §3131(C).

¶6 Nineteen days after the sale, Robert Finley appeared at the county treasurer's office and, seemingly fraudulently, asked the county to pay him the funds. He executed an affidavit on county letterhead, apparently prepared by the county, stating he was "the former owner" and that he should be paid the excess proceeds from the tax sale of "my property." The county, not knowing anything of the sale to Ms. Vu and apparently not performing any meaningful title check of its own, paid Robert Finley the full $82,013.65 on the same day he requested the funds.

¶7 By August 2019, Grillo had discovered Ms. Vu's deed and filed a quiet title action against her, the Finleys, and the outstanding lienholders. Ms. Vu answered and filed crossclaims against the Finleys for fraud and breach of warranty. Ms. Vu also filed a third-party petition against the Oklahoma County Treasurer and the Commissioners of the County of Oklahoma (collectively, "the county") seeking a writ of mandamus requiring the county to pay her the excess proceeds pursuant to §3131. In the alternative, Ms. Vu sought a money judgment against the county for $82,013.65, plus interest, costs, and attorney fees.

¶8 Ms. Vu did not challenge below, and does not challenge on this appeal, the adequacy of the proceedings leading to Grillo's tax deed. An agreed order quieting title in Grillo was entered below. After Ms. Vu dismissed without prejudice her crossclaims against the Finleys, only her third-party claims against the county remained.

¶9 The county filed a motion to dismiss these claims, arguing that the claim for mandamus failed as a matter of law and that Ms. Vu's alternative request for a money judgment failed for want of compliance with Oklahoma's Governmental Tort Claims Act. Ms. Vu responded and defended her request for a writ of mandamus but conceded she had not complied with Oklahoma's Governmental Tort Claims Act.

¶10 The trial court entered judgment against Ms. Vu on both claims, denying her request for a writ of mandamus and dismissing her "tort claim"[2] without prejudice to refiling. Ms. Vu timely appealed the denial of her request for mandamus, but does not challenge the court's dismissal of her alternative claim for a money judgment.

ANALYSIS

¶11 Our review of an order of dismissal is *de novo. Miller v. Miller*, 1998 OK 24 ¶15, 956 P.2d 887. The only question before us is the propriety of the trial court's denial of Vu's request for a writ of mandamus. Before such a writ may issue, a court must find (1) a clear legal right vested in the party seeking mandamus, (2) the governmental official's refusal to perform a plain legal duty which does not involve the exercise of discretion, and (3) the inadequacy of other relief. 12 O.S. 2011 §§1451-62; *Price v. Bd. of Cty. Comm'rs of Pawnee Cty*., 2016 OK 16, ¶6, 371 P.3d 1089, 1091. "Mandamus is proper only to compel an officer to perform a ministerial duty required by law." *Melton v. City of Durant,* 1974 OK 56, ¶10, 521 P.2d 1372, 1374.

¶12 From its general order of denial, it is not clear which element or elements of mandamus the court below found lacking. Although we ultimately determine that Ms. Vu cannot show a clear legal right to the funds at issue, see ¶¶17-20 below, we feel compelled to note, for the benefit of both county officials who are responsible for paying excess funds under §3131(C) and the parties entitled to receive those funds, that we find the county's interpretation of the statute unpersuasive.

¶13 Most notably, we disagree with the county's assertion that "the record owner" as used in §3131(C) necessarily references ownership according to the county assessor's records on the date of the sale. The primary support the county offers for this interpretation is by referencing the legislature's definition of "record owner" in 68 O.S. 2011 §3127, which relates to the contents of the notice of the tax sale and mandates to whom the county must send the notice. Section 3127 first notes that the notice of sale must contain "the name of the record owner of said real estate as of the preceding December 31 or later *as shown by the records in the office of the county assessor ...." Id*. (emphasis added). Section 3127 later requires that the treasurer mail the notice "to the record owner of said real estate, *as shown by the records in the county assessor's office*, which records shall be updated based on real property conveyed after October 1 each year ...." *Id*. (emphasis added). The county points to this definition of "the record owner" as controlling who is "the record owner" for purposes of §3131(C). However, for several reasons, we do not agree with the county's interpretation.

¶14 First, we note that the language of §3131(C) is different than that of §3127. Section 3131 does not reference the records of the county assessor's office, but references "the county's records." Although this could be a reference to the county assessor's records, it could also be a reference to the treasurer's records, or, we think most likely, the records of the county clerk's office. After all, it is the county clerk who is tasked with maintaining the vast majority of those records evidencing ownership of real property. *See* 68 O.S §225, §§284-300. Without further clarifying which office's records must be reviewed, we find "the record owner" as used in §3131(C) to be ambiguous. Absent any further direction from the text, we think the most logical reading of "the record owner" in §3131(C) means the owner according to the records of the county clerk's office at the time of the sale. In this case, all parties agree that was Ms. Vu.

¶15 The county also objects to this definition because it would require the treasurer to perform a title check prior to disbursing excess funds from county tax sales. Perhaps so. However, we do not find this fact to be pertinent in determining what was meant by "the record owner" in §3131(C). Further, we find this objection somewhat disingenuous as the treasurer is already required to check the county clerk's records prior to the sale in order to determine if there are any mortgagees entitled to notice. See 68 O.S. 2011 §3127 (requiring the treasurer to notify "all mortgagees of record"). The treasurer here admits it must perform some check of the county records prior to the sale, but objects to a reading of the statute that would "require the Treasurer to engage a title search firm to repeat the search every hour, every day, every week or any other month before the Tax Resale auction ...." However, reading "the record owner" and "the county records" in §3131(C) to require the treasurer to check the records of the county clerk's office to determine if there has been any sale of the property after the issuance of the notice of sale, but before issuing a check for the excess proceeds of the sale, places no such burden on the treasurer. It requires only a second check prior to the issuance of what is (as this case shows), a sometimes substantial sum and would all but eliminate cases such as this one, where the prior owner is permitted to claim the excess proceeds by fraud.

¶16 Simply put, if the legislature had intended "the county records" in §3131(C) to reference the records of the county assessor's office, it could have said so, as it did in §3127. As the statute stands today, however, we believe the statute requires the treasurer to pay the excess proceeds of the sale to "the record owner" as determined by consulting the records of the county clerk's office at the time of the sale.

¶17 Unfortunately for Ms. Vu, the analysis to this point is merely *obiter dicta*. That is because, in this case, under the undisputed record as presented below, Ms. Vu cannot show a clear legal right to the excess funds at issue because the county treasurer has already paid those funds to Robert Finley. The fund she asked the court below to require the county to turn over to her simply does not exist. Although we are not unsympathetic to Ms. Vu's position,[3] we are compelled to affirm the trial court's denial based on the simple fact that the funds Ms. Vu seeks to obtain are no longer in the hands of the county. "[M]andamus will not lie to compel performance of the impossible." *Town of New Wilson v. Davis*, 1938 OK 516,¶7, 83 P.2d 399, 400.

¶18 Although there are no reported cases directly on point, similar cases support this result. In *Rierdon v. Reder,* 1936 OK 824, 63 P.2d 751, for example, a purchaser paid a county treasurer for tax sale certificates for property located in the city of Ardmore. Per statute, the county treasurer paid the proceeds of the sale to the city treasurer, who deposited the money in a fund related to certain street improvement districts. The tax sale certificates were later determined to be invalid, and the purchaser sued the city treasurer for a refund of money paid for the now-defunct certificates. However, the city treasurer had used the money "to pay interest or bonds" prior to the adjudication of the invalidity of tax certificates. *Id.* ¶5. The purchaser argued that "it was the plain, mandatory duty of the defendant, the city treasurer, and the custodian of the fund, to refund and pay back to the plaintiff the amount paid into each of said street improvement districts. That if there was not sufficient amount on hand, the incoming revenue in said street improvement districts should be used to pay plaintiff's claim." *Id*. However, the Oklahoma Supreme Court affirmed the trial court's dismissal because the purchaser admitted in its petition that the city treasurer no longer held the funds requested. *Id*. ¶10 ("An examination of the petition herein shows that it not only fails to allege the money is being held by said treasurer, but is an admission that she does not retain the same.") *See also Commissioners of Land Office of Oklahoma v. Brunson,* 1935 OK 737, 51 P.2d 500 (holding that plaintiffs, who had succeeded in recovering the corpus of a trust fund previously held by the state, were unable to recover the interest via mandamus where the plaintiffs "wholly failed to prove the present existence of any sum of money representing interest on said trust fund ....").

¶19 In this case, Ms. Vu not only failed to allege that the county treasurer was holding the money but admits that the excess funds she seeks have already been paid, albeit erroneously, to Robert Finley. The trial court was, therefore, unable to order the county to pay those same funds to her. If Ms. Vu is to be made whole, she must seek a money judgment against the county for paying the wrong person, or against the Finleys themselves for their seemingly fraudulent conduct.

¶20 AFFIRMED.

SWINTON, V.C.J., concurs.

PEMBERTON, J., concurs specially.

¶1 Although I concur with the result, I respectfully take issue with the *obiter dicta,* namely the analysis regarding interpretation of 68 O.S. § 3131(C). The majority identifies as ambiguous the phrase, "the county records," and then provides as the interpretation "the most logical reading." The Oklahoma Supreme Court has provided principles to follow when interpreting ambiguous language in a statute, to wit:

> If the legislative intent cannot be ascertained from the language of a statute, as in the cases of ambiguity, we must apply rules of statutory construction. *YDF, Inc. v. Shlumar, Inc.*, 2006 OK 32, ¶ 6, 136 P.3d 656. The test for ambiguity in a statute is whether the statutory language is susceptible to more than one reasonable interpretation. The test for ambiguity in a statute is whether the statutory language is susceptible to more than one reasonable interpretation. *In Matter of J. L. M.*, 2005 OK 15, ¶ 5, 109 P.3d 336. Where a statute is ambiguous or its meaning uncertain it is to be given a reasonable construction, one that will avoid absurd consequences if this can be done without violating legislative intent. *Wylie v. Chesser*, 2007 OK 81, ¶ 19, 173 P.3d 64. In

ascertaining legislative intent, the language of an entire act should be construed with a reasonable and sensible construction. *Udall v. Udall*, 1980 OK 99, ¶ 11, 613 P.2d 742. Statutory construction that would lead to an absurdity must be avoided and a rational construction should be given to a statute if the language fairly permits. *Ledbetter v. Oklahoma Alcoholic Beverage Laws Enforcement Comm'n*., 1988 OK 117, ¶ 7, 764 P.2d 172. The legislative intent will be ascertained from the whole act in light of its general purpose and objective considering relevant provisions together to give full force and effect to each. *Keating v. Edmondson*, 2001 OK 110, ¶ 8, 37 P.3d 882. Any doubt as to the purpose or intent of a statute may be resolved by resort to other statutes relating to the same subject matter. *Naylor v. Petuskey*, 1992 OK 88, ¶ 4, 834 P.2d 439. This Court will not limit consideration to one word or phrase but will consider the various provisions of the relevant legislative scheme to ascertain and give effect to the legislative intent and the public policy underlying the intent. *YDF, Inc.*, 2006 OK 32, ¶ 6, 136 P.3d 656. Legislative purpose and intent may also be ascertained from the language in the title to a legislative enactment. *Naylor*, 1992 OK 88 ¶ 4, 834 P.2d 439; *Independent School District No. 89 of Oklahoma County v. Oklahoma City Federation of Teachers, Local 2309 of American Federation of Teachers*, 1980 OK 89, ¶ 17, 612 P.2d 719.

McIntosh v. Watkins, 2019 OK 6, ¶ 4, 441 P.3d 1094, 1096.

¶2 As indicated by the *McIntosh* Court, application of the rules of statutory construction is mandatory when dealing with an ambiguity. Here, the majority identifies an ambiguity and provides resolve without having fully analyzed the ambiguity within the required framework. If we are to resolve an ambiguity, we must fully analyze the same using the interpretative tools available. I respectfully submit that was not done here. However, because the majority's identification of an ambiguity and analysis thereof do not impact the outcome – that the third-party plaintiff, Thuy Thu Thi Vu, is not entitled to a writ of mandamus – further analysis of Section 3131 is not warranted.

Bay Mitchell, Presiding Judge:

1. Two other judgment liens, totaling $11,692.70 and held by the other two defendants that are not parties to this appeal, had also been filed against the property. Those liens were extinguished during the proceedings below and are not a part of this appeal.

2. Ms. Vu did not use the word "tort" when making her alternative claim for a money judgment against the city. This characterization was first pressed by the county in its motion to dismiss and carried forward into the trial court's dismissal. It is not clear from the record that Ms. Vu's alternative claim for a money judgment sounded in tort and we make no such pronouncement here.

3. Of course, our sympathy for Ms. Vu is tempered by the facts that she (1) paid $38,000 in cash for property without performing any sort of due diligence, (2) could have redeemed the lot at any time before the execution of the tax deed by tendering the delinquent taxes to the county, and (3) could have demanded the excess funds from the county at any time prior to the county's payment of those funds to Robert Finley.

On that last point, had the county refused payment, and the funds were still in the hands of the county, her quest for a writ of mandamus would have been successful. *Holliman v. Basden*, 1935 OK 708, ¶6, 47 P.2d 138, 138 ("[I]t is the duty of the county treasurer to hold money paid to him for the benefit of the holder of the tax sale certificate. The money in question could never become the property of the county. It was held in a separate fund, and never commingled with the county's funds, and it was clearly the duty of the county treasurer to pay said funds to the party who was entitled to receive the same. The record clearly discloses that the plaintiff below was entitled to receive the funds in question. This being true, mandamus was the proper remedy.")

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, November 5, 2020

RE-2019-377 — Clem Lamont Hawkins, Appellant, appeals from the revocation of three years of his seven year suspended sentence in Case No. CF-2013-7332 in the District Court of Oklahoma County, by the Honorable Natalie Mai, District Judge. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur in results; Hudson, J., concur; Rowland, J., concur.

F-2018-407 — Geomari Day'on Washington, Appellant, was tried by jury for the crimes of Count 1: First Degree Felony Murder; Count 3: Felon in Possession of a Firearm, After Former Conviction of Two or More Felonies; and Count 4: Obstructing an Officer, a misdemeanor, in Case No. CF-2016-503, in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment life imprisonment without the possibility of parole on Count 1: thirty years imprisonment on Count 3; and one year imprisonment in the county jail on Count 4. The Honorable William D. LaFortune, District Judge, sentenced accordingly and ordered the sentences to be served concurrently and granted Appellant credit for time served. From this judgment and sentence Geomari Day'on Washington has perfected his appeal. 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., Concurs.

Thursday, November 12, 2020

S-2019-947 — The State of Oklahoma charged Appellee Regina Montrice Yarbrough by amended Information in the District Court of Tulsa County, Case No. CF-2019-659, with one count of Child Neglect, in violation of 21 O.S. Supp.2014, § 843.5(C). The magistrate bound Yarbrough over on child neglect and Yarbrough filed a motion to quash the bind-over order and dismiss. The Honorable Sharon K. Holmes, District Judge, held a hearing, granted Yarbrough's motion to quash, and dismissed the case, finding insufficient evidence of child neglect. The State appeals. We exercise jurisdiction pursuant to 22 O.S.2011, § 1053. REVERSED and REMANDED for further proceedings. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

C-2019-768 — Christopher Lee Adams, Petitioner, was charged in Case No. CF-2017-6447, in the District Court of Oklahoma County, with eight counts of Lewd or Indecent Acts with a Child Under Sixteen Years of Age (Counts 1-4 and 7-10), two counts of Forcible Oral Sodomy (Counts 5-6) and one count of Rape in the First Degree (Count 11). Petitioner entered a negotiated plea of no contest to all eleven counts before the Honorable Timothy R. Henderson, District Judge. Judge Henderson accepted Petitioner's negotiated plea and sentenced him to twenty years imprisonment each on Counts 1-10 and to forty years imprisonment with all but the first twenty years suspended on Count 11. Judge Henderson imposed various costs and fees and ordered the sentences for all eleven counts to run concurrently. Judge Henderson also imposed a term of post-imprisonment supervision. Petitioner then filed a *pro se* motion to withdraw his pleas of no contest. After a hearing, Judge Henderson denied the motion to withdraw. Petitioner now seeks a writ of certiorari. The Petition for Writ of Certiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Lumpkin, J., Concur; Rowland, J., Concur.

F-2019-152 — Brande Lee Samuels, Appellant, was tried by jury for the crime of one count of Possession of a Firearm, After Former Conviction of Two or More Felonies, in Case No. CF-2016-1849, in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment four years imprisonment. The Honorable Dawn Moody sentenced accordingly and granted credit for time served. From this judgment and sentence Brande Lee Samuels, has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs in Results; Kuehn, V.P.J., Concurs in Results; Lumpkin, J., Concurs; Rowland, J., Concurs.

F-2018-1258 — Anthony Lee Pit, Appellant, was tried by jury and convicted of Count 1, robbery with a firearm, Count 2, burglary in the first degree, Count 3, assault while masked or in disguise, and Count 4, felon in possession of a firearm, in the District Court of Oklahoma County, Case No. CF-2018-1016. The jury sentenced Appellant to twenty years imprisonment in Count 1, ten years imprisonment in each of Counts 2 and 3, and five years imprisonment in Count 4. The trial court sentenced accordingly and ordered the sentences served concurrently, with credit for time service. The court also imposed a $500.00 fine and various fees. From this judgment and sentence Anthony Lee Pit has perfected his appeal. The judgment and sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs; Rowland, J., concurs.

F-2020-3 — James Wells Horsey, Appellant, was tried by jury for the crime of Possession of Child Pornography, in Case No. CF-2018-285 in the District Court of Comanche County. The jury returned a verdict of guilty and recommended as punishment Fifteen years in prison. The trial court sentenced accordingly. From this judgment and sentence James Wells Horsey has perfected his appeal. The Judgement and Sentence is AFFIRMED. The matter is REMANDED to the District Court and MANDATE ordered. Opinion by: Lumpkin, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs in Part/Dissents in Part; Hudson, J., Specially Concurs; Rowland, J., Specially Concurs.

COURT OF CIVIL APPEALS
(Division No. 1)
Thursday, November 5, 2020

118,252 — SACC Investments-Moyer 110-L.L.C., Plaintiff/Appellant, v. City of Edmond and the Edmond Planning Commission, Defendants/Appellees, and Brian Amy; Stacy Amy; Andy Donehue; Kindall Donehue; Rick Goranson; Lisa Goranson; Richard Kanaly; Pam Kanaly; Kristi Parker; Vince Parker; Shawn Smith; Jill Smith; Derek Smithee; and Laura Smithee, Intervenors/Appellees. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Thomas Prince, Judge. Plaintiff/Appellant SACC Investments-Moyer 10, LLC (Company) appeals a grant of summary judgment in favor of Defendants/Appellees the City of Edmond (City) and the Edmond Planning Commission (the Commission). Company sought approval of a Preliminary Plat (the Preliminary Plat) by the Commission for the development of a residential subdivision (the Property), which the Commission denied. Company brought suit to enjoin City from enforcing the Commission's denial of Company's Preliminary Plat. Some individual owners of adjacent property were allowed to intervene (Intervenors). Company moved for summary judgment. The trial court *sua sponte* granted summary judgment to City and the Commission. Because there remains a dispute of material fact as to whether the Commission's denial was arbitrary and capricious, we REVERSE AND REMAND. Opinion by Buettner, J., Bell, P.J., and Goree, J. concur.

118,100 — In the Matter of the Estate of Carroll Wayne Rogers, Deceased: Chad Rogers, Appellant, v. Karen K. Rogers, Appellee. Appeal from the District Court of Comanche County, Oklahoma. Honorable Gerald F. Neuwirth, Judge. Appellant, Chad Rogers, appeals an order determining the decedent's estate owned a 25% interest in a partnership. The trial court was not prohibited by the parol evidence rule from considering testimony of an oral partnership agreement and the specific purpose for a subsequent written partnership to determine the validity of the latter. *Martin v. Clem,* 1929 OK 363, 280 P. 826. The order was not clearly against the weight of the evidence and is AFFIRMED. Opinion by Goree, J., Bell, P.J., and Buettner, J., concur.

118,296 — George A. Esch, Jr., and Lynda A. Hamlet, as Trustees of the Esch and Hamlet Family Trust, dated March 10, 2016, Plaintiffs/Appellants, v. Chitwood Farms, LLC; Manuel Deleon, III; Jorie A. Deleon, and Hisle Yard, LLC, Defendants/Appellees, Manuel Deleon, III; Jorie A. Deleon; and Hisle Yard, LLC, Counterclaim Plaintiffs, v. George A. Esch, Jr. And Lynda A. Hamlet, Counterclaim Defendants. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Cindy Truong, Judge. Plaintiffs/Appellants George A. Esch, Jr., and Lynda A. Hamlet, husband and wife and trustees of the Esch and Hamlet Family Trust (hereinafter referred to collectively as "Esch/Hamlet") appeal a grant of summary judgment in favor of Defendants/Appellants Chitwood Farms, LLC (Developer), Manuel Deleon, III, and Jorie A. Deleon (the Deleons), and Hisle Yard, LLC (Hisle). Esch/Hamlet own a home that shares a private driveway with two other lots, owned by the Deleons and Hisle, respectively. Disputes arose amongst the

neighbors regarding the use of the private driveway, which sits upon a common area owned by each of the homeowners as one-third tenants in common. Because no dispute of material fact remained and the prevailing parties were entitled to judgment as a matter of law, we affirm the ruling of the trial court. Opinion by Buettner, J., Goree, J., concurs and Bell, P.J., dissents.

Friday, November 13, 2020

116,828 — Fannie Mae ("Federal National Mortgage Association"), Plaintiff/Appellee, v. Don Barthelme, Defendant/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Trevor Pemberton, Judge. Defendant/Appellant Don Barthelme (Appellant) appeals from an order granting Plaintiff/Appellee Federal National Mortgage Association's (Appellee) Motion to Dismiss Petition to Vacate Journal Entry of Judgment. The underlying case involves a foreclosure action filed by Appellee against Appellant. Appellant argues that Appellee lacked standing, that the underlying note was transferred in violation of the mortgage, and that the confirmation order did not comply with the statutory requirements. Appellee urges in response that most of the issues raised by Appellant were resolved in an earlier appeal and therefore not appealable, and the remainder of the issues do not require reversal. We AFFIRM. Opinion by Swinton, V.C.J.; Mitchell, P.J., and Buettner, J. (sitting by designation), concur.

(Division No. 2)
Thursday, November 5, 2020

117,536 — Gerald Garrett, Casey Morrison, T.K. Boydstun, Ryan Garrett, Bryan Fuller, and Dane Scheuerman, individually and on behalf of all others similarly situated, Plaintiffs/Appellees, vs. State of Oklahoma ex rel. Oklahoma Firefighters Pension and Retirement System and Oklahoma Firefighters Pension and Retirement Board, Defendants/Appellants. Appeal from an Order of the District Court of Oklahoma County, Hon. Aletia Haynes Timmons, Trial Judge. The defendants, State of Oklahoma ex rel. Oklahoma Firefighters Pension and Retirement System (System) and Oklahoma Firefighters Pension and Retirement Board (Board) (collectively B&S) appeal an Order granting the plaintiffs' motion for a temporary injunction. The plaintiffs' first complaint is that the Board enacted a regulation making mandatory the distribution to the member of the interest in the Plan B account rather than allow the member to retain the interest in the account and have it compound along with other sources of funds to the account. This is referred to as the Mandatory Distribution of Interest (MDI) regulation. The second complaint pertains to the Required Minimum Distribution (RMD) mandated by the United States Internal Revenue Service for retirement accounts when the retiree attains the age of 70 1/2 years of age. This had been 3.50% of the account and the Board raised it to 7.50%. Plaintiffs have met their burden with respect to the MDI complaint, but they have not met their burden with regard to the RMD complaint. Therefore, the judgment of the trial court is affirmed as to the MDI injunction and reversed as to the RMD injunction. B&S have raised the issue of standing. In that regard, the action is pled and captions as a class action. The Record does not establish that the statutory class action procedures have been undertaken. The issue of standing is a component of the class certification and this Court finds that consideration of the issue is premature at this time. Therefore, this Court defers the standing issue to the trial court for the first instance determination. AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

117,646 — Patricia Hamilton, Petitioner/Appellee/Counter-Appellant, vs. Gregory Buckingham, Respondent/Appellant/Counter-Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Thomas C. Riesen, Trial Judge. Trial court defendant, Gregory Buckingham, (Father) appeals the trial court's Order for Grandparent Visitation awarding Patricia Hamilton (Grandmother) grandparental visitation with her grandchild, J.D.W., in this grandparental visitation action. Grandmother appeals the denial of her request for attorney fees and costs. This Court finds the trial court did not err in awarding Grandmother grandparental visitation nor in the amount of visitation awarded. This Court affirms the trial court's Order for Grandparent Visitation. This Court further finds the trial court erred in denying Grandmother's request for attorney fees. The issue of attorney fees is remanded to the trial court for a determination of "attorney fees and costs, as the court deems equitable" for those attorney fees and costs stemming from Grandmother's action for grandparental visita-

tion under Title 43 O.S. Supp. 2019 § 109.4. AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

118,303 — James W. Trenz, individual and Terrane Associates, Inc., Plaintiffs/Appellants, vs. Glen Rupe, individual, Rupe Oil Company, Inc. and Peter Paul Petroleum Company, Defendants, and Brickell & Associates, and Ted W. Haxel, Attorney-Lien Claimants/Appellees, and Mahaffey & Gore, P.C., Attorney-Lien Claimants. Appeal from an Order of the District Court of McClain County, Hon. Jeff Virgin, Trial Judge. Plaintiffs appeal the Ruling and Order of the District Court which denied recovery of interest claimed by Plaintiffs on funds returned by Brickell-Haxel after the attorney fee award judgments on which they executed were either reversed or modified. This Court holds that Oklahoma law requires that there be a sum certain from the outset and that there be statutory authorization before interest may be assessed on restitution recovery. These criteria have not been satisfied here. Therefore, the trial court did not err in denying Trenz's claim for interest. The Record does not support a claim for interest under a constructive trust. The next issue is whether Trenz's claim may be denied under the Doctrine of Avoidable Consequences. Posting of a supersedeas bond would have avoided all of the claims by Trenz that he lost the use of his funds and property during the period of the appeals. The trial court's Ruling and Order of the District Court which denied recovery of interest claimed by Trenz on funds returned by Brickell-Haxel is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

(Division No. 3)
Friday, November 6, 2020

116,992 — (Comp. w/118,962) Deutsche Bank National Trust Company, as Trustee of Argent Mortgage Securities, Inc. Asset Backed Pass Through Certificates, Series 2006-W1 Under the Pooling and Servicing Agreement Dated as of February 1, 2006, Plaintiff/Appellant, vs. Bobbie S. Andrews and John Doe, her spouse, if married; Occupants of the Premises; Bank One, N.A.; Light House; Light House Harbor, Inc.; B&B Funding, L.L.C.; Andrews Group Investments, Inc.; Richard Lathrop; Camela Lathrop and Joe Laumer, Defendants/Appellees. Appeal from the District Court of Cleveland County, Oklahoma. Honorable Thad Balkman, Judge. Deutsche Bank National Trust Company (Deutsche Bank), seeks review of the April 4, 2018 Journal Entry of Judgment from the District Court of Cleveland County, Oklahoma entered after a May 2017 bench trial. The trial court found the conveyance of the subject property to Bobbie Andrews (Andrews) was a fraudulent transfer and was therefore void. Deutsche Bank brought the underlying foreclosure action in June 2006 to foreclose on a note and mortgage for a property in Norman, Oklahoma. The Lathrops (Lathrops) answered the Petition, asserting the deed on which Deutsche Bank based its cause was void, as the deed was based on a fraudulent and invalid transfer orchestrated by Andrews. The court's finding that the Lathrops were defrauded by Andrews is supported by the record, and the original lender and Deutsche Bank should have inquired into certain aspects of Andrews' loan application, which would have revealed Andrews' fraud. The April 4, 2018 order of the District Court of Cleveland County, Oklahoma is AFFIRMED. Opinion by PEMBERTON, J.; MITCHELL, P.J., and SWINTON, V.C.J., concur.

117,308 — In Re the Marriage of Pitzer: Bridgett Pitzer, Petitioner/Counter-Respondent/Appellee/Counter-Appellant, v. Kurt Pitzer, Respondent/Counter-Petitioner/Apellant/Counter-Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Sheila Stinson, Trial Judge. Petitioner/Counter-Respondent/Appellee/Counter-Appellant Bridgett Pitzer (Wife) and Respondent/Counter-Petitioner/Appellant/Counter-Appellee (Husband) appeal provisions of the Decree of Dissolution of Marriage. Husband challenges the amount of support alimony awarded. The trial court properly found Wife had a need and Husband had the ability to pay support alimony, but abused its discretion in awarding twice the amount requested by Wife. We therefore modify the support alimony award to $7,032 for 85 months, as requested by Wife and supported by her evidence of need. Wife challenges the findings that the increase in the value of Husband's separate property was not a marital asset and that Husband did not dissipate marital assets in contemplation of divorce. Our review of the record shows those findings are not against the clear weight of the evidence or an abuse of dis-

cretion. Wife also challenges the order that she pay part of Husband's attorney fees and we find no abuse of discretion in that order. We AFFIRM the decree. Opinion by Swinton, V.C.J.; Mitchell, P.J., and Pemberton, J., concur.

117,604 — Camella Kay Vaughn, Plaintiff/Appellee, vs. Forrest Williams and Frankie Williams, Defendants/Appellants, and James I. Crenshaw and Alpha P. Crenshaw, Defendants. Appeal from the District Court of Adair County, Oklahoma. Honorable J. Jeffrey Payton, Trial Judge. Forrest and Frankie Williams ("Appellants" or the "Williams") seek review of the trial court's November 13, 2018 Journal Entry of Judgment Quieting Title and Establishment of Boundary Lines and Determining Damages (the "Judgment"), a final judgment rendered in favor of Camella Kay Vaughn ("Appellee"). Appellants first contend the trial court committed reversible error by entering the Judgment without first allowing Appellants an opportunity to be heard. They next submit that, unbeknownst to Appellants, the trial judge conducted a site visit of the property at issue and thereby committed reversible error, having allegedly violated certain judicial canons. We find the trial court, in fact, deprived Appellants of the process to which they are due and therefore REVERSE AND REMAND the Judgment. Opinion by Pemberton, J.; Mitchell, P.J., and Swinton, V.C.J., concur.

117,810 — In the Matter of the Guardianship of M.H.L.J., minor child: Christine Price-Allen, Petitioner/Appellant, vs. Karen Farris, Cross-Petitioner, and Shannon D. Taylor, Respondent/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Richard Kirby, Trial Judge. Petitioner/Appellant Christine Price-Allen appeals from an order removing her as guardian of the person and as co-guardian of the estate of her great grandchild M.H.L.J. ("the child"). Price-Allen initiated this guardianship proceeding because the child's mother was deceased and her father was incarcerated. The trial court initially appointed Price-Allen as guardian of the person and Price-Allen and Respondent/Appellee Shannon D. Taylor as co-guardians of the estate. Taylor later sought to have Price-Allen removed as guardian for breach of fiduciary duty as shown by repeated failure to comply with court orders which resulted in unnecessary dissipation of the child's assets. The trial court removed Price-Allen as guardian of the person and co-guardian of the estate and appointed Cross-Petitioner Karen Farris, the child's maternal grandmother, guardian of the person. The record shows no abuse of discretion and we AFFIRM. Opinion by Swinton, V.C.J.; Mitchell, P.J., and Pemberton, J., concur.

117,846 — Brandi Miller, Plaintiff/Appellant, vs. Eliseo Navarro, Defendant, GEICO Casualty Company, Defendant/Appellee. Appeal from the District Court of Cleveland County, Oklahoma. Honorable Michael D. Tupper, Judge. In this bad-faith insurance action, the plaintiff/appellant challenges the trial court's judgment entered on a jury's verdict for the defendant/appellee, as well as the trial court's denial of GEICO's motion for new trial. Specifically, Ms. Miller challenges the trial court's admission of certain evidence obtained by GEICO after the company denied her demand for payment of the full policy limits and submitted a lesser offer. Additionally, Ms. Miller challenges the closing argument of GEICO's counsel, which she characterizes as so inflammatory as to have warranted a mistrial. We find that the trial court's admission of the complained-of evidence was not an abuse of discretion because the evidence was relevant and that the plaintiff waived any objection to GEICO's counsel's closing argument. Accordingly, we AFFIRM. Opinion by Mitchell, P.J.; Swinton, V.C.J., and Pemberton, J., concur.

118,126 — Kristi Herand, Plaintiff/Appellant, vs. 7725 Reno #1, LLC, Rack 59, LLC, 7725 Reno #1, LLC, Rack 59, LLC, West, and Zerby Interests, LLC, Defendants/Appellees. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Susan Stallings, Judge. Plaintiff/Appellant Kristi Herand (Plaintiff) appeals from an order granting summary judgment in favor of Defendants/Appellees 7725 Reno #1, LLC, Rack 59, LLC, 7725 Reno #1, LLC, Rack 59, LLC, West, and Zerby Interests, LLC (Defendants) related to a personal injury claim. Plaintiff claims injury from falling into a hole she alleges was covered by unkempt grass on Defendants' property. Plaintiff argues that there was a genuine dispute of material facts concerning whether there was an open and obvious dangerous condition, whether Defendants' actions caused or contributed to the dangerous condition, and whether Defendants had knowledge of the dangerous condition. We AFFIRM. Opinion by Swinton, V.C.J.; Mitchell, P.J., and Pemberton, J., concur.

118,322 — Janice Steidley, an individual, Plaintiff/Appellant, and David Iski, an indi-

vidual and Sean McConnell, an individual, Plaintiffs, vs. Community Newspaper Holdings, Inc., a Delaware Corporation, Bailey Dabney, an individual, Randy Cowling, an individual, and Salesha Walken, an individual, Defendants/Appellees. Appeal from the District Court of Rogers County, Oklahoma. Honorable Daman H. Cantrell, Judge. Plaintiff/Appellant, Janice Steidley ("Appellant" or "Steidley") seeks review of the district court's September 11, 2019 denial of her Motion to Reconsider, which addressed the court's earlier orders granting the Motion for Summary Judgment of Defendants/Appellees, Community Newspaper Holdings, Inc., Bailey Dabney, and Salesha Wilken (collectively, "Appellees" or "Newspaper Defendants"), denying a motion to compel and sustaining Appellees' assertion of the journalistic privilege, granting Appellees' motion to seal certain deposition testimony, denying requests for leave to file a second amended petition, and limiting discovery. The underlying cause of action relates to a Facebook post made by a Pryor police officer expressing dissatisfaction with Steidley's performance as the District Attorney of Mayes, Rogers and Craig Counties. "Where…the assessment of the trial court's exercise of discretion in denying a motion to reconsider depends on the propriety of the underlying grant of summary judgment, the abuse-of-discretion question is settled by our *de novo* review of the summary adjudication's correctness." *Waldrop v. Hennessey*, 2014 OK CIV APP 106, ¶7, 348 P.3d 213, 215. The other alleged errors asserted by Steidley are reviewed for an abuse of discretion. *Louisiana Mun. Police Employees' Ret. Sys. v. McClendon*, 2013 OK CIV APP 64, ¶12, 307 P.3d 393, 398; *City of Blackwell v. Wooderson*, 2017 OK CIV APP 33, ¶5, 397 P.3d 491, 494. In its order granting judgment to the Newspaper Defendants, the district court found Steidley failed to establish sufficient proof of actual malice. To maintain an action for libel, the plaintiff must show "the defamatory falsehood was made with "actual malice" – made with the knowledge that it was false, or with reckless disregard of whether it was false or not[.]" *Miskovsky v. Tulsa Tribune Company*, 1983 OK 73, 678 P.2d 242, 246. We agree with the trial court's grant of summary judgment and also do not find the district court abused its discretion with respect to the additional errors raised by Appellant. The September 11, 2019 order of the District Court of Rogers County denying the Motion to Reconsider is AFFIRMED. Opinion by Pemberton, J.; Mitchell, P.J., and Swinton, V.C.J., concur.

118,408 — In the Matter of the Adoption of J.D.E: Amy Clare Davis and Herbert Anthony Davis, Petitioners/Appellees, v. Austin Conan Hess, Respondent/Appellant. Appeal from the District Court of Washington County, Oklahoma. Honorable Linda S. Thomas, Judge. Austin Conan Hess ("Appellant") seeks review of the trial court's October 18, 2019 order, which granted without Appellant's consent Appellees Amy Clare Davis and Herbert Anthony Davis's ("Appellees") Petition for Adoption. The applicable standard of review for issues of law stemming from a trial court's determination of a child's eligibility for adoption without the consent of biological parents is *de novo. In re Adoption of J.N.K.*, 2000 OK CIV APP 132, ¶ 2, 15 P.3d 521, 522. Fact issues in this context are reviewed under a clear and convincing evidence standard. *Id.* Appellant raises three propositions of error. First, Appellant asserts the trial court erroneously relied on evidence outside the statutory fourteen-month period to find Appellant failed to establish a substantial and positive relationship with the minor child. Appellant next asserts the trial court erred by failing to consider evidence of the father's attempts to contact Ms. Davis to initiate visitation rights during the relevant fourteen-month period, and her subsequent denial of said requests. Appellant last contends the trial court erred by failing to consider evidence of Appellant's attempts to take sufficient legal action during the relevant fourteen-month statutory period. We affirm the determination of the Washington County District Court, finding the trial court's fact findings as well as the statutory grounds for adoption are supported by clear and convincing evidence. Opinion by Pemberton, J.; Mitchell, P.J., and Swinton, V.C.J., concur.

Monday, November 9, 2020

117,617 — State Farm Mutual Automobile Insurance Company, Plaintiff/ Appellant, vs. American Waste Control, Inc., and Robert Dixon, Defendants/Appellees. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Patrick Pickerill, Trial Judge. State Farm Mutual Automobile Insurance Company ("Appellant" or "State Farm") seeks review of the trial court's November 19, 2018 order, which denied State Farm's Motion for Directed Verdict and granted Appellees American Waste Control, Inc. and Robert Dixon's ("Appellees")

demurrer, determining State Farm was not entitled to reimbursement from Appellees. The applicable standard of review for matters in equity is a presumption by the appellate court that "the district court's findings of fact are correct and will not disturb such findings on appeal unless they are clearly contrary to the weight of the evidence." *Krumme v. Moody*, 1995 OK 140, ¶ 7, 910 P.2d 993, 995-996. Questions of law are reviewed by a *de novo* standard of review. *Salinas v. Sheets*, 2018 OK CIV APP 21, ¶ 3, 413 P.3d 890, 891. Appellant raises two propositions of error on appeal. First, Appellant asserts the trial court erred in its finding that State Farm was a volunteer without a right of subrogation. Second, Appellant contends the trial court erred in its finding that State Farm was not entitled to recover its UIM payment from Appellees under a right of subrogation. We AFFIRM the decision of the District Court of Tulsa County, finding State Farm is a volunteer without right of subrogation. Opinion by Pemberton, J.; Mitchell, P.J., and Swinton, J., concur.

Friday, November 13, 2020

117,452 — GFAC Engineering, Inc., an Oklahoma corporation, and Brian Marick, an individual, Plaintiffs/Appellees, v. Kathy Coe, an individual, Defendant/Appellant and DALCO Testing, LLC, Intervenor/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Caroline Wall, Judge. Katy Coe, Nathan Coe, Defendants/Appellants, and DALCO Testing, LLC, Intervenor/Appellant, appeal the trial court's orders granting GFAC Engineering, Inc., and Brian Marick's, Plaintiffs'/Appellees', motions to compel arbitration. The order compelled all claims to arbitration. Appellants appeal claiming Plaintiffs waived any right to compel arbitration. Additionally, Appellants argue DALCO could not be compelled to arbitrate as a nonsignatory because it did not consent to arbitration, and that DALCO's specific dispute is beyond the reach of a court to compel arbitration under the agreement. Nathan appeals asserting it was reversible error to consider parol evidence and not conduct an evidentiary hearing when requested. AFFIRMED IN PART, REVERSED IN PART AND REMANDED. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

(Division No. 4)
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.

118,615 — Cathie Sue Lee, Petitioner, vs. Multiple Injury Trust Fund and The Workers' Compensation Commission, Respondents. Proceeding to Review an Order of the Workers' Compensation Commission. Cathie Sue Lee seeks review of an Order of the Workers' Compensation Commission En Banc, affirming an order of an Administrative Law Judge (ALJ) denying Claimant's request for permanent total disability benefits from the Multiple Injury Trust Fund. Claimant sought to combine a September 2017 injury and a previous partial permanent disability adjudication from November 1997, for a determination that she was PTD. The ALJ found that the medical evaluation submitted by the Fund was more appropriate than the evaluation submitted by Lee and denied PTD benefits from the fund. Claimant timely appealed to the Commission En Banc. After a hearing of record, the Commission affirmed the ALJ's determination. On review, we find the ALJ's denial of Multiple Injury Trust Fund Permanent Disability Benefits was supported by substantial evidence. Finding no error, we sustain the WCC En Banc's order affirming the ALJ's order determining Claimant was not entitled to benefits. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C.J., and Thornbrugh, J., concur.

Wednesday, November 4, 2020

118,040 — In the Matter of the Estate of Fred J. Shaeffer, Deceased: Heather M. Cook, Appellant, vs. Joseph C. Shaeffer, as Personal Representative of the Estate of Fred J. Shaeffer, Deceased, Appellee, and Crystal Harkness, Appellee. Appeal from Order of the District Court of Cleveland County, Hon. Stephen Bonner, Trial Judge. Heather M. Cook (Cook) appeals an Order Allowing Final Account, Determination of Heirs, and Distribution of Estate. Based on our review of the record and applicable law, we affirm the Order Allowing Final Account, Determination of Heirs, and Distribution of Estate. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C.J., and Thornbrugh, P.J., concur.

Thursday, November 5, 2020

118,546 — Oklahoma Department of Corrections and State of Oklahoma, Petitioners, vs. Cheryl Pepiakitah and The Workers' Compensation Commission, Respondents. Proceeding to review an order of the Workers' Compensation Commission En Banc, affirming the decision of the Administrative Law Judge awarding medical treatment for Cheryl Pepiakitah (Claimant). Oklahoma Department of Corrections (Employer) argues that the ALJ was required by statute to conduct a hearing on its motion to join additional parties before proceeding with a trial on the merits on Claimant's motion for additional medical treatment. We find the ALJ did not abuse its discretion in concluding Employer failed to show good cause for a continuance. Employer knew who Claimant's subsequent employers were for over a year before filing its motion and had ample opportunity in advance of trial to seek information from them. Further, Employer offered no evidence of an intervening injury. Although asked by Employer at trial, Claimant, who the ALJ found to be a credible witness, denied any intervening injury and told the court that her subsequent employment was "easier" and "much lighter duty" than working at the penitentiary. We conclude that the ALJ's decision and the order of the WCC affirming that order are supported by the weight of the evidence. Employer failed to show any other error requiring us to reverse the WCC's decision. SUSTAINED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, C.J.; Thornbrugh, P.J., and Hixon, J., concur.

Friday, November 6, 2020

118,216 — The Bank of New York Mellon Trust Company, National Association fka The Bank of New York Trust Company, N.A. as Successor to JPMorgan Chase Bank, as Trustee for Residential Asset Securities Corporation, Home Equity Mortgage Asset-Backed Pass Through Certificates Series 2204-KS9, Plaintiff/Appellee, vs. Donna Gaile Caudill and Richard L. Caudill, Defendants/Appellants. Appeal from an Order of the District Court of Stephens County, Hon. Ken J. Graham, Trial Judge. Donna Gaile Caudill and Richard L. Caudill (Caudills) appeal an Order Confirming

Sheriff's Sale. Caudills contend the trial court erred by dismissing what they refer to as "counterclaims" involving an alleged "long-standing insurance claim/repair issue" pertaining to the subject property, and by issuing a writ of assistance, neither of which pertains to the confirmation order. Given the Caudills' lack of argument on appeal pertinent to the Order Confirming Sheriff's Sale and our review of the record, we cannot find the trial court abused its discretion by entering the Order. We therefore affirm the trial court's Order Confirming Sheriff's Sale. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C.J., and Thornbrugh, P.J., concur.

Tuesday, November 10, 2020

118,786 — In the Matter of the Estate of Roy L. Hall, aka Roy Hall, aka Roy Lee Hall, Deceased: Theodore Benfer, Plaintiff/Appellant, vs. Bea M. Hall, Personal Representative of the Estate of Roy L. Hall, aka Roy Hall, aka Roy Lee Hall, Deceased, Defendant/Appellant. Appeal from an Order of the District Court of Pontotoc County, Hon. Steven C. Kessinger, Trial Judge. Theodore Benfer (Benfer) appeals summary judgment granted to Bea M. Hall, Personal Representative of the Estate of Roy L. Hall, a/k/a Roy Hall, a/k/a Roy Lee Hall, Deceased. The PR's motion for summary judgment did not indisputably establish she was entitled to judgment as a matter of law on Benfer's Petition of Creditor for Breach of Contract and Damages. The district court's order granting the PR summary judgment was in error and is therefore reversed and the case is remanded for further proceedings. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C.J., and Thornbrugh, P.J., concur.

Tuesday, November 12, 2020

118,655 — J. Ross Kirtley, Debra J. Kirtley, and Sheryl J. Coy, Plaintiffs/ Appellants, vs. Patsy Kirtley, Defendant/Appellee. Appeal from an order of the District Court of Kingfisher County, Hon. Paul K. Woodward, Trial Judge, granting Patsy Kirtley's motion for summary judgment. The salient issue before us is whether the trial court correctly granted judgment to Patsy Kirtley as a matter of law. Patsy Kirtley and Wendell Kirtley were married but had no children together. Wendell died in 2015. Plaintiffs are Wendell's adult children. Plaintiffs say that after Wendell's death, Patsy broke her oral agreement with Wendell and transferred properties and made estate-planning decisions that will result in them receiving less than one-quarter of the property they were each intended to receive. Although Plaintiffs list 25 issues raised on appeal, the issues predominantly center on whether Patsy is entitled to judgment as a matter of law on Plaintiffs' claims of breach of contract and fraud/misrepresentation. Central to this case are Wendell's and Patsy's 2006 trusts as amended in 2015. Based on an affidavit filed by attorney Randy Mecklenburg, the attorney who prepared Wendell's and Patsy's 2006 revocable trusts and 2015 amendment, we conclude material facts remain in dispute precluding summary judgment in Patsy's favor on Plaintiffs' breach of contract claims. The affidavit also stated that Patsy concealed her true intentions from Wendell and made false promises to him about the disposition of their property when she and Wendell amended their trusts in 2015. Considering Mecklenburg's affidavit, and viewing all inferences and conclusions to be drawn from the materials submitted in response to Patsy's motion for summary judgment in favor of Plaintiffs, we must conclude Patsy is not entitled to judgment as a matter of law on Plaintiffs' fraud claim. The parties dispute material facts about whether Patsy made material misrepresentations or concealed material information about her intentions concerning the property placed in trust, whether she knew the statements were false when she made them or knew the impressions left by her non-disclosure were false, whether she specifically intended Wendell to rely on her statements or her failure to disclose, and whether damage to Plaintiffs resulted. These issues of fact cannot be resolved by summary judgment and remain for the trier of fact. Because facts material to this case remain in dispute, we must reverse the summary judgment in favor of Patsy and remand the case for further proceedings. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, C.J.; Thornbrugh, P.J., and Hixon, J., concur.

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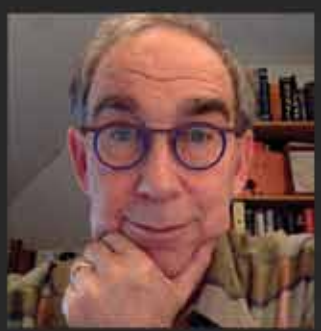

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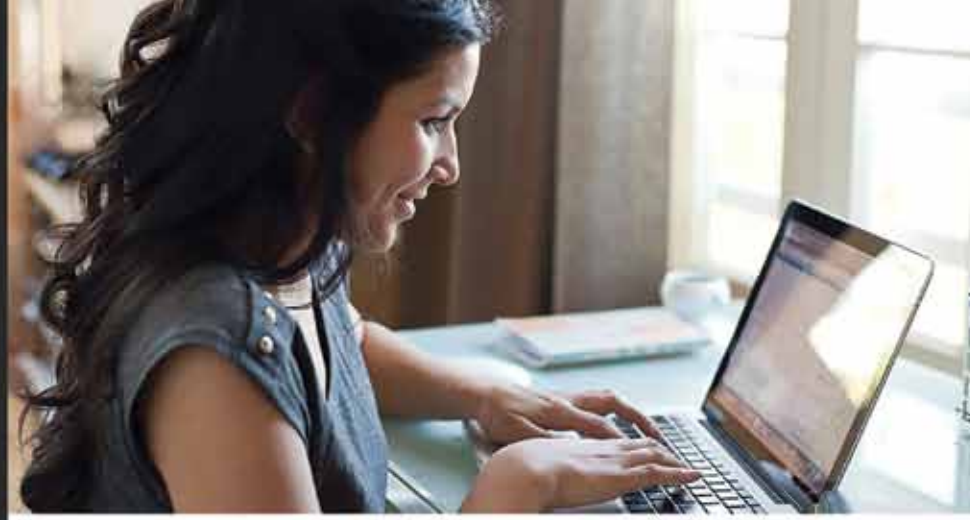

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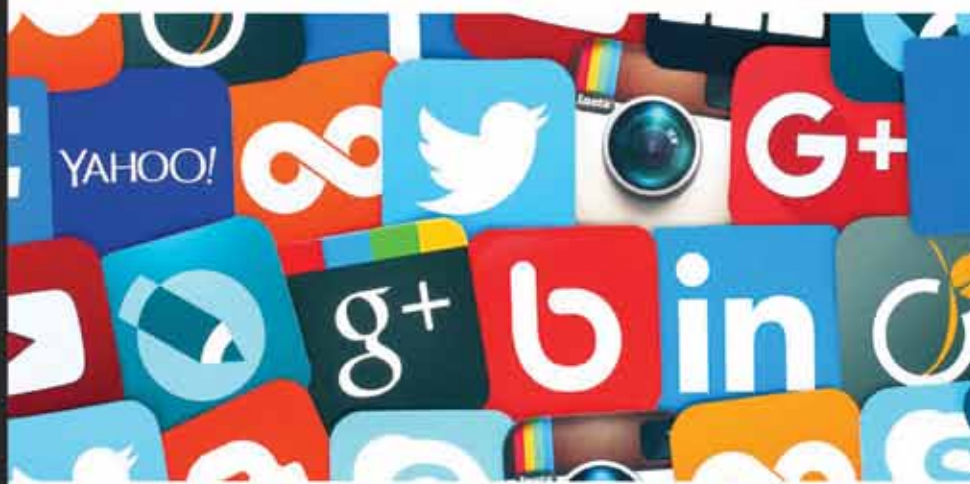

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SOCIAL MEDIA ETHICS IN THE AGE OF DOCUMENTED MISCHIEF

The phenomenon of social media has changed the landscape of the modern law firm. For many, the challenge of the learning curve prevents them from taking advantage of its potential benefits. Another perceived obstacle is that attorneys are rightfully concerned about compliance with the code of professional conduct. This timely session is designed to demystify these concepts and analyze ethics developments throughout the United States.