

# THE OKLAHOMA BAR **Journal**

Volume 91 — No. 23 — 12/4/2020

## **Court Issue**



THURSDAY,  
DECEMBER 17, 2020  
9 A.M. - 3:15 P.M.



MCLE 6/0



**FEATURED PRESENTER:**

**Rick Horowitz,**  
*Writing Coach, Prime Prose, LLC*

Stay up-to-date and follow us on



TO REGISTER GO TO [WWW.OKBAR.ORG/CLE](http://WWW.OKBAR.ORG/CLE)



# LEARN TO BE AN EFFECTIVE WRITER TO BECOME A MORE EFFECTIVE LAWYER

Knowing the law is essential – but so is being able to communicate about it. Join writing coach and former attorney Rick Horowitz for a lively and practical session that will reintroduce you to your legal-writing toolbox, including a few tools you didn't know were in there. This class explores the fundamentals (and the critical details) of creating clear, well-organized, persuasive legal documents. Briefs, memos, client letters, even daily correspondence benefit from your deeper understanding of what goes into successful writing, so we'll examine good and not-so-good writing to see what worked, what didn't, and why.

We'll take a fresh look at some of the assumptions and habits that often lead lawyers down less-than-productive writing paths. And we'll talk about other approaches that might work better for you in dealing with the variety of legal-writing tasks most lawyers face.

- **What should you include, and what can you leave out?**
- **What's the most effective structure for this document, and this audience?**
- **Should you use an outline? Are there better options?**
- **Are there ways to overcome blank-screen panic?**
- **How do you survive the in-house editing process?**
- **And do you really need all that "legalese"?**

THE OKLAHOMA BAR JOURNAL is a publication of the Oklahoma Bar Association. All rights reserved. Copyright© 2020 Oklahoma Bar Association. Statements or opinions expressed herein are those of the authors and do not necessarily reflect those of the Oklahoma Bar Association, its officers, Board of Governors, Board of Editors or staff. Although advertising copy is reviewed, no endorsement of any product or service offered by any advertisement is intended or implied by publication. Advertisers are solely responsible for the content of their ads, and the OBA reserves the right to edit or reject any advertising copy for any reason.

Legal articles carried in THE OKLAHOMA BAR JOURNAL are selected by the Board of Editors. Information about submissions can be found at [www.okbar.org](http://www.okbar.org).

#### BAR CENTER STAFF

John Morris Williams, *Executive Director*; Gina L. Hendryx, *General Counsel*; Jim Calloway, *Director of Management Assistance Program*; Craig D. Combs, *Director of Administration*; Janet K. Johnson, *Director of Educational Programs*; Beverly Petry Lewis, *Administrator MCLE Commission*; Carol A. Manning, *Director of Communications*; Dawn Shelton, *Director of Strategic Communications and Marketing*; Richard Stevens, *Ethics Counsel*; Robbin Watson, *Director of Information Technology*; Loraine Dillinder Farabow, Peter Haddock, Tracy Pierce Nester, Katherine Ogden, Steve Sullins, *Assistant General Counsels*;

Les Arnold, Julie A. Bays, Gary Berger, Debbie Brink, Jennifer Brumage, Melody Claridge, Cheryl Corey, Ben Douglas, Johnny Marie Floyd, Matt Gayle, Suzi Hendrix, Debra Jenkins, Rhonda Langley, Jamie Lane, Durrel Lattimore, Edward Maguire, Renee Montgomery, Whitney Mosby, Lauren Rimmer, Tracy Sanders, Mark Schneidewent, Kurt Stoner, Krystal Willis, Laura Willis & Roberta Yarbrough

Oklahoma Bar Association 405-416-7000  
Toll Free 800-522-8065

FAX 405-416-7001

Continuing Legal Education 405-416-7029

Ethics Counsel 405-416-7055

General Counsel 405-416-7007

Lawyers Helping Lawyers 800-364-7886

Mgmt. Assistance Program 405-416-7008

Mandatory CLE 405-416-7009

Board of Bar Examiners 405-416-7075

Oklahoma Bar Foundation 405-416-7070

# THE OKLAHOMA BAR Journal

Volume 91 – No. 23 – Dec. 4, 2020

## JOURNAL STAFF

JOHN MORRIS WILLIAMS  
Editor-in-Chief  
[johnw@okbar.org](mailto:johnw@okbar.org)

CAROL A. MANNING, Editor  
[carolm@okbar.org](mailto:carolm@okbar.org)

LAUREN RIMMER  
Advertising Manager  
[advertising@okbar.org](mailto:advertising@okbar.org)

## BOARD OF EDITORS

MELISSA DELACERDA  
Stillwater, Chair

LUKE ADAMS, Clinton

AARON BUNDY, Tulsa

CASSANDRA L. COATS,  
Vinita

PATRICIA A. FLANAGAN  
Yukon

AMANDA GRANT, Spiro

VIRGINIA D. HENSON, Norman

C. SCOTT JONES,  
Oklahoma City

ROY TUCKER  
Muskogee



## OFFICERS & BOARD OF GOVERNORS

SUSAN B. SHIELDS, President, Oklahoma City;  
BRANDI N. NOWAKOWSKI, Vice President, Shawnee; MICHAEL C. MORDY, President-Elect, Ardmore; CHARLES W. CHESNUT, Immediate Past President, Miami; MATTHEW C. BEESE, Muskogee; MICHAEL J. DAVIS, Durant; TIM E. DECLERCK, Enid; JOSHUA A. EDWARDS, Ada; AMBER PECKIO GARRETT, Tulsa; BRIAN T. HERMANSON, Ponca City; ANDREW E. HUTTER, Norman; DAVID T. MCKENZIE, Oklahoma City; BRIAN K. MORTON, Oklahoma City; MILES T. PRINGLE, Oklahoma City; ROBIN L. ROCHELLE, Lawton; D. KENYON WILLIAMS JR., Tulsa; JORDAN L. HAYGOOD, Chairperson, OBA Young Lawyers Division, Oklahoma City

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

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

# CONQUER YOUR MOUNTAIN

BURNOUT

DEPRESSION

ANXIETY

SUBSTANCE ABUSE

RELATIONSHIP  
CHALLENGES

LAWYERS HELPING LAWYERS  
ASSISTANCE PROGRAM

FREE 24-HOUR  
CONFIDENTIAL ASSISTANCE  
**800.364.7886**

[WWW.OKBAR.ORG/LHL](http://WWW.OKBAR.ORG/LHL)



## table of contents

Dec. 4, 2020 • Vol. 91 • No. 23

page

1402 INDEX TO COURT OPINIONS

1403 OPINIONS OF SUPREME COURT

1438 OPINIONS OF COURT OF CRIMINAL APPEALS

1453 OPINIONS OF COURT OF CIVIL APPEALS

1475 DISPOSITION OF CASES OTHER THAN BY PUBLICATION

## **Index to Opinions of Supreme Court**

2020 OK 91 RANDY HARRISON, Petitioner/Appellant, v. THE OKLAHOMA POLICE PENSION AND RETIREMENT SYSTEM and THE OKLAHOMA POLICE PENSION AND RETIREMENT BOARD of the State of Oklahoma, Respondents/Appellees. Case No. 116,681 .....	1403
2020 OK 92 LAMEES SHAWAREB and FAROUK SHAWAREB, Plaintiffs/Appellants, v. SSM HEALTH CARE OF OKLAHOMA, INC., d/b/a BONE AND JOINT HOSPITAL AT ST. ANTHONY and SAVANNAH PETTY, Defendants/Appellees. No. 117,633 .....	1407
2020 OK 93 State of Oklahoma ex rel. Oklahoma Bar Association, Complainant, v. Bradley A. Pistotnik, Respondent. SCBD 6859 .....	1414
2020 OK 94 In the Matter of the Estate of CHARLES FULKS, deceased. DOROTHY FULKS, Petitioner/Appellee, v. TAMMY MCPHERSON, Heir at Law/Appellant. No. 118,314 .....	1419
2020 OK 95 RE: Amendment to Disposition of Surplus Property, Rules for Management of the Court Fund, 20 O.S., Chap 18, App 1, Rule 10 (C) No. SCAD-2020-104 .....	1427
2020 OK 96 <u>FOURTH EMERGENCY JOINT ORDER REGARDING THE COVID-19 STATE OF DISASTER</u> SCAD No. 2020-107 .....	1428
2020 OK 97 REVOLUTION RESOURCES, LLC, Plaintiff/Appellee, v. ANNECY, LLC, Defendant/Appellant. Case No. 118,708 .....	1429

## **Index to Opinions of Court of Criminal Appeals**

2020 OK CR 22 DUSTIN MELVIN DAVISON, Appellant, v. THE STATE OF OKLAHOMA, Appellee. Case No. D-2018-373 .....	1438
---	------

## **Index to Opinions of Court of Civil Appeals**

2020 OK CIV APP 58 IN RE THE MARRIAGE OF: MARGARET A. CLEMENTS, Plaintiff/Appellant, vs. RICHARD D. CLEMENTS, Defendant/Appellee. Case No. 117,592 .....	1453
2020 OK CIV APP 59 IN THE MATTER OF THE ESTATE OF GEORGE THOMAS WHITEHOUSE, Deceased: KAREN BRIERTON, Appellant, vs. TAWANNAH BURRIS, Appellee. Case No. 117,879 .....	1458
2020 OK CIV APP 60 PNC BANK, NATIONAL ASSOCIATION, Plaintiff/Appellant, vs. UNKNOWN SUCCESSOR TRUSTEES OF THE ROBERT C. KECK REVOCABLE LIVING TRUST, DATED FEBRUARY 25, 1998, IF ANY, Defendant/Appellee, JOHN DOE, as Occupant of the Premises, and JANE DOE, as Occupant of the Premises, Defendants. Case No. 118,048 .....	1463
2020 OK CIV APP 61 IN THE MATTER OF THE PROTEST TO THE DENIAL OF THE SALES TAX CLAIM FOR REFUND OF AT THE BEACH, LLC: AT THE BEACH, LLC, Claimant/Appellant, vs. OKLAHOMA TAX COMMISSION, Respondent/Appellee. Case No. 118,119 .....	1471

# Opinions of Supreme Court

*Manner and Form of Opinions in the Appellate Courts;*

*See Rule 1.200, Rules — Okla. Sup. Ct. R., 12 O.S. Supp. 1996 (1997 T. 12 Special Supplement)*

---

2020 OK 91

**RANDY HARRISON, Petitioner/Appellant,  
v. THE OKLAHOMA POLICE PENSION  
AND RETIREMENT SYSTEM and THE  
OKLAHOMA POLICE PENSION AND  
RETIREMENT BOARD of the State of  
Oklahoma, Respondents/Appellees.**

**Case No. 116,681. November 24, 2020  
As Corrected November 24, 2020**

**ON WRIT OF CERTIORARI  
TO THE COURT OF CIVIL APPEALS,  
DIVISION NO. IV**

¶0 Former police officer with 19 years of service, terminated employment before his normal retirement date, but prior to being convicted of a felony committed while in the line of duty. After his conviction, officer submitted an application to the police retirement board and he elected to receive a vested pension benefit in lieu of a refund of his accumulated contributions. The pension board denied officer's application ruling that he did not have a "vested benefit" and that any benefit he had was forfeited under 11 O.S. 2011 §1-110 (A). The district court affirmed the agency's decision. The Court of Civil Appeals affirmed the district court's order and concluded that officer could be vested only if he met the conditions of service and all eligibility requirements for payment of the pension. We vacate the opinion of the Court of Civil Appeals, we reverse the district court's Order and remand this matter for proceedings consistent with this opinion.

**COURT OF CIVIL APPEALS' OPINION  
VACATED; ORDER OF DISTRICT COURT  
REVERSED; CAUSE REVERSED AND  
REMANDED FOR PROCEEDINGS  
CONSISTENT WITH TODAY'S  
PRONOUNCEMENT**

James R. Moore, Oklahoma City, Oklahoma,  
for Petitioner/Appellant

Mike Hunter, ATTORNEY GENERAL, Thomas  
R. Schneider, ASSISTANT ATTORNEY GEN-  
ERAL, Kimberly Heaton Wilson, ASSISTANT  
ATTORNEY GENERAL, for Respondents/  
Appellees

Edmondson, J.

## **FACTUAL AND PROCEDURAL BACKGROUND**

¶1 Appellant police officer, Randy Harrison, became employed as a police officer by the Del City Police Department on January 13, 1995. He joined the Oklahoma Police Pension and Retirement System. Both he and his employer made the statutorily required contributions to this plan until he resigned from the police force on January 1, 2014. At the time he left employment he had almost nineteen years of service. On January 28, 2014 he notified the pension system of his resignation and he applied to receive a full pension benefit, claiming he had the required twenty years of credited service. On February 5, 2014 officer was convicted of manslaughter for the on-duty shooting and killing of a suspect who tried to shoot him. In a July 10, 2014 letter to officer, the request for a full service pension was denied on the basis that he had less than twenty (20) years of credited service at the time his employment ended. In December, 2014, officer filed an application and requested to receive a "vested benefit" under 11 O.S. 2011 § 50-111.1 instead of the return of his accumulated contributions. This application was denied by OPPRS finding that officer's "retirement benefits were forfeited in accordance with the provisions of 11 O.S. § 1-110."<sup>1</sup> Following the filing of a Petition for Judicial Review of a Final Agency Determination, the district court affirmed the order of the OPPRS. The Court of Civil Appeals affirmed.

## **STANDARD OF REVIEW**

¶2 An agency order is subject to reversal if the appealing party's substantial rights were prejudiced because the decision was arbitrary, capricious or clearly erroneous. *Agrawal v. Oklahoma Dept. of Labor*, 2015 OK 67, ¶ 5, 364 P.3d 618, 621. Where the facts are not disputed, this Court must determine if the agency's order was free of legal error. *State ex rel. Protective Health Services State Dept. of Health v. Vaughn*, 2009 OK 61, ¶ 9, 222 P.3d 1058, 1064. Where the "issue presented is purely a matter of law, we employ a *de novo* standard." *Id.*



## ANALYSIS

¶3 The police pension system and its manager, the Board, is a state entity whose authority arises solely by statute. Because the OPPRS is an instrument of the State, it is without power to act contrary to law. *Kinzy v. State ex. Rel. Oklahoma Firefighters Pension and Retirement System*, 2001 OK 24, ¶ 10, 20 P.3d 818, 822.

¶4 The resolution of whether officer's retirement benefits were forfeited following his felony conviction hinges on the interpretation of the following two statutes:

### Title 1 Cities and Towns, Chapter 1 – Oklahoma Municipal Code, Article I General Provisions and Definitions.

11 O.S. 2011 § 1-110: Municipal Employees-Forfeiture of Retirement Benefits Upon Conviction of Crime – Procedures – Applicability of Act

- A. Any municipal officer or employee upon final conviction of, or pleading guilty or nolo contendere to, a felony for bribery, corruption, forgery or perjury or any other crime related to the duties of his or her office or employment in a state or federal court of competent jurisdiction shall forfeit retirement benefits provided by law. . . . The forfeiture of retirement benefits required by this section *shall not include the officer's or employee's contributions to the retirement system or retirement system benefits that are vested on the effective date of this act.*
- B. The forfeiture of retirement benefits as provided by subsection A of this section shall also apply to any such officer or employee who, after leaving the office or employment, is convicted of, or pleads guilty or nolo contendere to, in a state or federal court of competent jurisdiction, a felony committed while in such office or employment, where the felony is for bribery, corruption, forgery or perjury or any other crime related to the duties of his or her office or employment. . . .
- E. The provisions of this section shall apply to a municipal officer or employee who is a member of a retirement system authorized in Sections 48-101 through 48-106 of Title 11 of the Oklahoma Statutes, the Oklahoma Firefighters Pension and Retirement System, the Oklahoma Police Pension and Retirement System

or the Oklahoma Public Employees Retirement System. (Emphasis added).

### Title 1 Cities and Towns, Chapter 1 – Oklahoma Municipal Code, Article L Police Pension and Retirement System.

11 O.S. 2011 § 50- 111.1:<sup>2</sup> Termination of Service Before Normal Retirement Date – Refund of Accumulated Contributions – Election of Vested Benefit – Monthly Retirement Annuity – Rejoining System

- A. A member who terminates service before normal retirement date, other than by death or disability shall, upon application filed with the State board, be refunded from the Fund an amount equal to the accumulated contributions the member has made to the Fund, but excluding any interest or any amount contributed by the municipality or state. If a member withdraws the member's accumulated contributions, such member shall not have any recourse against the System for any type of additional benefits including, but not limited to, disability benefits. **If a member has completed ten (10) years of credited service at the date of termination, the member may elect a vested benefit in lieu of receiving the member's accumulated contributions.** If the member who has completed ten (10) or more years of credited service elects the vested benefit, the member shall be entitled to a monthly retirement annuity commencing on the date the member reaches fifty (50) years of age or the date the member would have had twenty (20) years of credited service had the member's employment continued uninterrupted, whichever is later. The annual amount of such retirement annuity shall be equal to two and one-half percent (2 ½%) of the annualized final average salary multiplied by the number of years of credited service. (Emphasis added).

Although these statutes share a common title and chapter, Title 11, Cities and Towns, Chapter 1, Municipal Code, they are not within the same article. The forfeiture statute § 1-110 is located in Article I, "General Provisions and Definitions" which applies to all of the various municipal employees and officers, including police officers. By contrast, § 50- 111, is found in Article L, "Police Pension and Retirement



System,” a more specific article which is limited to municipal employees who are police officers.

¶5 When construing statutes, our primary goal “is to ascertain legislative intent.” *Matter of C.M.*, 2018 OK 93, ¶ 22, 432 P.3d 763, 768. Where multiple statutes construed are located within the same act, the legislative intent will be ascertained by applying a reasonable and sensible construction considering all relevant provisions to give full force and effect to each. *McIntosh v. Watkins*, 2019 OK 6, ¶ 4, 441 P.3d 1094, 1096. We have been clear that “words and phrases of a statute are to be understood and used not in an abstract sense, but with due regard for context, and they must harmonize with other sections of the Act.” *State v. Tate*, 2012 OK 31, ¶ 7, 276 P.3d 1017, 1020. The goal of statutory construction is to harmonize the provisions within an act and not create confusion. *State v. Tyler*, 2009 OK 69, ¶ 13, 218 P.3d 510, 514. A construction that gives effect to both statutes within the act is preferred to a construction that would create a conflict within the other statute or render it meaningless. *Id.* (See also, *Raymond v. Taylor*, 2017 OK 80, ¶ 13, 412 P.3d 1141, 1145, “relevant provisions must be considered together to give full force to each if possible.”)

¶6 In addition to these general rules of construction, forfeiture statutes in Oklahoma are strictly construed. *Hendrick v. Walters*, 1993 OK 162, 865 P.2d 1232. Oklahoma has a strong statutory policy which “disfavors both private- and public-law forfeitures.” *Stipe v. State ex rel. Bd. of Trustees of Oklahoma Public Employees Retirement System*, 2008 OK 52, ¶ 9, 188 P.3d 120, 123 (citing *Hendrick*, *supra*). Courts are reminded not to search for a construction that results in forfeiture, nor adopt a meaning which would produce that effect, “unless the language of the statute or constitutional provision under consideration . . . clearly demonstrates the legislature intended that a forfeiture take place.” *Id.* We have been very clear that “where there is any doubt whether a forfeiture statute applies, the doubt must be resolved *against* forfeiture.” *Id.* Thus, the forfeiture statute, Section 1-110, must be strictly construed.

¶7 Applying these principles, we examine the plain language of Section 1-110. When this section was enacted in 2011, the legislature was clear, forfeiture did not apply to “retirement benefits that are vested on the effective date of this act.” 11 O.S. 2011 § 1-110 (A). If the officer

had a vested retirement benefit in 2011, then following the legislature’s plain language, forfeiture does not apply. Thus, our threshold inquiry is whether the officer had a retirement benefit that would be considered “vested” in 2011. To resolve this question, we first look to the relevant provisions within the Oklahoma Municipal Code for guidance. This term is not defined within the opening article of this Act titled Article I, “General Provisions and Definitions.” 11 O.S. 2011 § 1-102. Next we examine the more specific article dealing with police pensions and retirement benefits. Although “vested” or “vested benefit” is not included in the definition section of Article L<sup>3</sup> the following definition is helpful:

7. “Normal retirement date” means the date at which the member is eligible to receive the **unreduced** payments of the member’s accrued retirement benefit. Such date shall be the first day of the month coinciding with or following the date the member completes twenty (20) years of credited service. If the member’s employment continues past the normal retirement date of the member, the actual retirement date of the member shall be the first day of the month after the member terminates employment with more than twenty (20) years of credited service. 11 O.S. 2011 § 50-101 (7) (emphasis added).

¶8 We note within Article L, the legislature has recognized the following two distinct categories of members qualifying for payment of pension benefits: (1) unreduced pension benefits for full retirement age and (2) reduced benefits payable to the member or their surviving beneficiary for those with ten (10) years of credited service.<sup>4</sup> Those members with less than ten (10) years of credited service who depart the police force have no reduced or unreduced “pension” benefit option. While this group may be entitled to some type of refund of their contributions to the pension plan, it is clear the legislature did not authorize any “pension” benefit to them. However, the legislature recognized those members of the OPPRS with ten or more years of credited service, have a “vested benefit” which they can opt to receive if leaving their job prior to reaching full retirement. An “accrued retirement benefit” means two and one-half percent (2 ½%) of the member’s final average salary multiplied by the member’s years of credited service not to exceed thirty (30) years.” 50 O.S. 2011 § 50-101 (18). The

vested benefit for a member who has completed ten (10) or more years is two and one-half percent (2 ½%) of final average salary multiplied by the number of years of credited service. 11 O.S. 2011 § 50-111.1 (A).

¶9 Next, we must reconcile the word “vested” as used in Article I, Section 1-110, “the forfeiture of retirement benefits ... shall not include the officer’s ... retirement benefits that are **vested** on the effective date of this act” with the language of Article L, Section 50-111.1, “if a member has completed ten (10) years of credited service at the date of termination, the member may elect a **vested benefit** in lieu of receiving the member’s accumulated contributions.” We will not distort a construction to produce a forfeiture unless the language of the statute clearly reflects the legislature intended that result. Furthermore, we must adopt a construction of “vested” that harmonizes and gives full meaning to both Section 1-110 and Section 50-111.1, located in Articles I and L respectively.

¶10 In 2011, the year that the forfeiture statute was enacted, the officer had 16 years of credited service, and thus, under Section 50-111.1 of article L, he had enough years of credited service to elect a “vested benefit” under this section. This vested benefit option entitles the electing member to a reduced monthly pension which starts on the date the member “reaches fifty (50) years of age or the date the member would have had twenty (20) years of credited service had the member’s employment continued uninterrupted, whichever is later.” 11 O.S. 2011 § 50-111.1. The Court of Civil Appeals asserted that the officer did not meet the eligibility requirement for the early retirement “vested benefit” option as he failed to make this election prior to his conviction, resulting in forfeiture under Section 1-110. But this is not the inquiry. Rather, the threshold question is whether the officer possessed a “vested” benefit within the meaning of this forfeiture statute when enacted in 2011. Under the Court of Civil Appeals’ reasoning, no member of the police pension system could have a “vested benefit” within the meaning of the forfeiture statute unless they made an election under Section 50-111.1 while still a member. Such a construction does not create harmony between Section 1-110 and Section 50-111.1 or other sections within this act and would render parts of Section 1-110 meaningless.

¶11 Subpart A of Section 1-110 applies only to municipal officers and employees who are currently employed; it clearly does not apply to those members who are no longer employees through retirement or ending employment prior to retirement. In Subpart B of Section 1-110, the legislature provides for a different group, those who are convicted after leaving employment. The legislature clearly directed subpart A to members after leaving office and mandated that this subset of employees also had “vested” retirement benefits at the time of enactment in 2011, exempted from forfeiture. From this language, it is evident that the legislature understood that a member of a municipal retirement plan could have a “vested” benefit prior to retirement, prior to making any elections.

¶12 Section 50-111.1 provides that any member who leaves employment prior to reaching full retirement age and who has at least ten (10) years of credited service, has a “vested benefit.” Under the analysis applied by the Court of Civil Appeals, the only way that the officer could have had a “vested” benefit within the meaning of Section 1-110 (A) was if that election had been made prior to his conviction. But that is not the directive by our legislature. The legislature mandated that this forfeiture “**shall not include the ... employee’s ... retirement benefits that are vested on the effective date of this act.**” 11 O.S. 2011 § 1-110 (A).

¶13 With these rules of statutory construction and under these facts, we hold that as a matter of law, in 2011, the officer had a retirement benefit that was vested within the meaning of Section 1-110 (A) and Section 50-111.1, and which was not subject to forfeiture under Section 1-110.

**COURT OF CIVIL APPEALS’ OPINION  
VACATED; ORDER OF DISTRICT COURT  
REVERSED; CAUSE REVERSED AND  
REMANDED FOR PROCEEDINGS  
CONSISTENT WITH TODAY’S  
PRONOUNCEMENT**

¶14 CONCUR: GURICH, C.J., DARBY, V.C.J., KAUGER, WINCHESTER, EDMONDSON, COLBERT, COMBS, KANE, and ROWE, JJ.

1. Record, Findings of Fact, Conclusions of Law, and Final Order, p.5.

2. This statute has been amended since 2011; for the purpose of this analysis, we are referring to the statute in effect in 2011 at the time of the enactment of 11 O.S. 2011 § 1-110.

3. 11 O.S. 2011 § 50-101, Municipal Police Pension and Retirement System, Article L – Police and Retirement System, Section 50-101 – Definitions. Also noted is this statute was revised in 2016, but the

**2020 OK 92**

**LAMEES SHAWAREB and FAROUK SHAWAREB, Plaintiffs/Appellants, v. SSM HEALTH CARE OF OKLAHOMA, INC., d/b/a BONE AND JOINT HOSPITAL AT ST. ANTHONY and SAVANNAH PETTY, Defendants/Appellees.**

**No. 117,633. November 24, 2020**

**CERTIORARI TO THE OKLAHOMA COURT OF CIVIL APPEALS, DIVISION NO. III**

¶0 Plaintiffs filed an action based upon alleged negligence by defendants when one of the plaintiffs was staying in a hospital after surgery and received a burn from spilled hot water. The Honorable Trevor Pemberton, District Judge of the District Court for Oklahoma County, granted defendants' motion to strike plaintiffs' witness list and defendants' motion for summary judgment. Plaintiffs appealed and the Court of Civil Appeals, Division III, affirmed. We granted plaintiffs' petition for certiorari. We hold: reversible error occurred when summary judgment was granted based upon the trial court's ruling on a motion to strike a list of trial witnesses when plaintiffs were not provided time to respond to the motion to strike as granted by District Court Rule 4.

**CERTIORARI PREVIOUSLY GRANTED;  
OPINION OF THE COURT OF CIVIL  
APPEALS VACATED; JUDGMENT OF THE  
DISTRICT COURT REVERSED; AND THE  
CAUSE REMANDED TO DISTRICT  
COURT FOR FURTHER PROCEEDINGS**

Kenyatta R. Bethea, Holloway Bethea & Osenbaugh, Oklahoma City, Oklahoma, for Plaintiffs/Appellants.

Alexander C. Vosler, Alexandra G. Ah Loy, and Leslie L. Jones, Johnson Hanan Vosler Hawthorne & Snider, Oklahoma City, Oklahoma, for Defendants/Appellees.

**EDMONDSON, J.**

¶1 The two primary issues raised on certiorari are whether (1) the trial court's summary judgment procedure created reversible legal error, and (2) an expert medical opinion was necessary for plaintiffs on summary judgment. Plaintiffs argue an expert is not necessary to

explain a hospital's standard of care and causation of plaintiff's injury when (1) a hospital employee gave plaintiff, as a hospital patient, a cup of hot water to make hot tea, (2) the patient was receiving narcotic therapy altering her ability to make a cup of hot tea in a safe manner, (3) this was the first cup of hot water received by patient during her hospitalization, (4) the employee fixed a lid securely on the top of the cup, (5) the employee did not assist the patient with the lid, and (6) upon the patient receiving the cup and attempting to remove the lid the water spilled on the patient causing deep second and "potential third degree" burns to patient's thigh.

¶2 We hold the summary judgment must be reversed due to a prejudicial procedural error in the trial court. The trial court granted defendants' motion to strike plaintiffs' witness list when the list did not contain the name of plaintiffs' expert witness used by plaintiffs when responding to defendants' motion for summary judgment. The trial court ruled plaintiffs failed to have an expert witness necessary for a medical negligence action, and then granted summary judgment to defendants. The trial court's ruling granting the motion to strike and summary judgment occurred eight days after the motion to strike was filed. Oklahoma District Court Rule 4(e) allows fifteen days for a party to respond to a motion to strike. We need not adjudicate whether a medical expert's opinion is necessary to explain the standard of care for a hospital or the effect of narcotics on the patient's ability to use hot water in the circumstances presented by the parties in this case. However, we explain the case as presented by the parties for the context of the motion to strike.

¶3 Lamees Shawareb was a patient in the Bone and Joint Hospital at St. Anthony for postoperative care after her knee surgery. This was her second knee surgery at the same hospital where she had obtained favorable results, except for one incident which occurred after her second surgery on the day she was discharged from the hospital. She was handed a cup of hot water by a hospital employee and when Lamees tried to remove the lid from the cup of hot water it spilled on her thigh causing burns. She had not previously been given a cup of hot water to make tea during her hospitalization or warned of the water's temperature when the cup was handed to her.

¶4 The record on appeal states Lamees was "seen at Mercy" the day after she was burned,

and she was treated at “Baptist Burn Center” for “deep second degree burns and potential third degree burns” after her discharge from Bone and Joint Hospital.<sup>1</sup> Lamees Shawareb and her spouse, Farouk Shawareb, brought an action in District Court alleging the hospital and its employees failed to properly monitor a hot beverage machine, hot beverages were in excess of an acceptable and reasonable temperature for the public and a patient on narcotic therapy, and scalding hot water was served to Lamees without warning her concerning the water’s temperature.

¶5 Plaintiffs state the business which monitored the vending machines at the hospital “received a complaint that the liquid coffee machines at St. Anthony’s were too hot and needed to be turned down.” An employee of the business servicing the coffee machine testified concerning a work order he received in March of 2016 to make a service call at the hospital because “liquid coffee machines may be too hot, need to be turned down.” Further, a comment was made to him from an employee in his dispatch center stating “several people have been burnt by machine.” A photocopy of poor quality is attached to plaintiffs’ response, and it appears to be a work order identified by the employee and stating “several people have been burnt by the machine.”

¶6 The vending machine employee testified that while documents had been previously created relating to servicing a machine’s temperature setting there was no longer any document that he knew of showing his test results for the vending machine in March 2016 because the business had been “transitioning from paper to internet.” He testified that while he then currently takes video of a machine’s temperature settings during servicing no such video was available for when he serviced the machine after Lamees received her burns. He testified his recollection was that the machine was checked “and it was already at the minimum so there was no action [taken at that time to change the temperature].” He testified he serviced the machine again in November 2017 and it was operating at the correct temperature. The vending machine company was a party in the trial court proceeding.

¶7 The hospital and its employee filed a combined motion for summary judgment. Defendants stated a nurse assistant (or “nurse aid”) brought Lamees a cup of hot water at Lamees’ request to make a cup of tea, and Lamees

spilled the hot water on herself. Plaintiffs filed a response to defendants’ motion for summary judgment on October 4, 2018. Plaintiffs filed their “final witness and exhibit list” on Wednesday, October 17, 2018, and it did not include the name of plaintiffs’ expert they relied on in their response to defendants’ motion for summary judgment. On October 26, 2018, defendants filed both a motion to strike plaintiffs’ expert witnesses and a reply for summary judgment.

¶8 Defendants’ motion to strike plaintiffs’ expert witnesses was based upon: (1) Plaintiffs did not name this witness in plaintiffs’ final witness and exhibit list filed October 17th; (2) No expert witness was named in this filing; (3) The trial court’s previously entered scheduling order required preliminary list of witnesses and exhibits be exchanged no later than 60 days prior to pretrial conference (60 days prior to November 14, 2018); and (4) The final exchange of witness lists was required “30 days prior to Pretrial” conference.<sup>2</sup> The scheduling order states in the same numbered paragraph setting deadlines for the witness lists that “additional witness/exhibits shall be stricken by the Court, absent extraordinary circumstances.” This scheduling order states the pretrial conference is on November 14, 2018. The sole objection of defendants to plaintiffs’ expert testifying at trial was plaintiffs’ failure to include the name of plaintiffs’ expert on the final witness list filed by plaintiffs within the time limit set by the scheduling order.<sup>3</sup> Defendants argued “Plaintiffs submitted their Final Witness and Exhibit List two days late on October 17, 2018.”<sup>4</sup>

¶9 Defendants replied to plaintiffs’ response on summary judgment. They argued plaintiffs’ expert, a “certified nurse assistant” did not possess authority to prescribe or administer narcotics and was “clearly not qualified to render the neurologic and narcotics-related opinions relied upon by Plaintiffs.”<sup>5</sup> They argued the name of this witness was not included in plaintiffs’ final list of witnesses and exhibits. Defendants asserted plaintiffs did not produce any qualified expert testimony to support their claims. They stated Lamees “had not yet taken her narcotics at the time she requested the hot water.”<sup>6</sup> They argued “It is uncontroverted that Mrs. Shawareb was not under the influence of narcotics at the time she spilled the hot water.”<sup>7</sup> Further: “Absent a qualified physician expert who can testify about the effects of narcotics on a person’s neurological status, Plaintiffs cannot

controvert these facts, and her arguments lack adequate evidentiary support.”<sup>8</sup>

¶10 Defendants expressly stated on summary judgment “the affirmative defense of assumption of the risk is dispositive of this matter.”<sup>9</sup> Assumption of the risk is a defense raising a fact issue decided by a jury as required by the Oklahoma Constitution.<sup>10</sup> The two well-known “exceptions” to submitting the defense to a jury are (1) if “the plaintiff fails to present evidence showing primary negligence on the part of the defendant, or (2) if there are no material facts in dispute, and reasonable minds exercising fair and impartial judgment could not reach differing conclusions.”<sup>11</sup> The first exception, “lack of primary negligence” exception, is not, in a strict sense, an exception for applying or adjudicating the affirmative defense.<sup>12</sup> Rather, this exception is the fundamental premise underlying all negligence suits stating a defendant is not liable without primary negligence being shown.<sup>13</sup> In other words, the affirmative defense need not be adjudicated by a jury when the negligence of the defendant is not shown by the plaintiff as required for the procedural context, which is summary judgment in the matter before us. The second exception, “no material facts in dispute,” relates to no dispute on the facts relating to the assumption of risk affirmative defense, as opposed to the facts relating to primary negligence.<sup>14</sup> The trial court focused on this first argument and examined whether a negligence cause of action had been shown by plaintiffs.

¶11 A summary judgment process requires the parties to raise pleaded and unpleaded uncontroverted material facts on the material legal issues relating to whether a single inference is created in favor of the movant for a judgment on the merits.<sup>15</sup> Defendants challenged plaintiffs’ action and argued no primary negligence of defendants was shown, and in the summary judgment context this challenge argued that plaintiffs’ negligence cause of action failed to possess one or more of its required elements.<sup>16</sup>

¶12 For example, defendants argued and the trial court expressly ruled “Plaintiffs failed to establish a duty on the part of Defendants as to an individual in the same or similar circumstances.” We have noted the duty element in the context of a negligence action against a hospital alleging improper medical care: “A hospital has the duty to provide for the care and protection of its patients, and in the perfor-

mance of this duty the hospital is required to exercise such reasonable care as the patient’s known condition requires.”<sup>17</sup> Hospital does not dispute the existence of this duty in a general sense. Hospital argues that *if* plaintiffs’ action is judicially construed as based upon an alleged breach of a medical professional standard relating to (1) a patient’s pain management therapy, or (2) hospital-provided food and beverage service, or (3) a combination of both of pain management therapy and food services; *then* plaintiffs must provide a qualified expert witness testifying on the nature of this duty and standard by the hospital.

¶13 Hospital indicates a qualified medical expert must testify on the causation element in the negligence action and link the alleged breach of duty to the cause of plaintiffs’ injury. Plaintiffs expressly raise the issue of Lamees’ exposure to pain medication as a causal element in her negligence action. We explained in *Christian v. Gray*,<sup>18</sup> causation of a person’s legal injury resulting from exposure to a substance is usually analyzed in terms of both (1) general causation, which relates to whether a substance is “capable of causing a particular injury in the general population,” and (2) specific causation, which “is whether that substance caused the particular individual’s injury.”<sup>19</sup> We have recently repeated specific causation is the cause of *the particular individual’s injury*.<sup>20</sup> There is no discussion before us from an expert identifying typical, but not necessarily required, information to support a cause of action based upon a prescribed drug,<sup>21</sup> such as long-acting or short-acting narcotics, narcotic metabolization, half-lives of narcotics, or the effects of named and prescribed narcotics on Lamees during hospitalization at the time of her injury.<sup>22</sup>

¶14 Plaintiffs rely upon the statement of their expert witness, an argument no medical expert witness is necessary, and an argument based upon an alleged improper procedure by the trial court. They assert their expert possessed “just as much training and experience” as the hospital employee who served Lamees the hot water. They also rely upon one exception to the necessity of providing an expert’s opinion when the fact to be shown “lies within the common knowledge of lay persons.”<sup>23</sup> Plaintiffs’ arguments are essentially that (1) a lay jury has a common knowledge of opiates and their properties on individuals as well as the steps for making hot tea, and (2) Lamees will testify on the effect of hospital-provided pain

medication upon her ability to safely make a cup of hot tea when hot water was served to her in the manner used by the hospital's employee.

¶15 Upon review of the appellate record and arguments made by the parties on certiorari, we conclude an error in the trial court's procedure when rendering summary judgment requires a reversal of judgment with remand to the District Court for further proceedings without this Court adjudicating issues relating to the necessity of an expert witness for plaintiffs' cause of action.

¶16 Plaintiffs state on certiorari the District Court ruled on the defendants' motion to strike six days after it was filed without allowing plaintiffs fifteen days to respond to the motion in violation of District Court Rule 4(e). The motion to strike plaintiffs' experts was filed October 26, 2018, the hearing on defendants' motion for summary judgment occurred on November 3, 2018, and the motion to strike was granted at the same hearing. Rule 4(e) provides as follows.

e. Any party opposing a motion, except those enumerated in Section c above, shall serve and file a brief or a list of authorities in opposition within fifteen (15) days after service of the motion, or the motion may be deemed confessed.

12 O.Supp.2013, Ch. 2, App., Rules of the District Courts, Rule 4(e).

Rule 4(e) references motions in Rule 4(c) as outside the scope of Rule 4(e), but a motion to strike plaintiffs' experts is not listed as one of the motions in Rule 4(c).<sup>24</sup> The fifteenth day after October 26, 2018, was Saturday November 10, 2018. Plaintiffs filed an "Amended Final Witness and Exhibit List" on Thursday, November 8, 2018, and included the expert plaintiffs used in their response to defendants' motion for summary judgment. This filing appears to have been without express permission of the trial court.

¶17 Two challenges to plaintiffs' expert were made by defendants with two requests to strike and they must be analyzed separately. The first is defendants' separately filed motion to strike on October 26, 2018, and this motion was for the purpose of testimony occurring at a trial. The sole basis for the motion to strike was plaintiffs' failure to place the name of their expert on their filed expert list. The second

request to strike was part of defendants' reply on summary judgment which was also filed on October 26, 2018. Defendants' motion to strike plaintiffs' expert became a part of a motion incorporated into the summary judgment procedure by defendants' reply.

¶18 Defendants' reply on summary judgment stated plaintiffs' expert had not been endorsed as an expert for trial and as a result the expert's "declaration is not what the evidence will be at trial, and the declaration is inadmissible."<sup>25</sup> Defendants' reply combined this failure to endorse as a reason to strike with an additional assertion "such declaration must be stricken" because plaintiffs' expert was no expert. Defendants argued plaintiffs could not defeat summary judgment sought by defendants because of the absence of an expert for plaintiffs. Their argument relied on the rule that in responding to a motion for summary judgment a plaintiff need only show evidence of disputed material facts that, if proven at trial, would allow plaintiff to succeed on plaintiff's claim,<sup>26</sup> but plaintiffs could not succeed without an expert witness.

¶19 We address first the summary judgment challenge to the expert's qualifications and the defendants' request to strike the expert's statement as such relates to the procedure used in the trial court. A challenge to a witness testifying as an expert includes a factual inquiry including an examination of the knowledge, skill, experience, training, and education possessed by the witness.<sup>27</sup> An opinion may be provided by an ordinary person whose experience or perception provides him or her with knowledge which concerns some matter involved in the trial,<sup>28</sup> and a trial court adjudicates both a lay person's experience and an expert's experience (and any other factors) qualifying the person as an expert and whether expert's opinion assists the trier of fact.<sup>29</sup>

¶20 It is well-settled that the qualification of an expert witness is generally within the sound discretion of the trial court, and the exercise of discretion will not be reversed on appeal except when an abuse of discretion occurs.<sup>30</sup> Appellate review to determine an abuse of a trial court's discretion requires an actual antecedent exercise of that judicial discretion by the trial court on the issue reviewed. We do not make first instance determinations of disputed non-jurisdictional law issues or contested fact issues.<sup>31</sup> When looking first to the trial court's judgment and construing it to determine if judicial discretion was actually exercised on the issue we

are asked to review, we examine the clear and unambiguous language of the instrument, since such language is controlling.<sup>32</sup>

¶21 The clear language used in the trial court's judgment shows no exercise of judicial discretion on defendants' challenge to the qualifications of plaintiffs' expert witness. The summary judgment order states in part the following.

1. Plaintiffs did not endorse ..., [name of the witness] as an expert witness to testify at trial; therefore her declaration is stricken as inadmissible.
2. Plaintiffs have not endorsed any expert witnesses. As a result, Plaintiffs have no qualified medical expert testimony to support their claims.
3. Plaintiffs have failed to provide sufficient evidence in support of their "medical negligence" action against Defendants.

The trial court order grants defendants' request to strike plaintiffs' expert, but solely on the ground the name of the witness was not on plaintiffs' filed list of witnesses. The trial court did not adjudicate whether plaintiffs' expert was qualified as an expert, and we may not give that issue a first-instance adjudication.

¶22 A party must be afforded a reasonable opportunity to respond to an opposing party's motion for summary judgment.<sup>33</sup> During the summary judgment hearing, plaintiffs' counsel affirmatively requested additional time "to list somebody specifically" as a witness.<sup>34</sup> Plaintiffs' counsel also made the argument plaintiffs need not use in a summary judgment proceeding the actual expert witness plaintiffs would also use at trial, and counsel could pick which expert the plaintiffs would use for summary judgment and which expert(s) for trial. Plaintiffs' counsel also argued it was permissible to designate experts without a name but by professional degree or certification such as R.N. or M.D., and submit the name to the court and opposing counsel at a later date.

¶23 Plaintiffs' counsel argued discovery was ongoing and he had requested a deposition of one of the hospital's nurses. Defendants' counsel at the hearing stated he had no recollection of the deposition request and a discussion on the subject. He agreed he received a written request from plaintiffs' counsel the day before the hearing. Plaintiffs' counsel stated he had discussions relating to additional discovery

with defense counsel for the vending machine company.

¶24 Counsel for the hospital argued the interpretation of District Court Rule 13 by plaintiffs' counsel was "fundamentally unfair" to a defendant who had met the pretrial deadlines set by the trial court. While agreeing plaintiffs could select any expert witness they wanted, he argued plaintiffs must pick *at least one expert witness* in a timely manner for a party's list of witnesses at trial and also place this name in a timely filed witness list. Defendants argued plaintiffs could not use an expert witness for plaintiffs' response on summary judgment if no expert witness was listed by name as an expert witness at trial.

¶25 During the hearing the trial court stated to plaintiffs' counsel the court was striking the affidavit of plaintiffs' expert "for purposes of this Motion for Summary Judgment" because she was "not timely listed in compliance with the Scheduling Order and no request formally having been previously submitted to the Court." We construe the language referencing a formal request as no previous written request by counsel filed with the court. Some motions may be made by an oral motion in court pursuant to 12 O.S. § 2007,<sup>35</sup> however District Court Rule 5 (C), Pretrial Proceedings, states in part: "The scheduling order shall issue as soon as feasible after the case is at issue. A schedule shall not be modified *except upon written application by counsel* and by leave of the judge assigned to the case upon a showing of good cause."<sup>36</sup> There is nothing in the appellate record before us suggesting that plaintiffs' counsel followed this rule.

¶26 The purpose of the summary adjudication procedure is to avoid unnecessary jury trials,<sup>37</sup> and narrow the scope of a subsequent trial by a pre-trial identification of non-triable fact issues.<sup>38</sup> Generally, a plaintiff has a right to select which witnesses to use<sup>39</sup> in support of his or her case, subject of course to the usual restrictions as to evidence and witnesses.<sup>40</sup> The issue in this appeal is not what plaintiffs indicated at the hearing, *i.e.*, a limitation on a plaintiff's ability to call and present witnesses selected by plaintiff. Neither is the issue what defendants indicated at the hearing, *i.e.*, a plaintiff failing to follow a scheduling order, failing to seek a written application for additional time, and attempting to control the judicial docket. Clearly, a trial court may enforce its pretrial order by excluding a trial witness not listed on its pretrial order.<sup>41</sup>



The issue is a trial court simultaneously ruling on a motion to strike witnesses and a motion for summary judgment when the merits of the latter motion were based upon the former, and the date of the simultaneous ruling occurred when the opposing party had not responded to the motion to strike but still possessed time to do so pursuant to a Uniform District Court Rule.

¶27 The trial court made the motion to strike the expert witness a part of the summary judgment process when the court used the motion to strike as a basis for adjudicating no expert witness statement was submitted by plaintiffs on summary judgment. A flaw with using this procedure is: (1) The trial court granted the motion eight days after it was filed when plaintiffs possessed a Rule 4(e) fifteen days to respond to the motion, *and* (2) The trial court used this procedure as a basis for stating plaintiffs' failed to provide facts in support of their cause of action, and then granted a judgment on the merits to defendants based upon the court's action granting the motion to strike.

¶28 In *Andrew v. Depani-Sparkes*,<sup>42</sup> a summary judgment was granted to a defendant prior to the trial court's *Daubert* hearing on excluding plaintiffs' experts. Defendants' motion for summary judgment was based upon excluding one of plaintiffs' experts on the issue of causation.<sup>43</sup> We held: "A trial court commits reversible error by making a *sua sponte* *Daubert* decision as a basis for granting summary judgment without notice to a party that the party's testimony is subject to being excluded as part of that adjudication."<sup>44</sup> The trial court used the principle of *Daubert* and its progeny as a basis for granting summary judgment prior to the scheduled hearing on the *Daubert* issue. In our case today, the District Court granted summary judgment to defendants on the basis of a motion when on the date of summary judgment hearing the plaintiffs still had an opportunity to respond for an additional seven days.

¶29 What we said in *Andrew v. Depani-Sparkes*, applies herein as well: "Fundamental fairness cannot be afforded except within a framework of orderly procedure, and that fairness includes giving notice of certain judicial events altering legally cognizable rights."<sup>45</sup> A core element is an opportunity to be heard as well as notice of the judicial altering event.<sup>46</sup> Plaintiffs' petition in error and petition for certiorari raised their lack of an opportunity to respond to the motion to strike. Defendants

responded to this argument on certiorari and stated the trial court had discretion to enforce its scheduling order. Whether a party's procedural due process right was violated by a judicial procedure is reviewed by this Court *de novo*,<sup>47</sup> and we may review the issue although an appellant has failed to preserve the error in the lower tribunal.<sup>48</sup>

¶30 Procedural error may be harmless for the purpose of appellate review, and probability of a change in the outcome of a lawsuit is the test of prejudice this Court has long employed when analyzing alleged errors of practice and procedure.<sup>49</sup> There is no doubt the failure to provide plaintiffs their rule-mandated time to respond to the motion to strike was prejudicial when the trial court used its ruling on the motion to strike as a basis for granting summary judgment on the merits. A party's reasonable opportunity to respond on summary judgment includes "a reasonable opportunity to present all material made pertinent to such a motion by the rules for summary judgment," and a failure to provide this opportunity is reversible error.<sup>50</sup>

¶31 The petition for certiorari to the Court of Civil Appeals was previously granted. The opinion of the Court of Civil Appeals is vacated, the judgment of the District Court is reversed, and the matter is remanded to the District Court for further proceedings consistent with this opinion.

¶32 CONCUR: GURICH, C.J.; DARBY, V.C.J.; KAUGER, WINCHESTER, EDMONDSON, COLBERT, and COMBS, JJ.

¶33 DISSENT: KANE, and ROWE, JJ.

EDMONDSON, J.

1. Record on Accelerated Appeal, Tab 9, plaintiffs' response to defendants' motion for summary judgment, October 4, 2018, Exhibit 5, pg. 2 (Lamees' patient history provided at "OU Physicians Plastic, Aesthetic & Reconstructive Surgery" which states care after discharge at "Baptist Burn Center," and also includes an OU physician's physical exam with findings stating Lamees had areas with "obviously deeper burns than others," "some areas that were consistent with deep second degree burns and some areas that were between deep second degree and possibly third degree burns."). The Paul Silverstein Burn Center is located at Integris Baptist Medical Center in Oklahoma City.

Lamees' deposition states she was "seen at Mercy" the day after she received the burns. Record on Accelerated Appeal, Tab 8, defendants' motion for summary judgment, Exhibit "H," pg. 29. Mercy health system includes a collection of hospitals and clinics in Oklahoma.

2. Record on Accelerated Appeal, Tab 11, defendants' motion to strike plaintiffs' expert witnesses, October 26, 2018, Exhibit 1, Scheduling Order, July 16, 2018, ¶ 3.

3. The scheduling order states a different procedure for an objection to an expert's testimony other than identifying the expert in a witness list. The order provides an objection to expert testimony will be included in the pretrial conference order, a briefing schedule set by the court, and a *Daubert* hearing set at pretrial. Record on Accelerated Appeal, Tab 11, defendants' motion to strike plaintiffs' expert

witnesses, October 26, 2018, Exhibit 1, Scheduling Order, July 16, 2018, ¶ 7.

4. Record on Accelerated Appeal, Tab 11, defendants' motion to strike plaintiffs' expert witnesses, October 26, 2018, pg. 2.

5. Record on Accelerated Appeal, Tab 12, defendants' reply to plaintiffs' response to defendants' motion for summary judgment, October 26, 2018, pg. 4.

6. Record on Accelerated Appeal, Tab 12, defendants' reply to plaintiffs' response to defendants' motion for summary judgment, October 26, 2018, pg. 2.

7. Record on Accelerated Appeal, Tab 12, defendants' reply to plaintiffs' response to defendants' motion for summary judgment, October 26, 2018, pg. 2.

8. Record on Accelerated Appeal, Tab 12, defendants' reply to plaintiffs' response to defendants' motion for summary judgment, October 26, 2018, pg. 3.

9. Record on Accelerated Appeal, Tab 12, defendants' reply to plaintiffs' response to defendants' motion for summary judgment, October 26, 2018, pg. 5.

10. Okla. Const. Art. 23 § 6: "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury." See *Byford v. Town of Asher*, 1994 OK 46, 874 P.2d 45, 47 ("We have honored the plain meaning of these words [in Art. 23 § 6], and have repeatedly required the issue of assumption of risk to be submitted to the jury.").

11. *Reddell v. Johnson*, 1997 OK 86, ¶ 13, 942 P.2d 200, 203.

12. *Reddell v. Johnson*, at ¶ 14, 942 P.2d at 203 ("the 'lack of primary negligence' exception . . . is really not an exception").

13. *Reddell v. Johnson*, at ¶ 14, 942 P.2d at 203.

14. *Thomas v. Holliday By and Through Holliday*, 1988 OK 116, 764 P.2d 165, n. 8, 168 (Assumption of risk affirmative defense in negligence is often classified in three categories involving different facts, (1) express assumption of risk including an express contract, (2) implied primary assumption of risk including plaintiff's presumed consent to the risk based upon plaintiff's participation and the nature of the risk, and (3) implied secondary assumption of risk when the plaintiff knew of the unreasonable risk created by the defendant's conduct and voluntarily chose to encounter that risk.).

15. *Darrow v. Integrus Health, Inc.*, 2008 OK 1, n. 17, 176 P.3d 1204, 1209 (comparing purposes of motions to dismiss and summary judgment); *Indep. Sch. Dist. No. 52 of Okla. Cnty. v. Hofmeister*, 2020 OK 56, ¶ 28, 473 P.3d 475, 489 ("Summary judgment is an adjudication on the merits of the controversy.").

16. A defendant's motion for summary judgment may argue no cause of action exists possessed by plaintiff because either (1) the absence of a single element of the action [or more than one element of the action] or (2) the presence of all elements of a defense to the action. *McGee v. Alexander*, 2001 OK 78, ¶ 23, 37 P.3d 800, 806 (the absence of any one element used to define a cause of action is enough to defeat this action); *Akin v. Missouri Pacific Railroad Co.*, 1998 OK 102, ¶ 9, 977 P.2d 1040, 1044 (a defendant must show either the absence of at least one essential element to plaintiff's cause of action, or the presence of all elements necessary to an affirmative defense to the cause of action).

17. *Harder v. F.C. Clinton, Inc.*, 1997 OK 137, 948 P.2d 298, 304.

18. 2003 OK 10, 65 P.3d 591.

19. *Christian v. Gray*, 2003 OK 10, at ¶ 21, 65 P.3d at 602.

20. *Nelson v. Enid Medical Associates*, 2016 OK 69, ¶ 38, 376 P.3d 212, 225. See *Nelson*, at ¶¶ 38-61, 376 P.3d at 225-231 and the discussion of specific causation, internal causation, external causation, medical opinions concerning the medical use of vasopressin in a particular circumstance, and the different, and nonexhaustive, methods used for the proof of causation.

21. These topics may be used in some courts regarding specific causation of a particular person's injury when the injury is attributed to narcotic dosage. See, e.g., *Procaccini v. Lawrence Memorial Hospital, Inc.*, 175 Conn.App. 692, 168 A.3d 538, 548-550 (2017) (in the context of causation and a dose of methadone the court discussed concepts of metabolism, half-lives, and duration of effect for long-acting and short-acting narcotics).

We cite these examples showing what appears to be the type of action plaintiffs and defendants are litigating before us, and we expressly make no holding on proof necessary for plaintiffs' action because such holding would be hypothetical and advisory based upon our disposition herein on a procedural flaw in the summary judgment process. We do not address hypothetical and advisory issues in an appeal. *Gaasch, Estate of Gaasch v. St. Paul Fire and Marine Insurance Company*, 2018 OK 12, n. 23, 412 P.3d 1151, 1157.

22. Plaintiffs' expert stated "Mrs. Shawareb was under the influence of multiple narcotics...[o]pioid analgesics,. Like Dilaudid and Ultram, both of which Mrs. Shawareb had been given secondary to her

knee replacement...." This opinion did not expressly link specific narcotics and dosages to the time the Mrs. Shawareb was injured.

23. *Ellison v. Campbell*, 2014 OK 15, ¶ 15, 326 P.3d 68, 73.

24. 12 O.S.Supp.2013, Ch. 2, App., Rules of the District Courts, Rule 4(c):

c. Motions raising fact issues shall be verified by a person having knowledge of the facts, if possible; otherwise, a verified statement by counsel of what the proof will show will suffice until a hearing or stipulation can be provided.

Every motion shall be accompanied by a concise brief or a list of authorities upon which movant relies. Unless the court directs otherwise, neither a brief nor a list of authorities shall be required with respect to any of the following motions:

(1) Motions for extensions of time, if the request is made before expiration of the time period originally prescribed, or as extended by previous orders,

(2) Motions to continue a hearing, pretrial conference or trial,

(3) Motions to amend pleadings or file supplemental pleadings,

(4) Motions to appoint a guardian ad litem,

(5) Motions for physical or mental examinations,

(6) Motions to add or substitute parties,

(7) Motions to enter or vacate default judgments,

(8) Motions to confirm sales,

(9) Motions to stay proceedings to enforce judgments,

(10) Motions to shorten a prescribed time period, and

(11) Motions for scheduling conferences and other settings.

25. Record on Accelerated Appeal, Tab 12, defendants' reply to plaintiffs' response to defendants' motion for summary judgment, October 26, 2018, pg. 4.

26. See, e.g., *Beach v. Dept. of Public Safety*, 2017 OK 40, n. 19, 398 P.3d 1, 6 ("However, if Defendants move for summary judgment, Plaintiff need only show evidence of disputed material facts that, if proven at trial, would allow her to succeed on her claim.") (emphasis omitted).

27. 12 O.S. 2011 § 2702 (a witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise). See, e.g., *Gaines v. Comanche County Medical Hospital*, 2006 OK 39, ¶¶ 18-19 & 23, 143 P.3d 203, 209-211, 24 A.L.R.6th 931 (nurse was qualified as an expert witness pursuant to 12 O.S.2001 § 2702 by her knowledge, skill, experience, training and education).

28. 12 O.S.2011 § 2701 (opinion testimony by lay witness).

29. 12 O.S. 2011 § 2011 (2) (opinion must be helpful and not within 12 O.S. § 2702); *Nelson v. Enid Medical Associates, Inc.*, 2016 OK 69, n. 53, 376 P.3d 212, 224 ("A witness's qualifications must not be conflated with the reliability of the witness's theory or technique, although it may be considered as a *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)] factor.") (citation added).

30. *John v. Saint Francis Hospital, Inc.*, 2017 OK 81, ¶ 28, 405 P.3d 681, 690; *Williams Natural Gas Co. v. Perkins*, 1997 OK 72, ¶ 17, 952 P.2d 483, 489; *Jones v. Stemco Manufacturing Co. Inc.*, 1981 OK 10, 624 P.2d 1044, 1046.

31. *Indep. Sch. Dist. No. 52 of Okla. Cnty. v. Hofmeister*, 2020 OK 56, ¶ 52, & n. 73, 473 P.3d 475, 498.

32. *Marshall v. OK Rental & Leasing, Inc.*, 1994 OK 87, 879 P.2d 132, 133, citing *Lemons v. Lemons*, 1951 OK 300, 238 P.2d 790, 792.

33. *Glenhurst Homeowners Ass'n, Inc. v. Xi Family Trust*, 2014 OK 38, ¶ 8, 330 P.3d 494, 496, ("it is also important that all litigants be given a reasonable opportunity to have their day in court, and to have their rights and liberties tried upon the merits"), quoting *Cornett v. Carr*, 2013 OK 30, ¶ 13, 302 P.3d 769, 773.

34. Appellee's Supplemental Record on Accelerated Appeal, Exhibit 6, Summary Judgment hearing transcript, pg. 22.

35. *Osage Nation v. Bd. of Comm'r's of Osage Cnty.*, 2017 OK 34, ¶ 14 & n. 16, 394 P.3d 1224, 1232, citing *Campbell v. Campbell*, 1994 OK 84, 878 P.2d 1037, 1040 ("Case law also holds that oral motions are acceptable in this jurisdiction."); 12 O.S. 2011 2007(B)(1): "An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion."

36. 12 O.S.Supp.2013, Ch. 2, App., Rules of the District Courts, Rule 5(C) (emphasis added).

37. *Flanders v. Crane Co.*, 1984 OK 88, 693 P.2d 602, 605 (the purpose of summary judgment is to avoid unnecessary jury trials) citing *Flick v. Crouch*, 1967 OK 131, 434 P.2d 256, 262.

38. *Vance v. Federal Nat. Mortg. Ass'n*, 1999 OK 73, ¶ 6, 988 P.2d 1275, 1278 ("summary process is available to litigants to identify and isolate non-triable fact issues"), citing *Shamblin v. Beasley*, 1998 OK 88, 967 P.2d 1200, 1207.

39. *West v. Cajun's Wharf, Inc.*, 1988 OK 92, n.2, 770 P.2d 558, 563.

40. Cf. *May-Li Barki, M.D., Inc. v. Liberty Bank & Trust, Co.*, 1999 OK 87, ¶ 15, 20 P.3d 135, 140-141 (the exclusion of cumulative evidence does not constitute reversible error); *Worsham v. Nix*, 2006 OK 67, ¶ 34-35, 145 P.3d 1055, 1066-1067 (opinion testimony of expert was unreliable).

41. *Middlebrook v. Imler, Tenney & Kugler M.D.'s, Inc.*, 1985 OK 66, 713 P.2d 572, 583, citing *Short v. Jones*, 1980 OK 87, 613 P.2d 452, 457, where we explained a trial court could exclude from trial a witness whose name was undisclosed prior to trial, and the opposing party had objected during pretrial to trial testimony from the then unnamed witness).

42. 2017 OK 42, 396 P.3d 210.

43. *Andrew v. Depani-Sparkes*, 2017 OK 42, ¶ 35, 396 P.3d 210, 223.

44. *Andrew v. Depani-Sparkes*, 2017 OK 42, ¶ 35, 396 P.3d at 223.

45. *Andrew v. Depani-Sparkes*, 2017 OK 42, ¶ 38 & n. 54, 396 P.3d at 224, citing *Tucker v. Cochran Firm-Criminal Defense Birmingham L.L.C.*, 2014 OK 112, n. 63, 341 P.3d 673, 688.

46. *Braitsch v. City of Tulsa*, 2018 OK 100, ¶ 6, 436 P.3d 14, 18.

47. *In re Adoption of K.P.M.A.*, 2014 OK 85, ¶ 12, n. 3, 341 P.3d 38, 42-43, citing *Pierce v. State ex rel. Dept. of Public Safety*, 2014 OK 37, ¶ 7, 327 P.3d 530; *In re A.M. & R.W.*, 2000 OK 82, ¶ 6, 13 P.3d 484, 486-487.

48. *Patterson v. Beall*, 2000 OK 92, ¶ 1 & n.1, 19 P.3d 839, 841.

49. *Public Serv. Co. v. Brown*, 1998 OK 121, ¶ 7, 972 P.2d 354, 355, quoting *Montgomery v. Murray*, 1970 OK 226, 481 P.2d 755, 761, quoting *Badgwell v. Lair*, 1958 OK 122, 325 P.2d 968, 971.

50. *Beshara v. Southern National Bank*, 1996 OK 90, 928 P.2d 280, 290.

## 2020 OK 93

### State of Oklahoma ex rel. Oklahoma Bar Association, Complainant, v. Bradley A. Pistotnik, Respondent.

SCBD 6859. November 24, 2020  
As Corrected November 25, 2020

#### PROCEEDING FOR BAR DISCIPLINE

¶0 This is a summary disciplinary proceeding initiated pursuant to Rule 7.1 and 7.2 of the Rules Governing Disciplinary Proceedings (RGDP), 5 O.S.2011, ch. 1, app. 1-A, based upon Respondent Bradley Alan Pistotnik's guilty plea to three misdemeanor charges of Accessory After the Fact in violation of 18 U.S.C. § 3. On October 16, 2019, the United States District Court for the District of Kansas sentenced Respondent, ordering him to pay a fine of \$375,000, restitution of \$55,200, and a special assessment of \$300. On October 31, 2019, the Oklahoma Bar Association ("OBA") transmitted to this Court a certified copy of the record relating to the conviction, and on November 18, 2019, we ordered Respondent's immediate interim suspension. Following a mitigation hearing, the Professional Responsibility Tribunal ("PRT") concluded Respondent was not forthright in his testimony and recommended a one-year suspension. Upon *de novo* review, we find that a suspension for two years and a day serves the important goals of discipline.

**RESPONDENT IS SUSPENDED FOR TWO YEARS AND ONE DAY, EFFECTIVE FROM THE DATE OF THIS OPINION, AND ORDERED TO PAY COSTS.**

Attorneys and Law Firms:

Katherine M. Ogden, Oklahoma Bar Association, Oklahoma City, Oklahoma, for Complainant.

Charles F. Alden, III, Jack S. Dawson, and Amy L. Alden, Oklahoma City, Oklahoma and Sheila J. Naifeh, Tulsa, Oklahoma, for Respondent.

**DARBY, V.C.J.:**

#### I. FACTUAL BACKGROUND

¶1 Respondent Bradley Alan Pistotnik was admitted to the practice of law in the State of Oklahoma in 1981 and in the State of Kansas in 1982. Respondent attended the University of Kansas School of Law, and he currently lives in Wichita, Kansas. He maintains clients in both states with the majority of his practice being in Kansas. Respondent's federal criminal conviction in Kansas arose from his conduct in 2014, after he hired a web developer, David Dorsett, to build a website for his newly formed law firm. Respondent opened this new law office following a contentious dissolution of his old firm and partnership with his brother. The winding up of that business led to competing lawsuits between the brothers, including an action for receivership to retain control over clients, and a court order from a Kansas judge directing them to disable the old website, [www.pistotniklaw.com](http://www.pistotniklaw.com), and create their own independent sites. Hr'g Tr., 120-21.

¶2 On September 15, 2014, after receiving an email advertisement from David Dorsett, Respondent reached out, and the two met at Respondent's law office. During this initial meeting, Respondent hired Dorsett to: 1) build the new website, 2) serve as an information technology expert in the dissolution proceeding, and 3) provide assistance with online reputation management. Respondent was concerned that after the fallout at the firm, his brother may be publishing negative information about him online. At the conclusion of the meeting, Respondent wrote Dorsett a check for \$5,000, and gave him full access to his office computers and passwords. *Id.* at 124.<sup>1</sup>

¶3 Four days later, on September 19, 2014, Respondent met with Dorsett a second time. Dorsett instructed Respondent to search for his name online to see what results appeared. Respondent did so the following day and located an article on [RipoffReport.com](http://RipoffReport.com) describing him as a criminal. Respondent immediately emailed Dorsett the following: "Dave look at this new page from yesterday and tell me how we get

rid of it[.] states created yesterday[.]” Complainant’s Ex., 2. Dorsett informed Respondent he had a friend who could “de-index” negative articles and build new positive pages to make the unwanted content appear further down in the search results. Hr’g Tr., 127. Respondent testified that he agreed only to this legal de-indexing service. *Id.* at 128-29. On September 22, 2014, Respondent also emailed Dorsett: “Dave, can you find the IP address for this site and particular claim number to establish the location of the sender?” Complainant’s Ex., 3. Respondent titled both of these emails: “Ripoff Report” and “Ripoff page,” respectively.

¶4 Six days later, on September 25, 2014, Dorsett sent extortionate threats and initiated a flood of emails to the servers of Ripoff Report<sup>2</sup>, Leagle<sup>3</sup>, and the Arizona law firm that represented Ripoff Report, in effort to frustrate the recipients and cause them to remove all information pertaining to Respondent. Resp’s Ex., 4, 2. These emails impaired the servers of Ripoff Report, Leagle, and the Arizona law firm, rendering their communications and data inaccessible. Along with the emails, Dorsett sent the following threat separately to all three victims, each reflecting the particular site’s name:

Remove this page and we stop [link of subject article removed] . . . [I]f you don’t remove it we will begin targeting your advertisers and explain that this will stop happening to them once they pull their ads from leagle.com or leagle.com kills this page . . . [link removed] You have 4 hours before we start hitting your advertisers.

*Id.*

¶5 Later this day, as the communications were still inundating the businesses, two attorneys from the firm representing Ripoff Report contacted Respondent at his law office. The attorneys advised Respondent they were recording the phone call. This recording is included in the record before this Court. Complainant’s Ex., 7. The lawyers told Respondent that based on the threats regarding negative content about him, Respondent was their only link for determining who was responsible. Respondent denied having any knowledge or involvement and falsely stated that he had never asked or hired anyone to help him with reputation management. The lawyers asked Respondent repeatedly if he knew any information that could help them in any way, emphasizing that their servers were on the

brink of crashing unless they identified the attacker. The lawyers informed Respondent they were turning the matter over to the FBI. Respondent then began shifting the blame to his brother, stating how he was involved in contentious litigation with him so *he* would most likely be the culprit. Respondent said he would “call around” to see if he could find out anything but reemphasized falsely that he had “not hired anybody,” so whoever was responsible was “doing it on their own.”<sup>4</sup>

¶6 Immediately after hanging up, Respondent called Dorsett, who confirmed the attacks. According to Respondent, he “chewed him out” and “screamed at him,” asking “what the hell was wrong with him.” Hr’g Tr., 156. Ripoff Report ultimately acquiesced in the ransom and removed the negative review the same day. Dorsett also sent Respondent an email detailing his methods and confirming the successful removal. Four days later, on September 29, 2014, Dorsett emailed Respondent again, this time attaching an invoice listing the reputation services related to the attacks and noting: “I’m pretty sure nobody has ever gotten a full removal from either of those sites, and no reputation companies will even attempt it for under \$2,500 per page.” Complainant’s Ex., 4. Respondent paid the invoice by check the same day.<sup>5</sup>

¶7 Even if Respondent was initially unknowing of Dorsett’s plan, after the attacks he chose to persist in the lie, not contact the lawyers, and then pay for the completed scheme. It was not until months later that Respondent learned Dorsett had actually caused the publication of *the negative articles* in a larger ploy to also extort Respondent in addition to the other three victims. At this point, Respondent went to the FBI and reported Dorsett. Doing so, he described the events as if he was completely innocent in the scheme. In fact, Respondent was initially listed as a victim in the FBI’s investigation initiated against Dorsett alone. Hr’g Tr., 188. The FBI agent who investigated the criminal case testified at the PRT hearing that it was not until later in the investigation against Dorsett that their office discovered Respondent had excluded two incriminating emails from evidence when reporting Dorsett for extorting him. *Id.* at 195. At this point, the FBI learned the full extent of Respondent’s business relationship with Dorsett. *Id.* In summary, Respondent accepted and helped conceal the fraud when he believed it was carried out to his benefit and then reported it only after learning the larger

scheme was against him as well. Respondent's dishonesty regarding the true nature of his and Dorsett's involvement in the attacks led to his criminal conviction.

¶8 On July 17, 2018, after much investigation and several delays in the prosecutions of both men, the United States Attorney's Office ("USAO") for the District of Kansas filed a ten-count Indictment against Respondent in *United States v. Pistotnik*, Case No. 18-CR-10099-01.<sup>6</sup> Following plea negotiations, Respondent agreed to plead guilty to three counts of Accessory After the Fact, in violation of 18 U.S.C. § 3.<sup>7</sup> The USAO filed the three-count Information on October 15, 2019. The following day, the United States District Court for the District of Kansas accepted the plea, adjudicated Respondent guilty, and sentenced him to payment of a \$375,000 fine, restitution of \$55,200, and a special assessment of \$300, all due immediately in a lump sum of \$430,500. Respondent paid this amount in full on the day of his plea and sentencing.

## II. BAR DISCIPLINARY PROCEEDINGS

¶9 On October 31, 2019, the OBA filed its notice and certified copies of the record relating to the conviction pursuant to Rule 7.2 of the RGDP. Respondent requested to provide supplemental information relevant to the appropriateness of an interim suspension. The Court denied Respondent's request and on November 18, 2019, entered an order of immediate interim suspension. The Court directed Respondent to show cause, if any, no later than December 4, 2019, why the interim suspension should be set aside and to request a hearing before the PRT. Respondent filed a response on December 4, 2019, asserting that he should not be interim suspended and the matter should be dismissed. On December 30, 2019, Respondent requested the mitigation hearing. On January 2, 2020, the Court granted the Rule 7 hearing on the limited scope of mitigation and recommendation of discipline.

¶10 On January 15, 2020, the Court granted Respondent's unopposed motion for a continuance. Respondent then filed a Motion to Stay Proceedings pending resolution of the bar disciplinary proceeding initiated in the State of Kansas. The OBA objected, and on March 9, 2020, the Court ordered the mitigation hearing to proceed. Evidence regarding discipline imposed in that case, if any, is not included in the record before this Court. Based on both the

first and third emergency orders regarding the COVID-19 state of disaster, the PRT continued the mitigation hearing on two occasions, first on March 9, 2020, and then on May 7, 2020. The PRT ultimately held the hearing on June 5, 2020. Respondent presented exhibits and seven character witnesses, including himself, and the OBA presented exhibits and two witnesses. The PRT filed its report on July 6, 2020, and the Court received the completed record with all briefs on August 21, 2020.

¶11 Respondent asks this Court to impose a private reprimand as discipline for his conduct. The OBA recommends a six-month suspension, retroactive to the date of interim suspension. The PRT rejects both of these recommendations and asserts that suspending Respondent for a period of one year, effective from the date of our opinion, is necessary to accomplish the goals of discipline.

## III. PRIOR DISCIPLINE

¶12 Respondent has been previously disciplined in the State of Kansas on five occasions. Complainant's Ex., 1. The Kansas Office of the Disciplinary Administrator confirms that Respondent has received four informal admonitions and one suspension from the practice of law for a period of one year. The four informal admonitions, which are public but unpublished forms of discipline, date back to 1985, 1991, and 1994. Kansas suspended Respondent's license in 1993, for rule violations involving conflicts of interest and misconduct with clients. Recognizing these incidents of discipline date back more than two and three decades, we do not accord them undue weight but rather reference them in context with Respondent's full legal career.

## IV. STANDARD OF REVIEW

¶13 This Court possesses original, exclusive, and nondelegable jurisdiction over all attorney disciplinary proceedings in this State. 5 O.S. 2011, § 13; RGDP, Rule 1.1. The purpose of the Court's licensing authority is not to punish the offending lawyer but to safeguard the interests of the public, the courts, and the legal profession. *State ex rel. Okla. Bar Ass'n v. Friesen*, 2016 OK 109, ¶ 8, 384 P.3d 1129, 1133. In a Rule 7 summary disciplinary proceeding, generally the central concern is to inquire into the lawyer's continued fitness to practice and determine what discipline should be imposed. *State ex rel. Okla. Bar Ass'n v. Drummond*, 2017 OK 24, ¶ 19, 393 P.3d 207, 214; *State ex rel. Okla. Bar*

*Ass'n v. Hastings*, 2017 OK 43, ¶ 17, 395 P.3d 552, 557. The range of permissible inquiry stands confined to issues germane to mitigation or severity of discipline to be visited upon the offending attorney. *State ex rel. Okla. Bar Ass'n v. Livshee*, 1994 OK 12, ¶2, 870 P.2d 770, 772. To administer discipline evenhandedly, the Court considers prior decisions involving similar misconduct, but "the extent of discipline must be decided on a case-by-case basis because each situation will usually involve different transgressions and different mitigating circumstances." *State ex rel. Okla. Bar Ass'n v. Wilcox*, 2014 OK 1, ¶ 48, 318 P.3d 1114, 1128.

¶14 The Court considers *de novo* every aspect of a disciplinary inquiry, and the PRT's findings of fact, conclusions of law, and recommendation of discipline are not binding on this Court. *State ex rel. Okla. Bar Ass'n v. Ezell*, 2020 OK 55, ¶ 13, 466 P.3d 551, 554; *State ex rel. Okla. Bar Ass'n v. Cooley*, 2013 OK 42, ¶ 4, 304 P.3d 453, 454. The record consisting of the Notice of Deferment<sup>8</sup>, transcripts, exhibits, PRT Report, briefs, and Application to Assess Costs is sufficient for the Court's *de novo* review and determination of appropriate discipline.

## V. DISCIPLINE

¶15 "A lawyer who has been convicted or has tendered a plea of guilty or nolo contendere . . . in any jurisdiction of a crime which demonstrates such lawyer's unfitness to practice law . . . shall be subject to discipline." RGDP, Rule 7.1. The record of conviction constitutes "conclusive evidence of the commission of the crime . . . and shall suffice as the basis for discipline." RGDP, Rule 7.2. While "a criminal conviction does not *ipso facto* establish an attorney's unfitness to practice law," *State ex rel. Okla. Bar Ass'n v. Trenary*, 2016 OK 8, ¶ 12, 368 P.3d 801, 806, the commission of any act that would reasonably "bring discredit upon the legal profession, shall be grounds for disciplinary action." RGDP, Rule 1.3.

¶16 It is professional misconduct for an attorney to "commit a criminal act which reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Rule 8.4(b), Oklahoma Rules of Professional Conduct ("ORPC"), 5 O.S.2011, ch.1, app. 3-A. It is also professional misconduct to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." ORPC, Rule 8.4(c). A misrepresentation under Rule 8.4(c) of the ORPC requires clear and convincing evidence that the

lawyer had an underlying bad intent and made the misrepresentation for the purpose of deceiving. *State ex rel. Okla. Bar Ass'n v. Besly*, 2006 OK 18, ¶ 43, 136 P.3d 590, 605.

¶17 This Court has repeatedly disbarred attorneys following convictions for crimes involving dishonest conduct. *See, e.g., State ex rel. Okla. Bar Ass'n v. Shofner*, 2002 OK 84, 60 P.3d 1024 (disbarment after federal conviction for fraudulently concealing assets in bankruptcy proceeding); *State ex rel. Okla. Bar Ass'n v. Crabtree*, 1995 OK 123, 907 P.2d 1045 (disbarment after federal conviction for money laundering and fraudulently concealing assets in bankruptcy proceeding); *State ex rel. Okla. Bar Ass'n v. Hornung*, 1991 OK 56, 813 P.2d 1041 (disbarment following two federal convictions for conspiring to conceal taxable income and facilitating an unlawful interstate business enterprise). In certain disciplinary cases involving crimes of dishonesty, however, we have imposed discipline less severe than disbarment. In *State ex rel. Okla. Bar Ass'n v. Dennison*, 1994 OK 33, 872 P.2d 403, we imposed a 31-month suspension following the attorney's conviction for making false statements to a financial institution. In *State ex rel. Okla. Bar Ass'n v. Willis*, 1993 OK 138, 863 P.2d 1211, we imposed a 15-month suspension following the attorney's felony conviction for obtaining controlled substances by misrepresentation. In *State ex rel. Okla. Bar Ass'n v. Simms*, 1978 OK 153, 590 P.2d 184, we imposed a suspension for more than 20 months after the attorney was convicted for willfully making and subscribing tax returns believing them to not be true.

¶18 We particularly note two previous cases involving dishonest conduct similar to that of Respondent. In *State ex rel. Okla. Bar Ass'n v. Harlton*, 1983 OK 87, ¶ 1, 669 P.2d 774, 774, the attorney pled guilty in the United States District Court for the Northern District of Oklahoma for failing to disclose evidence used in the commission of the crime to help his client avoid detection. Knowingly and with the purpose of deceiving, Harlton "embraced the role of an accessory to a crime as a personal accommodation to its perpetrator." The Court suspended Harlton's license for five years. In *State ex rel. Oklahoma Bar Ass'n v. Kirk*, 1986 OK 9, 6, 723 P.2d 264, 264, the attorney pled no contest to conspiracy to commit an offense or defraud the United States in violation of 18 U.S.C. § 371. There the attorney actively engaged in a scheme to mislead federal immigration officials by representing

that his client was legitimately married to an American citizen despite knowing the marriage was entered into solely for the purpose of securing immigration documents. Kirk made the fraudulent representations and then accepted a fee for his services. We suspended Kirk's license for five years.

¶19 Here, Respondent acted as an accessory after the fact and paid for rather than accepted payment for illegal conduct. Additionally, the misrepresentations made in *Harlton* and *Kirk* were motivated, in part, by a misguided desire to protect a client. Here, Respondent's misrepresentations and criminal payment of Dorsett were motivated by a desire to protect himself and avoid detection of his own involvement in the crime. The fraud that Respondent covered up and paid for did not involve a client or a case he was handling *for a client*. His actions did, however, involve his handling of the dissolution proceeding in which he was a litigant and in many ways acting in his professional capacity as a lawyer.

## VI. DISCUSSION

¶20 Even if Respondent initially hired Dorsett innocently and without knowing he would act illegally, conclusive evidence of Respondent's guilty plea and conviction establishes he acquiesced in the scheme after the fact. After the attorneys for RipoffReport.com informed Respondent of the cyberattacks, he repeatedly and knowingly lied to these victims, denying he had ever hired or spoken to anyone about assisting him with reputation management. In reality, just days before this, Respondent had not only hired Dorsett, but had sent him the precise link of the negative review on Ripoff Report, asking him "how we get rid of it."

¶21 Respondent continued denying any knowledge of the scheme even after the lawyers proffered that Respondent could have been a completely innocent bystander. Despite this opportunity, Respondent doubled down and pointed the finger at his brother. Confirming the truth immediately after the phone call, Respondent chose not to inform the lawyers of Dorsett's identity and allowed the attacks to continue damaging the servers. Most telling of all, Respondent then paid Dorsett after that verbal communication and after Dorsett sent two emails describing his methods and touting the success of the extortion. Hr'g Tr., 176; PRT Report, 3. The record shows clearly and convincingly that Respondent misrepresented and

withheld facts with an underlying bad intent and for the purpose of deceiving.

¶22 This behavior of dishonesty is precisely what Respondent pled guilty to in federal court. Yet, in the mitigation hearing before the PRT, Respondent equivocated regarding his culpability and involvement in the scheme. The PRT described that it was "suspect of the truthfulness of Respondent during his testimony" at the mitigation hearing and concluded he "was not forthright with his version of the facts." PRT Report, 3. The PRT found notable that Respondent testified that Dorsett acted outside the parameters of what he ever intended him to do, yet admitted that he paid Dorsett after fully appreciating the criminal nature of his conduct. *Id.*

¶23 In mitigation, Respondent self-reported his criminal conviction in Kansas to the OBA. He also timely filed the required affidavit of compliance with RGDP, Rule 9.1, withdrawing from his cases in Oklahoma. Nothing in the record suggests Respondent has violated his interim suspension. Respondent's witnesses at the PRT hearing testified to his involvement in charitable organizations and his reputation in the Wichita legal community for working diligently for his clients. Many of these witnesses testified that the criminal conviction was outside of Respondent's character. All of Respondent's witnesses, however, admitted under cross-examination that they were "not aware of the exact crimes to which Mr. Pistotnik pled guilty, nor were they aware of any other details other than what they read in the news media." PRT Report, 2.

¶24 The criminal investigation and Respondent's conviction in federal court garnered considerable media attention, both in Kansas and nationally. These publications identified Respondent as a practicing attorney. His misconduct reflected poorly on the OBA and brought disrepute on the legal professional as a whole. A review of the record, particularly Respondent's testimony at the mitigation hearing, reveals he does not fully accept responsibility for his illegal conduct and largely maintains he was an innocent pawn in Dorsett's scheme.<sup>9</sup> Even following his guilty plea and conviction, Respondent does not show sincere remorse aside from the embarrassment his actions have caused him and his family. Considering appropriate discipline, we note that while handing down a conviction, the federal district court



sentenced Respondent to payment of fines and restitution rather than a term of confinement.

## VII. CONCLUSION

¶25 Respondent pled guilty to three criminal misdemeanors predicated on deceit. He carried out these misrepresentations in protection of his own interests to the detriment of others. Respondent's crimes involved fraudulent conduct as a litigant and in many ways in his professional capacity as a lawyer. Upon *de novo* review, we conclude that a suspension of two years and a day will best serve the welfare of the public and maintain the integrity of the bar. Because Respondent will be suspended for a period exceeding two years, reinstatement is not automatic. See RGDP, Rule 11.1. Upon applying for reinstatement, Respondent must satisfy all requirements of RGDP 11, and present stronger proof of his qualifications than a person seeking admission for the first time. RGDP, Rule 11.4; *In re Reinstatement of Mumina*, 2009 OK 76, ¶ 8, 225 P.3d 804, 809. The OBA's Application to Assess Costs is granted. Respondent is ordered to pay costs in the amount of \$2,465.40, within 90 days after the date of this opinion. RGDP, Rule 6.16.

### RESPONDENT IS SUSPENDED FOR TWO YEARS AND ONE DAY, EFFECTIVE FROM THE DATE OF THIS OPINION, AND ORDERED TO PAY COSTS.

Darby, V.C.J., Winchester, Edmondson, Combs, Kane and Rowe, JJ., concur. Gurich, C.J., and Kauger, J., concur in part and dissent in part;

**Gurich, C.J., with whom Kauger, J., joins, concurring in part and dissenting in part;**

**I would assess a two-year suspension.**

Colbert, J., dissents.

### DARBY, V.C.J.:

1. Respondent admitted in his signed plea agreement that Dorsett offered assistance with reputation management in his initial correspondence. Resp's Ex., 4, 2. He later denied this timing, however, in his testimony at the mitigation hearing. Hr'g Tr., 124-27, 149-54, 167-68.

2. Ripoff Report is a website that publishes consumer reviews of businesses. Ripoff Report made available a negative review of Respondent.

3. Leagle is a website that hosts opinions and cases from federal and state courts. Leagle made available an opinion from the Kansas Supreme Court's prior discipline of Respondent.

4. Complainant's Ex., 7. We note the following portions of that exchange:

Lawyer: The emails that we are getting are demanding that we take that report down and if we don't they are going to target our --

Respondent: I don't know who's doing that, but it's not me.

Lawyer: So my only question to you is, *did you hire someone or ask somebody to help you with this problem. Because whoever you hired is breaking the law.*

Respondent: *No, I haven't had anybody do that. If somebody is doing that, they're doing it on their own.*

Lawyer: Well, can you think of anybody that would want to help you in this way? Because again, we are, this is, this is very serious. This is my law firm's email server that is going to crash if this continues to happen. And --

Respondent: I don't know who that's from.

Lawyer: Well, the only way I can stop it is having my client, which I don't have the authority to do, take down the post about you. . . . So you're my only link to this, and I thought, *it seemed to me like maybe you innocently may have hired somebody who said, "Hey, I can help you with this problem," not knowing that the way they were going to do it was illegal because that happens sometimes. So that's why I thought, let me call you and see if you go, "Ya, I hired some guy, but he didn't tell me he was going to do this."*

Respondent: *No, I have not hired anybody, so whoever is doing it is doing it on their own.*

Lawyer: Did you possibly reach out, like investigating, you know, do some Google searches, find out who was offering to help, maybe have some phone calls, or whatever, you know just normal process?

Respondent: *I haven't sent anybody an email, I'm not trying to do that.*

*Id.*

5. At the mitigation hearing, Respondent equivocated regarding his knowledge of this email detailing the attacks, denying he had ever seen it while at the same time admitting he had knowingly paid the invoice. Hr'g Tr., 152-54.

6. The original ten counts of the Indictment included three counts for False Statements to an FBI Agent, five counts for Fraud in Connection with Computers, and two counts for Conspiracy to Commit Fraud in Connection with Computers. Notice of Deferment, Ex. 1, filed Oct. 31, 2019.

7. Title 18, section 3 of the United States Code provides:

Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by life imprisonment or death, the accessory shall be imprisoned not more than fifteen years.

18 U.S.C. § 3. Dorsett's criminal conduct violated interstate communications under 18 U.S.C. § 875(b), which provides:

Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 875(b).

8. The OBA notes that it titled this pleading in error. The Kansas federal district court did not defer Respondent's sentencing in this case.

9. When asked how he believed the Court should discipline him, Respondent testified:

I've already been suspended now for over six months, and I've had an awful lot of publicity, which doesn't help the business. I would hope that the Bar would understand that I was, I don't know what you call it, but [I] was conned, and I would hope they would return my license and do a public censure.

Hr'g Tr., 160.

**2020 OK 94**

**In the Matter of the Estate of CHARLES FULKS, deceased. DOROTHY FULKS, Petitioner/Appellee, v. TAMMY MCPHERSON, Heir at Law/Appellant.**

**No. 118,314.<sup>1</sup> November 24, 2020  
As Corrected November 25, 2020**

**APPEAL FROM THE NOWATA COUNTY DISTRICT COURT**

## Honorable Carl G. Gibson, Trial Judge

¶0 After the decedent, Charles Fulks died, his wife, the petitioner/appellee, Dorothy Fulks, filed the probate of his estate in the District Court of Nowata County, Oklahoma. An heir at law/appellant, the decedent's daughter, Tammy McPherson, objected to the probate in Nowata County. She argued that: 1) the decedent died in Osage County, and all of the decedent's real and personal property was located in Osage County; 2) pursuant to 58 O.S. 2011 §5, the proper venue for the probate was solely in Osage County, Oklahoma; and 3) the cause should be transferred pursuant to the doctrine of intrastate *forum non conveniens*. The trial court determined that Nowata County was also a proper venue, and it denied the daughter's request to transfer the cause to Osage County. The daughter appealed, and we retained the cause to address where the probate should be brought. We hold that venue is proper in Osage County.

### CAUSE RETAINED; TRIAL COURT REVERSED AND REMANDED WITH INSTRUCTIONS.

James C. Milton, Aaron C. Tifft. Tulsa, Oklahoma,

Bransford Shoemake, Pawhuska, Oklahoma,

Amanda S. Proctor, Jenks, Oklahoma, for Appellant.

Todd A. Cone, Nowata, Oklahoma, for Appellee.

### KAUGER, J.:

¶1 The questions presented are whether: 1) 58 O.S. 2011 §5,<sup>2</sup> which delineates probate venue, requires the probate in this cause to be brought in Osage County, where the decedent died and all of his property was located; 2) Nowata County, where his widow first filed and received letters of administration, is an alternative venue for the probate; or 3) the cause should be transferred because of intrastate *forum non conveniens*. Venue is proper in Osage County.

### FACTS

¶2 The decedent, Charles Fulks (Fulks/decedent), died on February 11, 2013. At the time of his death, all of his real and personal property was alleged to have been located in Osage County, Oklahoma. On June 4, 2019, the petitioner, Dorothy Fulks (petitioner/widow), filed a Petition for Letters of Administration in the

District Court of Nowata County, Oklahoma, where she resided after her husband's death. In the petition, the widow listed herself as the surviving spouse of Fulks, and three children: daughters, Tobi Bricker, and Kim Bricker, and son, Charles Cody Fulks. She also stated that no will had been found, and that the decedent died intestate. She did not disclose the residency of her husband in her petition, nor did she subsequently disclose or argue that her husband had ever resided in Nowata County, Oklahoma.

¶3 The widow asked to be appointed Personal Representative of the decedent's estate. The trial court set the matter for hearing on July 2, 2019. On July 1, 2019, the appellant, Tammy McPherson (McPherson/daughter), filed a special appearance and reservation of time to answer in Nowata County. She identified herself as another daughter of the Fulks who was an "heir at law" and a lawful devisee and legatee named under the decedent's last Will and Testament. McPherson also requested a continuance of the July 2, 2019, hearing. On July 2, 2019, McPherson filed a Motion to Dismiss, arguing that: 1) the decedent did not die intestate; 2) she is a named heir in decedent's will; 3) all of the decedent's real and personal property was located in Osage County, Oklahoma; and 4) the proper venue for the probate lies in Osage County, and even if it did not, the cause should be transferred to Osage County because intrastate *forum non conveniens*.<sup>3</sup>

¶4 McPherson attached a copy of decedent's will dated September 26, 2011. The will lists the widow as Personal Representative, with McPherson as a the successor Personal Representative, should the widow be unable or refuse to serve. Also on July 2, 2019, the widow filed an Application for Appointment of Special Administrator. She requested that she be appointed Special Administrator immediately so that she could assess, protect, and preserve all of decedent's assets. According to a court minute, and a court order both filed July 2, 2019, the trial court, with no one appearing to object, appointed the widow as Personal Administrator. The trial court also determined that Nowata County was a proper venue, and it issued Letters of Special Administration the same day.

¶5 On July 15, 2019, the widow filed a "Motion for an Order to Produce Last Will and Testament." She alleged that McPherson had removed her from the family home immediately after the decedent's death without most of

her personal belongings, and without the property of her spouse of fifty-one years. She requested that the trial Court order McPherson to deliver the decedent's will. The next day, the widow filed a response to McPherson's motion to dismiss, arguing that: she had the option of choosing where to file the probate for her convenience; venue was proper in Nowata County; and McPherson was the only one complaining.

¶6 On July 29, 2019, the widow filed a "Request for Citation to Appear" asking the trial court to order McPherson to appear because she had concealed, embezzled, smuggled, conveyed, and disposed of decedent's property. She also suggested that there was a question of whether McPherson was the biological child of the decedent. The trial court set a hearing for all pending matters on August 13, 2019, but the cause was reset for August 15, 2019. On August 15, 2019, it overruled McPherson's motion to dismiss, and sustained the petition and appointments of the widow. The court minute reflects that a copy of the will was submitted and filed with no objection.

¶7 On August 16, 2019, the widow filed an "Amended Petition for Admission of the Last Will and Testament to Probate and Letters Testamentary," naming all four children as heirs at law. The trial court set the matter for hearing on August 28, 2019, which was passed by agreement until September 10, 2019. On September 10, 2019, the trial court issued an order again overruling McPherson's motion to dismiss and appointing the widow as Personal representative. It appears, based on the arguments and authority presented to the trial court, that its ruling was based on the recent opinion of the Court of Civil Appeals in In re Estate of Walker, 2018 OK CIV APP 63, 439 P.3d 424 which was released for publication by the Court of Civil Appeals, without a petition for certiorari being filed in this Court. The Court of Civil Appeals held that the Legislature had amended the statute so that probate could be filed in any county. However, the trial court, applying an unusual rationale, also determined that the testator died intestate, noting:

The Court, after hearing evidence, and announcement and stipulation of counsel, finds the parties have stipulated that the paper or instrument propounded herein for probate as the Last Will and Testament of said deceased, which Will is dated September 26, 2011, was duly executed by Charles Fulks, and that at the time of exe-

cuting the same, the Testator was full age, of sound mind and memory, and was not acting under duress, menace, fraud, or undue influence, and that the Will was executed in all particulars as required by law. However, although the authenticity, capacity, and testamentary provisions have been proved and agreed by the parties, at this time, there is no testimony that the will was in existence at the time [of] testator's death. Therefore, the estate of Charles Fulks, as of this time, will be administered as an intestate estate.

The daughter appealed on October 10, 2019, and we retained the appeal on May 12, 2020, to address whether renumbering of 58 O.S. 2011 §5<sup>4</sup> changed the priority of proper probate venue. The cause was assigned to this chamber on May 21, 2020.

## I.

### UNDER THE FACTS OF THIS CAUSE, VENUE IS PROPER IN OSAGE COUNTY.

¶8 The widow argues that: she chose where to file her husband's probate for her convenience and cost; and that because the application for letters occurred first in Nowata County, the cause should remain there. She primarily relies on both the probate venue statute, 58 O.S. 2011 §5,<sup>5</sup> coupled the recent rationale of the Court of Civil Appeals opinion, In re Estate of Walker, 2018 OK CIV APP 63, 439 P.3d 424, as persuasive authority.<sup>6</sup> The daughter argues that the litany of venue options provided by the statute is in a **prioritized order**, and that he resided and died in Osage County, and all of the decedent's real and personal property is located in Osage County, the cause must be transferred to Osage County.

¶9 Probate proceedings are of equitable cognizance.<sup>7</sup> We presume that the trial court's decision is legally correct and we will not disturb the trial court's decision unless it is "found to be clearly contrary to the weight of the evidence or to some governing principle of law."<sup>8</sup> This matter also involves questions of statutory interpretation and harmonization. We are required to review questions of law, such as the construction of statutes, under a de novo standard of review.<sup>9</sup>

## A.

### TITLE 58 O.S. 2011 §5 HAS REMAINED RELATIVELY UNCHANGED SINCE ITS

**ENACTMENT. A PUBLISHER'S  
MODIFICATIONS CANNOT CHANGE A  
STATUTE'S SUBSTANTIVE MEANING.**

¶10 Title 58 O.S. §5 was originally enacted in 1910 as, Ch. 64, Art.1 §6193. It was taken from South Dakota and California statutory provisions,<sup>10</sup> and it provided as follows:

**Venue of Probate Acts.** Wills must be proved and letters testamentary or of administration granted:

First. In the county of which the decedent was a resident at the time of his death, in whatever place he may have died.

Second. In the county of which the decedent may have died, leaving an estate therein, he not being a resident of the State.

Third. In the county of which part of the estate may be, the decedent having died out of State, and not a resident thereof at the time of death.

Fourth. In the county in which any part of the estate may be, the decedent not being a resident of the State, but dying within it, and not leaving estate in the county in which he died.

Fifth. In all other cases, in the county in which letters of administration is first made. (Emphasis in original).

¶11 By 1941, the statute had relocated to 58 O.S. 1941 §5.<sup>11</sup> Without any Legislative amendment, the publishing company changed the numbers in the statute from written numbers, to numerical symbols.<sup>12</sup> Generally, a publisher's correction becomes part of the statute if the publisher did not change the substantive meaning of the statute as it was originally intended by the Legislature.<sup>13</sup> Consequently, the changes from the word "First" to the numeral "1" became part of the statute. The Legislature did not make any amendments to the statute until 1982, nor have they made any since 1982.

¶12 The 1982 amendments were small changes intended to clarify language relating to residency requirements.<sup>14</sup> Title 58 O.S. Supp. 1982 §5, reads the same as the current version.<sup>15</sup> Consequently, the publisher's changes from words such as "First" to "1" has no effect on the statutes' substantive meaning. Our precedents vary on construction of §5 based on the variation in facts and circumstances. The present question has never been addressed by this

Court based on the change from written to numerical designations. We would not do so now but for the recent opinion of the Court of Civil Appeals in *In re Estate of Walker*, 2018 OK CIV APP 63, 439 P.3d 424 in which the Court of Civil Appeals held that the Legislature had amended the statute so that probate could be filed in any county. We do not agree with this premise, it is overly broad and statutorily inconsistent.

**II.**

**THE COUNTY IN WHICH THE  
DECEDENT RESIDES WHEN THE DEATH  
OCCURS IS THE PROPER COUNTY FOR  
VENUE OF THE PROBATE.**

¶13 The probate of the decedent's estate falls into two categories: either the decedent was a resident of the State of Oklahoma at the time of death,<sup>16</sup> or the decedent was not a resident of the State of Oklahoma at the time of death. Of the litany of five items in 58 O.S. 2011 §5, subsections 1 concerns when the decedent is a resident of Oklahoma at the time of death; 2-4 all concern when the decedent was not a resident of Oklahoma at the time of death; and 5 is a catch-all provision for "all other cases."<sup>17</sup>

¶14 Subsection 1 provides that probate must be in the county of which the decedent was a resident at the time of his death, regardless where he or she died. Subsection 2 applies when a decedent dies in an Oklahoma County, and has left an estate in that county, but the decedent was not a resident of Oklahoma at the time of death. Subsection 3 concerns a decedent who has an estate in an Oklahoma County but dies out of state and was not a resident of Oklahoma at the time of death. Subsection 4 applies when a decedent leaves an estate in an Oklahoma County, was not a resident of Oklahoma at the time of death, but died in Oklahoma in another county than where the estate was located.<sup>18</sup> Subsection 5 applies "in all other cases" the county where letters of administration is first made.

¶15 Nevertheless, §5 cannot be read in isolation because there are three provisions relating to venue in the Probate Code.<sup>19</sup> Section 6 concerns the circumstances in which a decedent is not a resident of Oklahoma at the time of death. It provides that:

When the estate of the decedent is in more than one county, he having died out of the state, and not having been a resident thereof

at the time of his death, or being such non-resident and dying within the state, and not leaving estate in the county where he died, the district court of that county in which application is first made for letters testamentary or of administration, has exclusive jurisdiction of the settlement of the estate.

Title 58 O.S. 2011 §7 provides that:

The district court of the county in which application is first made for letters testamentary or of administration in any of the cases above mentioned, shall have jurisdiction coextensive with the State in the settlement of the estate of the decedent and the sale and distribution of his real estate and excludes the jurisdiction of the district court of every other county.

This Court, in State ex rel. Monahawee v. Hazelwood, 1921 OK 103, 196 P. 937 recognized the efficacy of §7's applicability to probate venue when it is unclear where, exactly, the decedent resided within Oklahoma at the time of death. Monahawee concerned a Native American's probate conflict between two courts – Osage County and Okmulgee County. Osage County was the first Court to issue letters of administration. The Court held that:

¶4 From the foregoing provisions it seems quite clear that when the county court of Okmulgee county took jurisdiction of the administration proceedings in the instant case, such jurisdiction was co-extensive with the state and excluded the jurisdiction of the county court of every other county. It is not only the rule made so by statute, but, on the ground of public policy, was the rule at common law. Dobler v. Strobel, 9 N.D. 104, 81 Am. St. Rep. 530-5, 81 N.W. 37. When the county court of Okmulgee county took jurisdiction of the estate of Lete Kolvin, deceased, and appointed an administrator therein, such taking of jurisdiction and such appointment of administrator were the finding of every jurisdictional fact necessary to such an appointment.

¶16 In subsequent cases, the Court adhered to the principle that venue of probate, as set by statute, generally lies foremost in the county where the decedent resided at the time of death.<sup>20</sup> These cases held that if the decedent was a resident of Oklahoma when the death occurred and the decedent died within the State of Oklahoma, location of the decedent's

assets was of no consequence. Only the residence of the decedent at the time of death was the determinative factor.<sup>21</sup>

¶17 However, a problem arises when residency is unclear, and two counties are in conflict over a decedent's residency, and one of the counties issues letters of administration first. In some cases the Court has noted that, the venue of that county court is presumed as a proper and cannot be collaterally attacked by appeal.<sup>22</sup> For example, in Whitney v. Cook, 1956 OK 302, ¶¶4-6, 303 P.2d 1116, another case involving a conflict of jurisdiction and venue over a probate case, the Court explained, relying on previous cases, that:

The rule is well-settled that when there is presented an intolerable conflict between two courts, each attempting to exercise jurisdiction in the same cause and between the same parties, that this court must determine where the jurisdiction or venue lies and issue its writ accordingly. The rule is also recognized that when either of two or more courts of equal jurisdiction might originally have acted in the matter, and proper resort has been had to one such court, and that court has assumed full jurisdiction and has acted and is acting in the matter, that other courts of equal jurisdiction should be barred from action in the same matter. . .

The granting of letters of administration by a county court imports jurisdiction in the court so to do, and it will be inferred from the fact that such letters were granted that a resident decedent whose estate is being administered died a resident of the county in which letters of administration are first granted.

¶18 However, we have also had previous cases wherein exceptions were recognized where the will was admitted to probate, but the evidence appeared on the face of the pleadings to support proper venue in only one county. In James v. Sanders, 1923 OK 690, ¶2, 218 P.877, the Court addressed a conflict in probate jurisdiction in Love County and Carter County. The decedent lived at a sanitarium in Carter County, but before her death, moved to Love County, but then returned to Carter County where she died. The Court held that:

We have carefully considered the evidence in the record, and while it may be conceded that there is evidence tending to show that

Cora James left the sanitarium at Talihina with the intention of making her home with Dora Sanders in Love county, yet we are unable to wholly ignore the undisputed testimony that shows that she was anxious, after having resided for 12 days on the farm of the petitioner in Love county, to return to the academy, where she had been reared, educated, and given a home from early childhood until she had reached majority and until she was sent to the sanitarium as a patient. It is our conclusion that this testimony conclusively establishes the fact that it was her intention in returning to this academy to continue to live there the remainder of her life and to constitute the same as her permanent residence and home. In view of this conclusion it necessarily follows that the judgment of the trial court must be reversed. It may well be observed that the judgment of the district court would not be sustained for another reason – that the will admitted to probate had been legally revoked. But, in view of the conclusion reached as to the jurisdiction of the county court of Love county, it is unnecessary for any further discussion of this proposition. The judgment of the district court of Love county is reversed, and the cause is remanded, with directions for said court to enter an order remanding cause to county court, with directions to dismiss the petition for the probate of the will in Love county.

¶19 In Anderson v. Jackson, 1935 OK 170, ¶9, 41 P.2d 815 and Breedlove v. Tulsa County, 1930 OK 1101, ¶11, 58 P.2d 305, the Court held that the clear weight of the evidence established only one county as proper venue. In Anderson, all of the evidence established that the decedent died in McCurtain County and not in Choctaw County where the probate was filed. Similarly in Breedlove, first Tulsa County, and then Sequoyah County asserted jurisdiction in the same probate estate. While some evidence was presented that the decedent was a resident of Sequoyah County at the time of death, the weight of the evidence showed that he actually resided in Tulsa County at the time of death, thus Tulsa County was the proper venue.

¶20 The question of the necessity for the appointment of an administrator is within the exclusive original jurisdiction of the district courts.<sup>23</sup> Nevertheless we must reconcile our

previous cases with 58 O.S. 2011 §5, §6, and §7. We must acknowledge that the statutes collectively require venue first and foremost in the county where the decedent resided at the time of death. The subsections of §5, along with §6 and §7, clarify merely what happens on those occasions when the decedent either dies out of state, but resided and owned property in Oklahoma at the time of death; or leaves an estate in an Oklahoma county, but dies in another Oklahoma county or out of State.

¶21 If the conflicting evidence is unclear as to the decedent's actual residency, then pursuant to 58 O.S. 2011 §7, the jurisdiction of district courts to probate are co-extensive, and once a district court which appears to be a proper venue asserts jurisdiction, and then issues letters of administration, that court has jurisdiction exclusive of all others.<sup>24</sup> To construe these statutes otherwise would make the language of all three statutes superfluous. We never presume the Legislature has done a vain and useless thing.<sup>25</sup>

¶22 Here, the evidence points only to Osage County as both the residence of the decedent and the county in which he died. Consequently, this cause should have been brought in Osage County. Because no conflict of the decedent's residency even appears, those cases in which a collateral attack on the jurisdiction or venue of the probate court is prohibited are inapplicable. The matter may not be collaterally attacked on appeal where it genuinely appears on the face of the record that two different counties might have been the residence of the decedent at the time of death and one county determines it has jurisdiction and issues letters of administration first.<sup>26</sup> This does not mean that probate may be brought anywhere one wishes.

¶23 In In re Estate of Walker, 2018 OK CIV APP 63, 439 P.3d 424, the Court of Civil Appeals addressed the venue of probates. Like this cause, Walker, supra, also involved the request to transfer a probate case based upon a change of venue after administration of letters were first made. The Walker Court noted the original statutory enactment of 1910, but it incorrectly assumed that the Legislature subsequently amended the statute to removing priority language of "First, Second," etc. Thus, Walker's holding that a priority no longer exists in the statute because of a legislative amendment, and that a probate action may be filed in any of the applicable situations listed in §5, was based on

an incorrect assumption. As a result, the rule suddenly became that probate venue was proper anywhere in the State of Oklahoma. To the extent that *Walker* is inconsistent with this opinion it is hereby overruled. Because we hold that Osage is the only proper county in which this probate may proceed, we need not address the intrastate *forum non conveniens* arguments made by the daughter.<sup>27</sup>

### CONCLUSION

¶24 Pursuant to §5, venue is prioritized and lies first and foremost in the county where the decedent resided at the time of death.<sup>28</sup> It is only when it appears on the face of the pleadings that evidence is conflicting concerning what county the decedent resided in at the time of death or that the decedent died out of state that, pursuant to 58 O.S. 2011 §§5-7, the jurisdiction of county courts for probate are co-extensive. In the appearance of such a conflict, once a county court asserts jurisdiction, and issues letters of administration, that court has jurisdiction exclusive of all others.<sup>29</sup> Here, only one county, Osage County, is the proper venue. The trial court is reversed, and the matter is remanded to Nowata County with directions for the trial court to transfer the cause to Osage County, and to dismiss the Nowata County proceedings.<sup>30</sup>

### CAUSE RETAINED; TRIAL COURT REVERSED AND REMANDED WITH INSTRUCTIONS.

GURICH, C.J., KAUGER, WINCHESTER, EDMONDSON, COMBS, JJ., concur.

DARBY, V.C.J., KANE, ROWE, J.J., (by separate writing) Concur in part; Dissent in part.

COLBERT, J., not participating.

**ROWE J., with whom Darby, V.C.J. and Kane, J., join, concurring in part; dissenting in part:**

¶1 I concur with the majority that the litany of venue options are prioritized pursuant to § 5. Venue lies first and foremost in the county where the decedent resided at the time of death. I further concur in overruling *In the Matter of the Estate of Walker*, 2018 OK CIV APP 63, 439 P.3d 424, and reversing the trial court with instructions to transfer the cause to Osage County, the county where the decedent undisputedly resided at the time of his death.

¶2 I cannot accede to the majority's holding that when "evidence is unclear" concerning the county in which the decedent resided at the time of death, that the jurisdiction of district courts to probate are "co-existive" pursuant to 58 O.S. 2011 § 7.<sup>1</sup>

¶3 In situations where evidence of residence is unclear, the majority interprets § 7 to allow venue to attach in the county where application for letters is first made. However, pursuant to the plain and unambiguous language in 58 O.S. 2011 §§ 6 and 7, these sections apply only to a decedent who is not a resident of Oklahoma. There can be no conflicting evidence of residence for a non-resident of this state.

¶4 Moreover, §§ 6 and 7 apply when a non-resident of this state has estate "in more than one county" and either a) dies out of state or b) dies within Oklahoma but "not leaving estate in the county where he died." Under these circumstances, the Legislature has provided the first of these counties in which application is made for letters testamentary or of administration "shall have" jurisdiction coextensive with the state in the settlement of the estate and excludes the jurisdiction of the district court of every other county.<sup>2</sup>

¶5 In *Presbury v. County Court of Kay County, Oklahoma*, 1923 OK 127, 213 P. 311, we held that § 5 is the applicable statute to determine venue when a decedent dies a resident of the state. Relevant here, we held in *Presbury* that § 7 "merely refers and is supplementary to" § 6 and that neither § 6 nor § 7 "has any application whatever to cases where the decedent resides within one of the counties of the state at the time of his death."<sup>3</sup> *Id.*, ¶¶ 9-10.

¶6 Since we decided *Presbury* in 1923, there have been no substantive amendments to §§ 6 and 7. Importantly, § 7 refers to § 6 as its antecedent, using the phrase "in any of the cases above mentioned." After judicial construction of a statute, the Legislature's failure to amend the statute constitutes acquiescence to that construction. *See In re Estate of Dicksion*, 2011 OK 96, ¶ 5, 286 P.3d 283, 294.

¶7 Because the deceased died a resident of Oklahoma, today's opinion is necessarily limited to the application of 58 O.S. § 5. Accordingly, I respectfully dissent from today's opinion as it applies 58 O.S. §§ 6 and 7.



1. We retained the appeal and made this cause a companion case to No. 118,671, *In the Matter of the Estate of Hertzog* on May 12, 2020, because both cases involved the exact same issue of interpretation of Title 58 O.S. 2011 §5. The causes were assigned on May 21, 2020, but before the briefing cycle on No. 118,671 was completed, the parties settled their claims on appeal and requested dismissal. We dismissed the companion cause on August 20, 2020.

2. Title 58 O.S. 2011 §5 provides:

Venue of Probate Acts

Wills must be proved, and letters testamentary or of administration granted in the following applicable situations:

1. In the county of which the decedent was a resident at the time of his death, regardless where he died.
2. In the county in which the decedent died, leaving an estate therein, the deceased not being a resident of this state.
3. In the county in which any part of the estate of the deceased may be, where the decedent died out of this state, and the decedent was not a resident of this state at the time of his death.
4. In the county in which any part of the estate may be and the decedent was not a resident of this state, but died within it, and did not leave an estate in the county in which he died.
5. In all other cases, in the county where application for letters is first made.

3. Title 12 O.S. Supp. 2013 §140.3, *see* page 20, *infra*.

4. Title 58 O.S. 2011 §5, *see* note 2, *supra*.

5. Title 58 O.S. 2011 §5, *see* note 2, *supra*.

6. Because the opinion was not approved for publication by this Court, it is entitled to persuasive effect only. Title 20 O.S.2011 § 30.5; Rule 1.200, Oklahoma Supreme Court Rules, 12 O.S. 20011, Ch. 15, App. 1.

7. *In re Estate of Holcomb*, 2002 OK 90, ¶ 8, 63 P.3d 9; *In re Estate of Sneed*, 1998 OK 8, ¶ 8, 953 P.2d 1111; *In re Estate of Lacy*, 1967 OK 123, ¶ 6, 431 P.2d 366.

8. *In re Estate of Holcomb*, *see* note 8, *supra*; *In re Estate of Maheras*, 1995 OK 40, ¶ 7, 897 P.2d 268; *In re Estate of Eversole*, 1994 OK 114, ¶ 7, 885 P.2d 657.

9. *In re Estate of Jackson*, 2008 OK 83, ¶ 9, 194 P.3d 1269; *St. John Medical Center v. Bilby*, 2007 OK 37, ¶ 2, 160 P.3d 978.

10. Dak. 5656; S 1890, Sec. 1253 and Cal. Code Civ. Pro. Sec. 1294.

11. It became §1088 in 1921, and then §1069 in 1931, before becoming Title 58 O.S. 1941 §5.

12. Consequently, the statute, Title 58 O.S. 1941 §5 provided:

Venue of Probate Acts – Wills must be proved and letters testamentary or of administration granted:

1. In the county of which the decedent was a resident at the time of his death, in whatever place he may have died.
2. In the county of which the decedent may have died, leaving an estate therein, he not being a resident of the State.
3. In the county of which part of the estate may be, the decedent having died out of State, and not a resident thereof at the time of death.
4. In the county in which any part of the estate may be, the decedent not being a resident or the State, but dying within it, and not leaving estate in the county in which he died.
5. In all other cases, in the county in which letters of administration is first made. (Emphasis in original).

13. *Independent Finance Institute v. Clark*, 1999 OK 43, ¶20, 990 P.2d 845. Title 75 O.S. 1071 § 171, which was repealed in 2012, authorized then West Publishing “Company” to compile, codify and annotate the Oklahoma Statutes according to the terms, specifications and conditions directed by the Speaker of the House of Representatives and the President Pro Tempore of the Senate. Nor does a scrivener’s error change the substantive law. In *Charleson v. State ex rel. Department of Public Safety*, 2005 OK 83, ¶11, 125 P.3d 672, we said that “[i]f a book publisher were to make a scrivener’s error in an opinion of this Court, it would not change the efficacy of the opinion. If the company were to misprint a statute enacted by the Legislature, the law passed would not lose its effectiveness. To rule otherwise allows copyists employed by publishers to change the law. That cannot be the case. The Court has also recognized that a statute’s incorporation in a decennial compilation purges or cures any procedural defect in the enactment’s title that might otherwise invalidate it. *Allen v. State ex rel. Bd. of Tr.*, 1988 OK 99, ¶9, 769 P.2d 1302, 1305. However, we specifically found in *Hendrick v. Walters*, 1993 OK 162, ¶17, 865 P.2d 1232, 1241-42 that “inclusion in the codification of a statute which has been repealed by substitution does not inevitably give the discarded statute untrammeled viability.” *See also* A.G. Opin 82-20, at 56 (“West Publishing Company has only the authority of a compiler and must compile the

statutes exactly as they were enacted by the Legislature, subject only to deleting from the compilation laws which have been repealed or held unconstitutional by the courts of last resort.”).

14. Ch. 176, Oklahoma Session Laws, 1982 states: “AN ACT RELATING TO PROBATE PROCEDURE; AMENDING 58 OS. 1981, SECTION 5; PROVIDING FOR-PROBATE VENUE, CLARIFYING LANGUAGE CONCERNING RESIDENCY REQUIREMENTS AND DECLARING AN EMERGENCY.”

The changes, shown below, and as illustrated on the next page in the 1982 version of the statute include: **in whatever place he may have died, he, but dying within it, and not leaving estate in the county in which he died, to regardless of where he dies, the deceased, and but died within it, and did not leave an estate in the county in which he died, respectively.**

Title 58 O.S. 1971 §5, with the portions which were changed in 1982 bolded, provided:

Venue of Probate Acts –Wills must be proved and letters testamentary or of administration granted:

1. In the county of which the decedent was a resident at the time of his death, **in whatever place he may have died.**
2. In the county of which the decedent may have died, leaving an estate therein, he not being a resident of the State.
3. In the county of which part of the estate may be, the decedent having died out of State, and not a resident thereof at the time of death.
4. In the county in which any part of the estate may be, the decedent not being a resident or the State, **but dying within it, and not leaving estate in the county in which he died.**
5. In all other cases, in the county in which letters of administration is first made. (Emphasis supplied.)

15. Title 58 O.S.2011 §5 provides:

Venue of Probate Acts

Wills must be proved, and letters testamentary or of administration granted in the following applicable situations:

1. In the county of which the decedent was a resident at the time of his death, regardless where he died.
2. In the county in which the decedent died, leaving an estate therein, the deceased not being a resident of this state.
3. In the county in which any part of the estate of the deceased may be, where the decedent died out of this state, and the decedent was not a resident of this state at the time of his death.
4. In the county in which any part of the estate may be and the decedent was not a resident of this state, but died within it, and did not leave an estate in the county in which he died.
5. In all other cases, in the county where application for letters is first made.

16. For probate purposes, residency has been equated with domicile. *In re Davis’ Estate*, 1935 OK 242, ¶¶6-7, 43 P.2d 115; *Richards v. Nuff*, 1930 OK 547, ¶¶6-7, 293 P. 102.

17. Title 58 O.S. 2011 §5, *see* note 2, *supra*.

18. Title 58 O.S. 2011 §5, *see* note 2, *supra*.

19. Title 58 O.S. 2011 §§1 et seq.

20. *In the Matter of Estate of Brown*, 1979 OK 128, ¶19, 600 P.2d 857; *In re Davis*, 1935 OK 242, ¶6, 43 P.2d 115; *Presbury v. County Court of Kay County*, 1923 OK 127, ¶11, 213 P. 311; *James v. Sanders*, 1923 OK 690, ¶10, 218 P. 877.

21. *Griffin v. Hannan*, 1939 OK 304, ¶14, 93 P.2d 1078; *Stock v. Sentinel Rural & Long Distance Telephone Co.*, 1939 OK 66, ¶3, 87 P.2d 656; *Okfuskey v. Corbin*, 1935 OK 121, ¶10, 40 P.2d 1064; *Wolf v. Gills*, 1923 OK 725, ¶6, 219 P. 350. *See also*, “Necessity and Sufficiency of Assets to Justify Appointment, 59 A.L.R. 87 (1929); *But see*, *In re Carter’s Estate*, 1925 OK 845, ¶15, 240 P. 727 (No abuse of discretion when court refused probate jurisdiction because old wearing apparel and a watch were not enough to afford adequate appointment of administrator.).

22. *State ex rel. American Flyers Airline Corp., v. Superior Court of Creek County*, 1967 OK 144, ¶5, 435 P.2d 131; *Sewell v. Christison*, 1926 OK 293, ¶6, 245 P. 632; *Copeland v. Johnson*, 1924 OK 368, ¶18, 224 P.986; *Wolf v. Gills*, *see* note 23, *supra* at ¶¶5-6; *See, State ex rel. Monahawee v. Hazelwood*, 1921 OK 103, ¶4, 196 P. 937 and *Davis v. Sandlin*, 1964 OK 123, 392 P.2d 722. Where petition to probate was ambiguous as to testator’s residence at death, the Court does not reverse. *Kirk v. Alexander*, 1935 OK 210, ¶7, 41 P.2 899. The matter is nearly unimpeachable. *Sewell v. Christison*, *supra*.

23. *Stock v. Sentinel Rural & Long Distance Telephone Co.*, *see* note 21, *supra*. The Okla. Const. art. 7, §8 provides in pertinent part:

... The District Judges and Associate District Judges shall exercise all jurisdiction in the District Court except as otherwise provided by law. The District Courts, or any Judges thereof, shall have the power to issue any writs, remedial or otherwise necessary or proper to carry into effect their orders, judgments, or decrees.

24. Title 58 O.S. 2011 §7, *see* page 14, *supra*.

25. *Bryant v. Commissioner of the Dept. of Public Safety*, 1996 OK 134, ¶11, 937 P.2d 496; *Rogers v. Higgins*, 1993 OK 45, ¶20, 871 P.2d 398; *Cooper v. Dix*, 1989 OK 55, ¶4, 771 P.2d 614.

26. *State ex rel. American Flyers Airline Corp., v. Superior Court of Creek County*, *see* note 24, *supra*; *Sewell v. Christison*, *see* note 24, *supra*; *Copeland v. Johnson*, *see* note 24, *supra*; *Wolf v. Gills*, *see* note 23, *supra* at ¶¶5-6; *See, State ex rel. Monahawee v. Hazelwood*, note 24, *supra*, and *Davis v. Sandlin*, *see* note 24, *supra*. *Kirk v. Alexander*, *see* note 24, *supra*; and *Sewell v. Christison*, *supra*.

27. We examined this doctrine in *Stevens v. Blevins*, 1995 Ok 6, 890 P.2d 936. *Stevens* involved a cause in which the trial court sua sponte decided another county was a more appropriate and convenient venue. We held that the trial court may not transfer the cause on its own motion, rather, the parties must make an application for such a transfer. In 2013, the Legislature enacted, in the general pleading code, 12 O.S. Supp. 2013 §140.3 which provides:

A. If the court, upon motion by a party or on the court's own motion, finds that, in the interest of justice and for the convenience of the parties, an action would be more properly heard in another forum either in this state or outside this state, the court shall decline to exercise jurisdiction under the doctrine of *forum non conveniens* and shall stay, transfer or dismiss the action.

B. In determining whether to grant a motion to stay, transfer or dismiss an action pursuant to this section, the court shall consider:

1. Whether an alternate forum exists in which the action may be tried;
2. Whether the alternate forum provides an adequate remedy;
3. Whether maintenance of the action in the court in which the case is filed would work a substantial injustice to the moving party;
4. Whether the alternate forum can exercise jurisdiction over all the defendants properly joined in the action of the plaintiff;
5. Whether the balance of the private interests of the parties and the public interest of the state predominate in favor of the action being brought in an alternate forum; and
6. Whether the stay, transfer or dismissal would prevent unreasonable duplication or proliferation of litigation.

We have not applied this general statute specifically to probate proceedings, nor do we need to do so today.

28. Title 58 O.S. 2011 §5, *see* note 2, *supra*.

29. Title 58 O.S. 2011 §7, *see* page 14, *supra*.

30. *See, James v. Sanders*, 1923 OK 690, ¶2, 218 P.877.

**ROWE J., with whom Darby, V.C.J. and Kane, J., join, concurring in part; dissenting in part:**

1. Opinion, ¶ 21.

2. 58 O.S. 2011 § 6 provides:

When the estate of the decedent is in more than one county, he having died out of the state, and not having been a resident thereof at the time of his death, or being such nonresident and dying within the state, and not leaving estate in the county where he died, the district court of that county in which application is first made for letters testamentary or of administration, has exclusive jurisdiction of the settlement of the estate.

58 O.S. 2011 § 7 provides:

The district court of the county in which application is first made for letters testamentary or of administration in any of the cases above mentioned, shall have jurisdiction coextensive with the State in the settlement of the estate of the decedent and the sale and distribution of his real estate and excludes the jurisdiction of the district court of every other county.

3. The applicable versions of §§ 6 and 7 were §§ 6194 and 6195, Revised Statutes 1910, respectively.

**2020 OK 95**

**RE: Amendment to Disposition of Surplus Property, Rules for Management of the Court Fund, 20 O.S., Chap 18, App 1, Rule 10 (C)**

**No. SCAD-2020-104. November 32, 2020**

**ORDER**

Rule 10 (C) of the Rules for Management of the Court Fund, is hereby amended as shown on the attached Exhibit "A". The amended rule shall be effective immediately.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 23rd day of NOVEMBER, 2020.

/s/ Noma D. Gurich  
CHIEF JUSTICE

ALL JUSTICES CONCUR

--- EXHIBIT A ---

## **Title 20**

### **Chapter 18 – Court Fund**

#### **Appendix 1 – Rules for Management of the Court Fund**

##### **Rule 10 – Disposition of Surplus Property**

As authorized by 20 O.S. §1314, the following provisions shall govern the disposition of surplus property acquired or purchased by the local court fund.

A. Any worn out, outmoded, inoperable or obsolete equipment, furniture or other property purchased with local court funds for a district court or court clerk may be declared surplus by the Court Fund Board by written resolution of the Board describing the property and manner of disposal.

B. Such property may be disposed of by any of the following methods;

1. By trade-in to cover part of the cost of equipment or furniture to be acquired by purchase;
2. By separate cash sale where it appears that a greater amount can be recovered than could be realized by exchange or trade-in;
3. By transfer to another court clerk or district court;
4. By transfer to another county office in the same county; or
5. By junking, if the property has no value.

C. Except as provided in paragraph D below, before surplus items may be sold, a list of the items must be submitted to the Administrative Office of the Courts for distribution to the other district courts and court clerks, unless otherwise authorized by the Chief Justice. The Court Fund Board of any county may request such surplus property be transferred by a written resolution

of the Court Fund Board having the surplus property. If no request for transfer to another court clerk or district court is received within 30 days from the notification to the Administrative Office of the Courts, the surplus items may be sold in accordance with this rule.

D. Property with a current value which is less than the amount required for inclusion in the county inventory as set forth in 19 O.S. Supp. 2012 §178.1, or as hereafter may be amended, may be junked or disposed of in any manner deemed appropriate by the Court Fund Board without first being offered to the other district courts and court clerks.

E. The cash sale of property by the Court Fund Board may be by any of the following methods or combinations of methods:

1. At public auction or internet auction after public advertisement;
2. By inclusion in the sale of surplus county property by county commissioners; or
3. Sale after securing one or more bids in writing.

F. At any auction, the Court Fund Board shall reserve the right to reject any and all bids and remove the item from sale.

1. All proceeds of a sale of surplus property shall be deposited in the court fund.
2. The records of all sales, including all bids received, shall be retained for a period of not less than three (3) years.
3. All costs incurred in any sale shall be paid from the proceeds of the sale.

G. Within 30 days after the disposition of any surplus property, the Court Fund Board shall provide documentation of the date and manner of disposal to the Board of County Commissioners. The Board of County Commissioners shall record the disposal information and shall remove the disposed items from any county inventory lists.

## **2020 OK 96**

### **FOURTH EMERGENCY JOINT ORDER REGARDING THE COVID-19 STATE OF DISASTER**

**SCAD No. 2020-107. November 23, 2020**

1. Governor J. Kevin Stitt issued The Seventh Amended Executive Order 2020-20 on Novem-

ber 16, 2020 extending the health emergency in all 77 Oklahoma Counties caused by the impending threat of COVID-19 to the people of the state. This order is issued to clarify the procedures to be followed in all Oklahoma district courts and to avoid unnecessary health risks to judges, court clerks, court employees and the public.

2. This order supplements the First, Second, and Third Joint Emergency Orders (SCAD Nos. 2020-24, 2020-29 & 2020-36) from the Supreme Court and the Court of Criminal Appeals. Certain provisions in the prior three (3) orders concluded based on their own terms. Nothing in this Order extends any provision that has concluded.

3. Judges of the District Courts are authorized to take any and all necessary steps to protect the health and safety of all participants in any court proceeding. Decisions should be made on a courthouse by courthouse basis. Decisions should be based upon the number of judges, clerks, and courthouse personnel who are currently under treatment and/or in quarantine due to COVID-19. Other relevant factors to consider include but are not limited to hospitalizations, the community rate of COVID-19 infections and any other directives from the Oklahoma Department of Health and regional and county health departments.

4. Local county officials will continue to guide the extent to which county buildings are closed or have restricted access to the public. All areas of a county facility occupied by judges, judicial staff, court clerks and staff may remain closed to the public with exceptions for necessary and emergency matters and as permitted by local order.

5. Orders and Notices should be made available to the public, which may include restrictions on access to courtrooms, judges' offices, the court clerk's office and any other areas of the courthouse designated for the use of court functions. Conditions required by the public in order to permit entrance may include the requirement that all persons wear two-ply masks. The taking of temperatures may be required. People who are ill should be restricted from entering courtroom or other areas designated for use by the court. Social distancing should be practiced and crowded hallways should be avoided. All persons should be reminded to wash their hands. To that end,

county facilities are responsible for providing soap and water.

6. The decision to schedule or proceed or continue or reschedule any jury term, Civil or Criminal jury trial, non-jury trial or any other proceeding rests solely with the judges of the District Court.

7. In the event that there is an objection to the continuance of any civil or criminal jury trial, non-jury trial or other proceeding, the assigned judge shall make a full record including reference to all Joint Emergency Orders, any local directives, and any other facts and circumstances necessary for later appellate review.

8. Judges and other courthouse personnel shall continue to use all available means to ensure the health of all participants in any court proceeding. Judges are encouraged to continue to use remote participation to the extent possible by use of telephone conferencing and video conferencing pursuant to Rule 34 of the Rules for District Courts. The use of TEAMS is recommended. BlueJeans.com may be used with approval of the Chief Justice. Zoom remains blocked on all equipment provided by the AOC/MIS. Judges are encouraged to develop methods to give reasonable notice and access to the participants and the public.

9. To the extent that in person dockets are held, judges may restrict the number of persons who are permitted to enter the courtroom or other areas designated for use by the court, including courtrooms, offices of the judges and court clerks and areas adjacent thereto.

10. Court clerks and judges may continue to use mail, email, and drop off boxes for acceptance of written materials and correspondence with parties/counsel.

11. All rules and procedures, and all deadlines whether prescribed by statute, rule or order in any civil, juvenile or criminal case, are in force and effect, including all appellate rules and procedures for the Supreme Court, the Court of Criminal Appeals, and the Court of Civil Appeals.

12. All appellate filings shall continue to be made by mail, third party commercial carrier or in person delivery to a specified area at the Oklahoma Judicial Center, subject to the conditions set forth in notices posted on OSCN.

13. It is anticipated that additional orders may be entered as deemed necessary.

**IT IS SO ORDERED.**

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 23rd DAY OF NOVEMBER, 2020.

**/s/ Noma D. Gurich  
CHIEF JUSTICE  
Supreme Court of Oklahoma**

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

Darby, V.C.J. and Colbert, J., dissent;

**Colbert, J., with whom Darby, V.C.J., joins,  
dissenting**

Pursuant to article 7, section 6, of the Oklahoma Constitution, the original jurisdiction of the Supreme Court shall extend to a general superintending and control over all inferior courts and all Agencies, Commissions and Boards created by law. Thereby having superintending control of all courts throughout the State, we have the duty and responsibility to ensure consistent policies are executed by all courts rather than leaving these decisions to the discretion of individual judges of the district courts throughout the State of Oklahoma. To do otherwise is to negate our role as required by the Constitution. To protect the health and safety of individuals utilizing the court facilities, I would issue an order closing all the courts until further notice of the Supreme Court.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT THIS 23RD DAY OF NOVEMBER, 2020.

**/s/ David B. Lewis  
Presiding Judge  
Oklahoma Court of  
Criminal Appeals**

**2020 OK 97**

**REVOLUTION RESOURCES, LLC,  
Plaintiff/Appellee, v. ANNECY, LLC,  
Defendant/Appellant.**

**Case No. 118,708. November 24, 2020**

**APPEAL FROM THE DISTRICT COURT OF  
OKLAHOMA COUNTY  
HONORABLE JUDGE  
SUSAN C. STALLINGS**

¶0 The Appellee filed a Petition to Appoint Appraisers in an action under the Oklahoma Surface Damages Act related to its oil and gas operations on the Appellant's surface estate. The Appellant unsuccessfully sought a temporary injunction against Appellee's operations. Appellant appealed the interlocutory order denying its motion for temporary injunction. This Court granted an injunction pending the appeal. Appellant was required to post a bond securing the cost and attorney fees of the Appellee if we should hold the temporary injunction granted by this Court should not have been granted. Upon review of a developed record, this Court affirms the trial court's order denying the motion for temporary injunction, we dissolve the temporary injunction granted by this Court, and remand for further proceedings to determine the costs and attorney fees owed the Appellee which are secured by the bond.

**ORDER OF THE TRIAL COURT  
AFFIRMED; TEMPORARY INJUNCTION  
DISSOLVED; CASE REMANDED FOR  
FURTHER PROCEEDINGS**

Michael J. Blaschke, Michael J. Blaschke, PC, and Rachel Lawrence Mor, Rachel Lawrence Mor, PC, Oklahoma City, OK, for Defendant/Appellant

John M. Krattiger, Nicholas V. Merkley, and Jay P. Walters, GableGotwals, Oklahoma City, OK, for Plaintiff/Appellee

**COMBS, J.:**

**I. FACTS AND PROCEDURAL HISTORY**

¶1 On February 18, 2020, the Plaintiff/Appellee, Revolution Resources, LLC, (Revolution), an oil and gas well operator, commenced this action under the commonly referred to, Oklahoma Surface Damages Act (SDA), 52 O.S. §§ 318.2-318.9,<sup>1</sup> by filing a Petition to Appoint Appraisers. Revolution is engaged in the business of drilling, completion, and operation of oil and gas wells within the State of Oklahoma and serves as the operator in the oil and gas drilling operations on the subject premises:

Southwest Quarter (SW/4) Northeast Quarter (NE/4) of Section 9, Township 13N, Range 4W, Oklahoma County, Oklahoma.

In February 2018, Revolution acquired and became the operator of a 30,000 acre unit that was created in 1947 pursuant to Order 20212 of the Oklahoma Corporation Commission (OCC).

The unit is known as the West Edmond Hunton Lime Unit (WEHLU). Order 20212 approved the creation of the WEHLU for the unitized management, operation and further development of the Hunton Lime formation oil and gas pool. The subject premises is located within the WEHLU. On June 13, 2018, Revolution filed with the Oklahoma County Clerk a Notice of West Edmond Hunton Lime Unit and Surface Rights. The Notice quoted, as follows, from the Plan of Unitization which Order 20212 approved:

XX.

**RIGHTS OF WAY**

The Unit shall have a servitude and right-of-way on, over and across all of the lands in the Unit Area for the purpose of laying, constructing, building, using and maintaining, operating, changing, repairing and removing pipelines, tanks, telegraph and telephone lines, water lines and other facilities for the development and operation of the Unit Area for oil and gas and for the gathering, handling and disposal of Unit Production; provided, the Unit shall pay all damages to growing crops, timber, fences, improvements and structures on the land resulting from the exercise of the rights and privileges granted to it in this section.

Exhibit "A" attached to the Notice contained the legal description of all lands covered under the WEHLU, which included all of Section 9 of Township 13 North, Range 4 West, Oklahoma County, Oklahoma.

¶2 The record reflects the Defendant/Appellant, Annecy, LLC, (Annecy) purchased the subject premises in August 2019.<sup>2</sup> Annecy purchased the land to build expensive luxury homes in the NE/4 of Section 9 of Township 13 North, Range 4 West, Oklahoma County, Oklahoma. The plat for this portion of land had been approved by the City of Oklahoma City (City) and Annecy received a permit to begin construction. Construction was set to begin on February 24, 2020. Annecy claims the subject premises was zoned (R-1) for single-family residential use only.

¶3 Revolution contacted Annecy in October 2019 to discuss its intent to drill an oil and gas well on the subject premises. An agreement between the parties was never reached. Revolution then pursued and received permits from the OCC and the City to drill on the premises in December 2019.<sup>3</sup> Pursuant to the SDA,

Revolution served Annecy with its Notice of Intent to Drill on February 13, 2020.<sup>4</sup> As required by law, within five days of service of the notice Revolution attempted to continue good-faith negotiations with Annecy for a surface use agreement for any damages that might occur to the subject premises.<sup>5</sup> No agreement was reached and on February 18, 2020, Revolution filed its Petition to Appoint Appraisers and served a Ten Day Notice.<sup>6</sup> Title 52 O.S. 2011, §318.5, provides that “[o]nce the operator has petitioned for appointment of appraisers, the operator may enter the site to drill.” On February 19, 2020, pursuant to this statute, Revolution entered the subject premises to begin construction of the well.

¶4 On February 24, 2020, Annecy filed a Special Appearance and Motion for Temporary Injunction/Restraining Order and Expedited Hearing. Annecy’s two main arguments in support of its motion for extraordinary relief were: 1) Annecy would suffer irreparable harm if Revolution is allowed to drill on the subject premises,<sup>7</sup> and 2) Revolution was required under the City’s Code<sup>8</sup> and state law<sup>9</sup> to procure a variance from the City’s Board of Adjustment (BOA) prior to the City issuing the permits.<sup>10</sup> Because a variance hearing was never held nor was an order granting a variance made by the BOA, Annecy asserted it never received notice of a hearing and thus was not given an opportunity to be heard and object to Revolution’s operations. Had such a hearing been held, Annecy stated they “reasonably believe[]” they would have prevailed in preventing Revolution from receiving a variance and drilling on the subject premises and therefore there was a likelihood they would have been successful on the merits of such a BOA variance hearing.

¶5 In response, Revolution notes there are no homes or homeowners on the subject tract and Annecy has not yet performed any substantial development work that would affect anyone other than Annecy’s pecuniary interests. On the other hand, any delay to Revolution’s drilling operations would cause a significant hardship to Revolution and others by causing standby and additional mobilization charges from the rig operator for releasing the rig, potentially cause the loss of the use of its rig to another operation, and causing the delay in payment of royalties to over 5,600 WEHLU mineral owners. Revolution further asserted, the SDA was specifically created by the Legislature to handle this very situation. It provides

for money damages, i.e., legal relief, to surface estate owners for any potential harm they may suffer by the drilling operations; it does not provide for an injunction, i.e., equitable relief. Injunctive relief cannot be granted because Annecy suffers no irreparable harm. This is a business dispute over the value of surface land which will be determined by three appraisers pursuant to the SDA. It is nothing else. There is nothing special about the subject premises other than Annecy’s desire to maximize its profit by developing it into luxury homes and selling them for the maximum amount possible.

¶6 Additionally, Revolution argued Annecy cannot show a likelihood of success on the merits. Annecy stated in its motion that it “reasonably believes” it would succeed on the merits of a BOA hearing. Revolution asserts such a BOA hearing is “hypothetical” due to recent changes in the law and the present action is under the SDA. The only success on the merits is pursuant to the SDA, i.e., Revolution will drill its well, the subject premises will be appraised, and Annecy will receive monetary compensation for damages to its surface estate. Further, a reasonable belief that one would succeed on the merits is not the required clear and convincing evidence of a “likelihood of success on the merits” needed to establish this element for a temporary injunction. Annecy cannot be successful on the merits of its stated goal of preventing Revolution from drilling on the subject premises. This goal is premised on the BOA denying Revolution’s right to drill through refusing to issue a variance at a hearing that never occurred. Revolution argued that to the extent the City’s Code bears upon these proceedings it has been preempted by a recently enacted law that dramatically diminished municipal powers over oil and gas operations.

¶7 In 2015, the Legislature enacted 52 O.S. Supp. 2015, §137.1 and repealed 52 O.S. 2011, §137.<sup>11</sup> The repealed §137<sup>12</sup> had for decades provided broad powers to political subdivisions to regulate oil and gas operations as follows:

Nothing in this act is intended to limit or restrict the rights of cities and towns governmental corporate powers to prevent oil or gas drilling therein nor under its police powers to provide its own rules and regulations with reference to well-spacing units or drilling or production which they may have at this time under the general laws of the State of Oklahoma.

It was replaced with §137.1 which provides:

A municipality, county or other political subdivision **may enact reasonable ordinances, rules and regulations concerning road use, traffic, noise and odors incidental to oil and gas operations** within its boundaries, **provided such ordinances, rules and regulations are not inconsistent with any regulation established by Title 52 of the Oklahoma Statutes or the Corporation Commission.** A municipality, county or other political subdivision **may also establish reasonable setbacks and fencing requirements for oil and gas well site locations as are reasonably necessary** to protect the health, safety and welfare of its citizens *but may not effectively prohibit or ban any oil and gas operations, including oil and gas exploration, drilling, fracture stimulation, completion, production, maintenance, plug-ging and abandonment, produced water disposal, secondary recovery operations, flow and gathering lines or pipeline infrastructure. All other regulations of oil and gas operations shall be subject to the exclusive jurisdiction of the Corporation Commission.* Provided, notwithstanding any provision of law to the contrary, a municipality, county or other political subdivision may enact reasonable ordinances, rules and regulations concerning development of areas within its boundaries which have been or may be delineated as a one-hundred-year floodplain but only to the minimum extent necessary to maintain National Flood Insurance Program eligibility. (emphasis added).

Revolution noted the Oklahoma Attorney General wrote a detailed opinion concerning the changes made in §137.1. The opinion found the enactment of §137.1 altered the shared regulatory structure over oil and gas regulation between the municipalities and the OCC. 2015 OK AG 12, ¶¶4-5. With but a few exceptions, the OCC now enjoys exclusive jurisdiction over such regulation. *Id.*, ¶5. The statutory change limited local regulation to the areas specifically enumerated. *Id.*, ¶12. Localities no longer have the authority to enforce regulations that fall outside the powers specifically granted to them in §137.1. *Id.*, ¶21.

¶8 Revolution also asserted the City Code provides for the commencement of oil and gas operations to drill a well once a person has secured a permit. *Citing City's Code of Ordi-*

nances, Article II, §37-38.<sup>13</sup> Revolution received permits from both the OCC and the City. To the extent Annecy believes some ordinance or provision has not been followed, its quarrel is with the City and its permitting procedures, not with Revolution. The City, not Annecy, is the one responsible for enforcing its ordinances.

¶9 On March 2, 2020, the district court held a hearing on Annecy's motion. At the hearing Annecy stated its desire is to enjoin Revolution from drilling while the court orders this matter back to the City to hold a variance hearing.<sup>14</sup> Annecy argued its intent is to stop Revolution from drilling on the subject premises, noting that there is nearby land that Revolution could drill upon.<sup>15</sup> Revolution asserted that "that's exactly what the problem is," §137.1 "clearly says you can't do anything to stop us from drilling a well where the [OCC] permits us to drill a well."<sup>16</sup> The court asked Annecy if it had spoken to the City about why it did not require a variance before issuing the permit.<sup>17</sup> Annecy responded that it had spoken to the City and since the passage of §137.1, the City said it "thought we had to get out of the business of variances."<sup>18</sup> Revolution suggested that Annecy's problem is with the City's interpretation of §137.1, and therefore it should sue the City to have a court determine whether or not its interpretation is wrong.<sup>19</sup> The court itself was not convinced Annecy was in the right place.<sup>20</sup> The court then asked Annecy what is the irreparable harm here, since the subject premises is "just a bunch of dirt."<sup>21</sup> Annecy agreed that at this stage the subject premises is just all dirt.<sup>22</sup> The irreparable harm Annecy argued is that it would not have purchased this property if it had known an oil and gas facility will be on the subject premises which would include increased truck traffic related to the well.<sup>23</sup> Revolution responded that this matter only concerns money. Annecy has a "big piece of dirt here" and "big plans to develop [it] to make big money;" "[i]t's a commercial investment."<sup>24</sup> The diminution in value to the property is a matter concerning money damages, it is not irreparable, and is precisely the type of action to be handled under the SDA.<sup>25</sup> The court agreed and concluded that Annecy had not proven irreparable harm at this stage and denied its motion for temporary injunction and restraining order.<sup>26</sup> The court filed its order on March 5, 2020.

¶10 On March 10, 2020, Annecy filed a Petition in Error in this Court to review the interlocutory

order. See Okla.Sup.Ct.R 1.60-1.61. The following day, Annecy also filed a separate action for declaratory judgment in the district court.<sup>27</sup> This separate action names both Revolution and the City as defendants. It seeks an order determining Annecy's rights under the zoning and variance laws and requiring the City to comply with its obligations under those laws.

¶11 On March 10, 2020, and simultaneously with its Petition in Error, Annecy filed a Motion for Emergency Relief, requesting this Court grant a temporary injunction against Revolution while the issues raised on appeal can be resolved. Revolution responded to the motion on March 12, 2020. The issues raised by the parties were nearly identical to those raised before the district court. On March 13, 2020, this Court entered an order enjoining Revolution from drilling activities on Annecy's property pending further order of this Court. On March 16, 2020, Revolution filed a Motion for Bond on Temporary Injunction, wherein it claimed the injunction would cost \$222,190.00 in damages and an additional estimated \$35,000.00 in attorney fees. On March 30, 2020, this Court entered a second order issuing a temporary injunction enjoining Revolution from proceeding with its drilling activities on Annecy's property pending the appeal. However, the temporary injunction was conditioned upon Annecy posting a bond in the amount of \$257,190.00. within 30 days of the order pursuant to 12 O.S. 2011, §1392. On May 4, 2020, Annecy filed a Bond for Temporary Injunction with this Court stating it had executed the bond on April 29, 2020.

## II. STANDARD OF REVIEW

¶12 An injunction is an extraordinary remedy, and relief by this means is not to be lightly granted. *Amoco Production Co. v. Lindley*, 1980 OK 6, ¶50, 609 P.2d 733. Matters involving the granting or denial of injunctive relief are of equitable concern. *Edwards v. Bd. of Cty. Comm'rs of Canadian Cty.*, 2015 OK 58, ¶11, 378 P.3d 54. To grant or refuse to grant an injunction is generally within the sound discretion of the trial court, and its judgment in refusing to grant an injunction will not be disturbed on appeal unless it can be said the court abused its discretion, or that the judgment rendered is clearly against the weight of the evidence. *Johnson v. Ward*, 1975 OK 129, ¶42, 541 P.2d 182. See also *O'Laughlin v. City of Fort Gibson*, 1964 OK 31, ¶12, 389 P.2d 506 (judgment of a trial court in an action of equitable cognizance will not be dis-

turbed unless clearly against the weight of the evidence). An abuse of discretion occurs when a decision is based on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling. *Velasco v. Ruiz*, 2019 OK 46, ¶6, 457 P.3d 1014. "An abused judicial discretion is manifested when discretion is exercised to an end or purpose not justified by, and clearly against, reason and evidence. It is discretion employed on untenable grounds or for untenable reasons, or a discretionary act which is manifestly unreasonable." *Patel v. OMH Medical Center, Inc.*, 1999 OK 33, ¶20, 987 P.2d 1185, 1194. To obtain a preliminary injunction, a plaintiff must show that four factors weigh in his or her favor: 1) the likelihood of success on the merits; 2) irreparable harm to the party seeking injunctive relief if the injunction is denied; 3) his threatened injury outweighs the injury the opposing party will suffer under the injunction; and 4) the injunction is in the public interest. *Dowell v. Pletcher*, 2013 OK 50, ¶7, 304 P.3d 457. The right to injunctive relief must be established by clear and convincing evidence and the nature of the injury must not be nominal, theoretical or speculative. *Sharp v. 251st Street Landfill, Inc.*, 1996 OK 109, 925 P.2d 546. An injury is irreparable when it is incapable of being fully compensated for in damages or where the measure of damages is so speculative that it would be difficult if not impossible to correctly arrive at the amount of the damages. *Hines v. Indep. Sch. Dist. No. 50, Grant Cty*, 1963 OK 85, ¶14, 380 P.2d 943. It has been long settled that an injunction should not be granted or allowed where there is a full and adequate remedy at law. *Marshall v. Homier*, 1903 OK 84, ¶3, 74 P. 368; See also, *Indep. Sch. Dist. No.9 of Tulsa Cty. v Glass*, 1982 OK 2, ¶9, 639 P.2d 1233 ("[w]hen a remedy for any particular wrong or injury has been provided by statute, generally no redress can be afforded by injunction.") A temporary injunction should not be granted where the alleged contemplated injury is such as can be fully compensated in money damages. *Marshall*, ¶3.

## III. ANALYSIS

¶13 This appeal concerns whether the trial court abused its discretion in denying Annecy's motion for a temporary injunction within an action filed under the SDA. The district court determined Annecy did not prove it would be irreparably harmed if extraordinary relief was not granted. We review that decision to determine if it was based upon an erroneous



conclusion of law or there was no rational basis in evidence for the ruling. Upon appeal, this Court granted Annecy's motion for extraordinary relief only pending the appeal. After a review of a developed record, we conclude the district court did not abuse its discretion in denying Annecy's motion.

¶14 The district court ruled only on one of the four factors necessary to obtain a temporary injunction, i.e., irreparable harm. Because all four factors must be proven by clear and convincing evidence in order to obtain a temporary injunction, and the court ruled there was no irreparable harm, she denied the motion. Therefore, our analysis will focus on whether or not Annecy proved by clear and convincing evidence it would be irreparably harmed if a temporary injunction was not granted.

¶15 The underlying action is filed pursuant to the SDA. The SDA was enacted in 1982 to provide a mechanism for balancing the conflicting interests of the owners of two of our State's important natural resources, i.e., the mineral estate and the surface estate. *Ward Petroleum Corp. v. Stewart*, 2003 OK 11, ¶5, 64 P.3d 1113. Although the two estates may be of equal dignity for some purposes, the surface estate is servient to the dominant mineral estate for the purpose of oil and gas development. *Dulaney v. Oklahoma State Dept. of Health*, 1993 OK 113, ¶8, 868 P.2d 676; *Turley v. Flag-Redfern Oil Co.*, 1989 OK 144, ¶13, 782 P.2d 130. The purpose behind the SDA is to provide prompt payment of compensation to the surface estate owner for any losses suffered because of the oil and gas mining operations. *Ward*, ¶5; *Turley*, ¶15. Prior to the SDA, the oil and gas operator would be held liable for surface damages only if such damages resulted from wanton or negligent operations or if the operations affected a more than reasonable area of the surface. *Ward*, ¶5; *Davis Oil. Co. v. Cloud*, 1986 OK 73, ¶9, 766 P.2d 1347. That is no longer the case under the SDA which modified that common law rule. *Ward*, ¶5. The SDA limits the damages recoverable to those which the surface owner **has sustained or will sustain** by reason of entry upon the land and by reason of **drilling or maintenance of oil and gas production** on the subject tract of land. 52 O.S. 2011, §318.5 (C); *Ward*, ¶6. This Court noted that on several occasions we have held the **damage standard** intended by the Legislature under the SDA is the **diminution in the fair market value of the surface property resulting from**

**the drilling and maintenance operations.** *Ward*, ¶6. We held, this measure of damages is appropriate since the SDA "partakes of the nature of a condemnation action."<sup>28</sup> *Id.* Being as such, condemnation proceedings are not civil actions at law or suits in equity but rather are special statutory proceedings for the purpose of ascertaining the compensation to be paid for the property to be appropriated. *Id.*; See *Curtis v. WFEC R.R. Co.*, 2000 OK 26, 1 P.3d 946; *State Dept. of Highways v. O'Dea*, 1976 OK 133, 555 P.2d 587. We determined the procedural requirements under the SDA are mandatory and under these proceedings only three pleadings are authorized, i.e., a petition seeking the appointment of appraisers, objection to the report of appraisers, and a demand for a jury trial. *Ward*, ¶8.

¶16 Ownership of an oil and gas interest carries with it the right to enjoy that interest by entering and making reasonable use of the surface to explore and extract mineral deposits. *Turley*, ¶13; *Ricks Expl. Co. v. Oklahoma Water Res. Bd.*, 1984 OK 73, ¶10, 695 P.2d 498 ("[t]he ownership of oil-and-gas carries with it by implication the means of enjoying the mineral estate.") The right to enter the surface for exploration purposes is in the nature of a property right. *Dulaney*, ¶8; *Turley*, ¶13. One who purchases land subject to the outstanding rights held by parties with an interest in the mineral estate is not divested of a property right by an OCC order increasing the number of wells which can be drilled on the property. *Turley*, ¶14. The surface estate owner holds an estate that is servient to the mineral estate and subject to the valid exercise of the State's police power. *Id.* It has been long recognized that the State, in exercise of its police power, may control the density of drilling. *Id.*, ¶13. The surface estate owner's pecuniary interest in his or her property is protected under the SDA which will provide for compensation for injuries to the property. *Id.*, ¶15.

¶17 Annecy purchased its surface estate subject to the outstanding mineral estate held by Revolution. Annecy's surface estate is servient to that of Revolution's mineral estate. The damages asserted by Annecy all relate to the diminution in the fair market value of its surface estate that it has either sustained or will sustain from Revolution's drilling and maintenance operations. The SDA provides a full and adequate remedy in the law to fully compensate Annecy in money for such damages. A temporary injunction is not appropriate under these circumstances. Annecy

did not meet its burden of proving by clear and convincing evidence that it would be irreparably harmed by Revolution's oil and gas operations. Having failed to establish one of the four factors required, i.e., irreparable harm, by clear and convincing evidence, Annecy did not meet its burden to prove all necessary factors to obtain extraordinary relief, therefore its motion for temporary injunction was correctly denied. There was a rational basis in the evidence for the district court's order denying the temporary injunction and it clearly was not an abuse of discretion. Accordingly, we affirm the district court's denial of Annecy's motion for temporary injunction.

¶18 In addition, Annecy asserts it was denied due process because it was never given notice and an opportunity to be heard at a variance proceeding before the City's BOA. This argument was presented in regard to one of the four factors for a temporary injunction, i.e., the likelihood of success on the merits. Annecy claimed it believed it would succeed at a BOA variance hearing if one had occurred. They claimed the result of such variance proceeding would be to deny Revolution a variance to drill on Annecy's property. Revolution argued 52 O.S. Supp. 2015, §137.1 prohibits that very result. Annecy asserted at the temporary injunction hearing that in its conversations with the City, the City no longer requires a variance hearing on oil and gas operations before granting a permit to drill due to the enactment of §137.1.

¶19 In the present SDA action, the district court did not make a ruling concerning Annecy's right to a variance proceeding or what impact §137.1 has on variance proceedings. The court only ruled that Annecy had not proven it would be irreparably harmed by Revolution's oil and gas operations. Likelihood of success on the merits is but one of the four factors necessary to be proven for such extraordinary relief. The issue of whether due process was denied does not relate to the present action under the SDA. The evidence supports due process was afforded in this SDA action.<sup>29</sup> Annecy's argument about being denied due process is aimed at a BOA variance hearing, not the SDA action, and Revolution argued such variance proceedings are now preempted under §137.1.

¶20 Annecy filed, and there remains pending, a declaratory judgment action in the district court to determine its right to a variance proceeding.<sup>30</sup> The resolution of that matter will

largely hinge upon what effect §137.1 has on variance proceedings concerning oil and gas operations. Both Revolution and the City, unlike the present case, are parties to that action. The issue concerning what right, if any, Annecy has to a variance proceeding and thus whether due process was denied is not ripe for this Court to hear until there is an appeal of a final judgment of the district court deciding that issue.

¶21 For the same reasons we affirm the district court's order denying a temporary injunction, we find the temporary injunction granted by this Court pending appeal, which was secured by a bond, should not have been granted. The temporary injunction issued by this Court is dissolved and the matter concerning what costs and attorney fees were incurred by Revolution and secured by the bond is remanded to the district court for further proceedings.

**ORDER OF THE TRIAL COURT  
AFFIRMED; TEMPORARY INJUNCTION  
DISSOLVED; CASE REMANDED FOR  
FURTHER PROCEEDINGS**

¶22 Gurich, C.J., Darby, V.C.J., Kauger, Winchester, Edmondson, Combs, Kane and Rowe, JJ., - concur.

¶23 Colbert, J., - not participating.

**COMBS, J.:**

1. The Oklahoma Surface Damages Act was created in 1982 Okla. Sess.Laws c. 341 (H.B. 1460), eff. July 1, 1982. The Act does not include a short title naming it the Oklahoma Surface Damages Act but it has been commonly referred to in that manner or just as the Surface Damages Act.

2. Transcript of the Proceedings, March 2, 2020, at 6.

3. Revolution received a permit from the City to drill the well name "Winterfell 1304 09-21 #1BH" issued December 31, 2019. See Ex. 5, Plaintiff's Response to Defendant's Motion for Temporary Injunction/Restraining Order filed February 28, 2020, CV-2020-381, District Court of Oklahoma County, Oklahoma. In January 2020, Revolution sought to amend the permit on this well (permit no. "Well-2019-00023") in order to move the surface hole location/pad site by less than 500 feet, which was approved by the City in February 2020. *Id.*

4. Title 52 O.S. Supp. 2013, §318.3 provides:

Before entering upon a site for oil or gas drilling, except in instances where there are non-state resident surface owners, non-state resident surface tenants, unknown heirs, imperfect titles, surface owners, or surface tenants whose whereabouts cannot be ascertained with reasonable diligence, the operator shall give to the surface owner a written notice of his intent to drill containing a designation of the proposed location and the approximate date that the operator proposes to commence drilling.

....

Within five (5) days of the date of delivery or service of the notice of intent to drill, it shall be the duty of the operator and the surface owner to enter into good faith negotiations to determine the surface damages.

5. *Id.*

6. Title 52 O.S. 2011, §318.5 provides in pertinent part:

A. Prior to entering the site with heavy equipment, the operator shall negotiate with the surface owner for the payment of any damages which may be caused by the drilling operation. If the parties agree, and a written contract is signed, the operator may enter the site to drill. If agreement is not reached, or if the operator is not able to contact all parties, the operator shall petition the

district court in the county in which the drilling site is located for appointment of appraisers to make recommendations to the parties and to the court concerning the amount of damages, if any. Once the operator has petitioned for appointment of appraisers, the operator may enter the site to drill.

B. Ten (10) days' notice of the petition to appoint appraisers shall be given to the opposite party, either by personal service or by leaving a copy thereof at the party's usual place of residence with some family member over fifteen (15) years of age, or, in the case of nonresidents, unknown heirs or other persons whose whereabouts cannot be ascertained, by publication in one issue of a newspaper qualified to publish legal notices in said county, as provided in Section 106 of Title 25 of the Oklahoma Statutes, said ten-day period to begin with the first publication.

7. In their motion, Anney asserts the subject premises, consisting of almost 160 acres, is in the process of development as a luxury housing community. Allowing Revolution to drill a well on approximately 4 acres of this property, including construction of a road for the drilling and long-term servicing of the well, would eliminate several home tracts currently included in the final plat and diminish the desirability of all the home tracts, in particular, those in the west side of Anney's property.

8. Anney quotes from the City's Code of Ordinances, Article II, §37-39 (a)(8), which concerns applications for permits to drill and operate wells. This section provides in pertinent part:

(a) **Every application for a permit to drill and operate an original well or to re-enter and operate an abandoned well** shall be in writing and signed by the applicant or by some person duly authorized to sign on his behalf, and it shall be filed with the inspector and be accompanied by a nonrefundable application fee in the amount established in Chapter 60, the General Schedule of Fees. The application fee shall be paid by cashier's check. The permittee shall pay an additional nonrefundable operating permit fee in the amount established in Chapter 60, the General Schedule of Fees, when the drilling permit is approved and accepted, and this payment shall also be in the form of a cashier's check. The applicant shall submit two copies of the application and all required documents. **The application shall contain full information as required by the inspector, including the following:**

(8) if the proposed well is located outside of the boundaries of the Oil and Gas District or U-7 Zone, the applicant shall also submit a certified copy of the order by the **Board of Adjustment of the City** or a certified copy of the journal entry of judgment **which grants such applicant the right to drill the well at the proposed location.** (emphasis added)

9. Anney cites 11 O.S. §44-108, which requires notice of a public hearing to be mailed by the clerk of the BOA to property owners within a 300 foot radius of the subject property, at least 10 days prior to a hearing. It provides in pertinent part:

A. Notice of public hearing before the board of adjustment shall be given by publication in a newspaper of general circulation in the municipality where the property is located and by mailing written notice by the clerk of the board of adjustment to all owners of property within a three hundred (300) foot radius of the exterior boundary of the subject property. A copy of the published notice may be mailed in lieu of written notice; however, the notice by publication and written notice shall be published and mailed at least ten (10) days prior to the hearing.

Sections 44-101 through 110 of Title 11 of the Oklahoma Statutes, concern municipal boards of adjustment. Section 44-101 requires a municipality, when it is exercising zoning powers conferred by 11 O.S. §43-101 through §43-109, to provide by ordinance for the appointment of a board of adjustment. Section 44-104, grants a board of adjustment the power to hear oil and gas applications and appeals *unless prohibited throughout a municipality by municipal ordinance*. Its pertinent provisions are as follows:

The board of adjustment **shall have the power to:**

4. **hear and decide oil and/or gas applications or appeals unless prohibited throughout a municipality by municipal ordinance.** The board of adjustment shall be required to make the findings prescribed by Section 44-107 of this title in order to grant a variance as to use with respect to any such application or appeal. Exceptions and/or variances may be allowed by the board of adjustment only after notice and hearing as provided in Section 44-108 of this title. The record of the meeting at which the variance or special exception was granted shall show that each ele-

ment of a variance or special exception was established at the public hearing on the question, otherwise said variance or special exception shall be voidable on appeal to the district court. (emphasis added).

Section 44-107, concerns variances. It provides:

A variance from the terms, standards and criteria that pertain to an allowed use category within a zoning district as authorized by the zoning ordinance may be granted, in whole, in part, or upon reasonable conditions as provided in this article, only upon a finding by the board of adjustment that:

1. The application of the ordinance to the particular piece of property would create an unnecessary hardship;
2. Such conditions are peculiar to the particular piece of property involved;
3. Relief, if granted, would not cause substantial detriment to the public good, or impair the purposes and intent of the ordinance or the comprehensive plan; and
4. The variance, if granted, would be the minimum necessary to alleviate the unnecessary hardship.

10. Anney attaches as an exhibit to its motion Table 59-6100.1, Oklahoma City Code of Ordinances, Use 8450.2, Mining and Processing: Oil and Gas. Anney claims the subject premises are zoned R-1, single family residential. The attached table indicates for "Mining and Processing: Oil and Gas" a variance is required for every type of zoning listed in the table, including R-1.

11. 2015 Okla.Sess.Laws c. 341 (SB 809).

12. Section 137 was enacted in 1935 and had never been previously amended.

13. This section provides:

No person shall commence operations to drill a well, or drill or produce a well, or conduct any natural or artificial production operations unless such person has secured a permit as provided by this chapter. This requirement shall apply whether such well is located within the Oil and Gas District or U-7 Zone or is located outside of such drilling zone but is authorized to be drilled and produced by operation of law. This section shall never be construed to enlarge the Oil and Gas District or U-7 Zone nor to grant the right to drill, produce or operate a well where the right to do so is not fixed by operation of law.

14. Transcript of the Proceedings held March 2, 2020, at 5, 17.

15. *Id.*, at 12-13.

16. *Id.*

17. *Id.*, at 15.

18. *Id.*; The City is not a party to this SDA action, nor did anyone testify on behalf of the City.

19. Transcript of the Proceedings held March 2, 2020, at 21.

20. *Id.*, at 15.

21. *Id.*, at 16.

22. *Id.*, at 17.

23. *Id.*, at 16-17.

24. *Id.*, at 20.

25. *Id.*, at 20-21. Revolution's lawyer also accused Anney's injunction to be nothing more than a "stickup" because they wanted more than what Revolution was willing to pay "a week ago." *Id.*, at 8. He stated further that "[t]hey were totally willing to accept money" but the "parties are about four to eight-hundred thousand dollars apart." *Id.* Anney's lawyer denied that the purpose of the injunction was a "stickup." *Id.* at 13.

26. *Id.*, at 24.

27. CV-2020-597, District Court, Oklahoma County, Oklahoma. The matter was transferred to Judge Stallings by Civil Docket Transfer Order on September 2, 2020.

28. The Ward Court determined this is because §318.5 (F) of the SDA provides, "[t]he trial shall be conducted and judgment entered in the same manner as railroad condemnation actions tried in the court."

29. In addition, in *Turley v. Flag-Redfern Oil Co.*, 1989 OK 144, 782 P.2d 130, surface owners challenged an order of the Oklahoma Corporation Commission establishing drilling and spacing units because they were not given notice and an opportunity to be heard. We noted under 52 O.S. Supp. 1988, §87.2, only parties owning an interest in the mineral estate are required to receive actual notice. *Id.*, ¶18. Our holding determined the surface owners are protected under the Surface Damages Act, and where injured parties have an alternative statutory remedy to claimed due process violations, procedural defects are cured by the remedy afforded. *Id.*, ¶¶15, 18. See also *Turley v. Mewbourne Oil Co.*, 715 F. Supp. 1052, 1055 (W.D. Okla. 1989), aff'd, 904 F.2d 43 (10th Cir. 1990); *Blanchett v. Connecticut Gen. Ins. Corp.*, 419 U.S. 102, 156, 95 S.Ct. 335, 365, 42 L.Ed.2d 320, 361 (1974).

30. See note 27, *supra*.



*ensure*  
**JUSTICE**  
*for all*

**A little bit of your time can make a big difference  
by answering a pro bono legal question online  
for a low-income Oklahoman.**

**Visit [oklahoma.freelegalanswers.org](http://oklahoma.freelegalanswers.org)  
to learn more.**

# Opinions of Court of Criminal Appeals

---

2020 OK CR 22

**DUSTIN MELVIN DAVISON, Appellant, v.  
THE STATE OF OKLAHOMA, Appellee.**

**Case No. D-2018-373. November 19, 2020**

## OPINION

**LEWIS, PRESIDING JUDGE:**

¶1 Dustin Melvin Davison, Appellant, was tried by jury and found guilty of first degree murder, in violation of 21 O.S.Supp.2012, § 701.7(C), in the District Court of Oklahoma County, Case No. CF-2015-3992. The jury found as aggravating circumstances that the murder was especially heinous, atrocious, or cruel, and that there exists a probability that Appellant would commit criminal acts of violence that would constitute a continuing threat to society, and sentenced him to death. The Honorable Cindy H. Truong, District Judge, pronounced judgment and sentence accordingly. Mr. Davison appeals.

## FACTS

¶2 On the afternoon of May 18, 2015, K.B., the two-year-old son of Jennifer Young, died at Children's Hospital in Oklahoma City. Earlier that day, K.B. had suffered multiple blunt force traumas to his head and torso, resulting in fifty or more areas of external bruising; a broken mandible; a fracture of the skull behind his right ear; internal damage and hemorrhaging from the liver, pancreas, and intestinal mesentery; hemorrhages of the scalp, subgaleal, subdural and subarachnoid areas of the head; retinal hemorrhage; and edema throughout the brain. K.B.'s fatal injuries involved the application of substantial force inconsistent with typical play or accidents. The State's medical experts later testified that K.B.'s injuries indicated he had been beaten to death.

¶3 On the day K.B. died, he and his mother, Jennifer Young, were living with the Appellant, Dustin Davison, in an apartment paid for by Ms. Young. Appellant was Ms. Young's ex-boyfriend, but they remained roommates, and Appellant watched K.B. while Ms. Young worked. Around 11:00 a.m. that morning, Appellant and K.B. dropped off Ms. Young at work. Appellant and K.B. then returned to the apartment and appar-

ently remained there until Appellant called 911 seeking emergency assistance for K.B.

¶4 During the investigation of K.B.'s death, Appellant gave investigators several conflicting accounts of the events leading up to his 911 call. Appellant first claimed he came out of the shower to find K.B. lying on the floor, bleeding from his nose and mouth. He later claimed that K.B. fell and hit his head on a coffee table during a pillow fight, or that the family dog had knocked him into the table. He also stated that K.B. had bumped his forehead in the bathtub the previous day.

¶5 Appellant told police at one point that K.B.'s extreme bruising was caused by Jennifer Young's brother. He also stated at various times that K.B. had fallen from the apartment balcony, been struck by a soccer ball, had a chair pulled out from under him, or fallen to the ground at 7-11. Appellant admitted being a "straight up asshole" to K.B. when K.B. "pissed him the fuck off." Appellant also admitted throwing K.B. to the ground, probably causing K.B.'s skull fracture, and waiting twenty minutes or more to call 911.

¶6 Contrary to these statements, Appellant took the stand at trial against the advice of counsel and testified that a man named Jeremy Walker had killed K.B. after coming to the apartment to buy drugs that day. Appellant claimed that he had injected methamphetamine while Walker was there and temporarily lost consciousness. When he woke up, Walker had left the apartment and K.B. was lying on the floor seriously injured. Appellant told the jury that Jeremy Walker had "aggressively killed and murdered" the victim. Appellant had "tried to save" K.B., and had "wasted time trying to revive him" instead of calling 911.

¶7 Appellant said that he "didn't know how to explain" the injuries inflicted by Jeremy Walker to investigators, which "made me out to be – to look like a liar." Appellant said he "would never hurt" K.B. because he "loved that child." Appellant claimed he "had to make up more stories" only because he wanted to tell Jennifer Young "what truly happened" before he told investigators. He "wanted to tell

[the investigating detective] the truth, but I didn't know how to."

¶8 On cross-examination, the State established that Appellant was not selling drugs to Jeremy Walker every weekend, as he had claimed in his testimony. According to phone records, Appellant hadn't spoken to Walker in more than two and a half months before the homicide. Appellant acknowledged that he had waited a year and a half after being charged with this murder to name Jeremy Walker as the real perpetrator.

¶9 Appellant admitted on cross-examination that he had repeatedly lied to investigators, his parents, and his siblings about the facts of K.B.'s death as he tried to deflect suspicion from himself, but had waited almost eighteen months to name the real killer. Appellant also admitted that when naming Jeremy Walker as the murderer didn't work, Appellant offered to implicate a fellow jail inmate in the murder in exchange for a deal. Appellant also agreed when the prosecutor asked him if he thought he was the real victim in this case.

¶10 Additional facts will be related in connection with the individual propositions of error.

### **ANALYSIS**

¶11 In Proposition One, Appellant argues that he was denied the effective assistance of trial counsel in violation of the Sixth, Eighth, and Fourteenth Amendments and Article II, sections 7, 9, and 20 of the Oklahoma Constitution. We address these complaints applying the test required by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), by initially presuming that counsel rendered reasonable professional assistance. Appellant must establish the contrary by showing that trial counsel's performance was unreasonably deficient and that he was prejudiced by the deficient performance. *Spears v. State*, 1995 OK CR 36, ¶ 54, 900 P.2d 431, 445.

¶12 To determine whether counsel's performance was deficient, we ask whether the representation was objectively reasonable under prevailing professional norms. In this inquiry, Appellant must show that the trial attorney made errors so serious that the attorney was not functioning as the counsel guaranteed by the Constitution. *Browning v. State*, 2006 OK CR 8, ¶ 14, 134 P.3d at 816, 830. The overriding concern in judging trial counsel's performance is

"whether counsel fulfilled the function of making the adversarial testing process work." *Hooks v. State*, 2001 OK CR 1, ¶ 54, 19 P.3d 294, 317.

¶13 Where the Appellant shows counsel's performance was objectively deficient under prevailing professional norms, he must further show that he suffered prejudice as a result. The Supreme Court in *Strickland* defined prejudice as a reasonable probability that, but for counsel's unprofessional errors, the outcome of the trial or sentencing would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. If the record permits resolution of an ineffective counsel claim on the ground that *Strickland's* prejudice prong has not been satisfied, we will ordinarily follow this course. *Phillips v. State*, 1999 OK CR 38, ¶ 103, 989 P.2d 1017, 1043.

¶14 Appellant challenges several aspects of trial counsel's representation as deficient. He first alleges that trial counsel's failure to develop and utilize expert neuropsychological evidence deprived him of a fair trial on the issues of guilt and sentence. In connection with this claim, he has filed a *Notice Of Extra-record Evidence Supporting Propositions I And II Of The Brief Of Appellant And, Alternatively, Rule 3.11 Motion To Supplement Direct Appeal Record Or For An Evidentiary Hearing* (hereafter the Rule 3.11 Motion), as permitted by Rule 3.11(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App (2020).

¶15 We review a Rule 3.11 motion and the attached extra-record materials in light of the existing record, in conjunction with the appellant's corresponding claim(s) of ineffective assistance. Rule 3.11(B)(3)(b)(i) requires the appellant to present "sufficient information to show this Court by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence."

¶16 If the Court finds that a strong possibility of ineffectiveness is shown, we will remand the matter for an adversarial evidentiary hearing and direct the trial court to make findings of fact and conclusions of law on the issues and evidence raised in the application. Rule 3.11(B)(3)(b)(ii). The resulting evidence and judicial findings and conclusions on remand may then be considered in adjudicating Appellant's corresponding claim(s) of ineffective counsel. Rule 3.11(B)(3) and (C).

¶17 This standard is less demanding than the two-prong test for ineffective assistance imposed by *Strickland*: It is easier to show clear and convincing evidence of a strong possibility that counsel was ineffective than to show that counsel's performance *was* deficient, and that a reasonable probability exists that the result of the proceeding *would have been* different. When the Court grants a request for an evidentiary hearing under Rule 3.11(B), we have decided only that the appellant has shown a strong possibility that counsel was ineffective, and should be afforded a further opportunity to develop this claim. On the other hand, when we deny a request for an evidentiary hearing on a claim of ineffective assistance under the Rule 3.11(B) standard, we necessarily conclude that the appellant has not sustained the corresponding claim of ineffective assistance under the more rigorous *Strickland* standard. *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 906.

¶18 Appellant attaches to his Rule 3.11 motion affidavits from his trial and appellate counsel and a neuropsychologist, and various documents showing appellate counsel's efforts to obtain an MRI of Appellant's brain during the pendency of this appeal. Trial counsel's affidavit states that she obtained Appellant's birth, school, and other medical records. None of these records or reported family history showed Appellant had suffered head trauma. Appellant's birth records and other testimony at sentencing did indicate a period of post-natal cyanosis and pneumonia, but he was discharged from the hospital five days after birth.

¶19 Trial counsel's affidavit states that she retained forensic psychologist Terese Hall, J.D., Ph.D., to review Appellant's school and medical records and evaluate Appellant for a possible insanity defense. Dr. Hall conducted some psychological testing on Appellant and consulted with defense counsel regarding her diagnostic impressions, which weighed against a finding of insanity defense or other significant mental illness. Trial counsel also researched and consulted with several other mental health experts "in search of helpful mitigation witnesses," including "four forensic psychologists, a criminal sociologist, a neuropsychologist, and a licensed clinical therapist with expertise in sexual trauma."

¶20 Trial counsel ultimately decided not to present any mental health or other expert testimony in the first or second stage of trial. The

defense called several family members and personal friends of the Appellant in the sentencing stage, who testified to Appellant's birth complications and cyanosis, his developmental delays, a learning disability and resulting placement in remedial or special education classes, a history of sexual abuse by a family member, separation from his mother after his parents' divorce, witnessing abuse and suffering neglect by his father, substance abuse and addiction, grief from the loss of his younger brother and stepmother to cancer, his acts of kindness toward others, and saving a friend from a drug overdose.

¶21 Shortly before trial, Appellant contradicted his earlier statements to counsel and said he had suffered head trauma at some time before the crime. On appeal, the defense retained neuropsychologist Jeanine Galusha, Ph.D., to review records and evaluate the Appellant. Dr. Galusha's report is attached to the Rule 3.11 motion. In her report, Dr. Galusha indicates that she reviewed treatment records obtained from Deaconess Hospital concerning an automobile collision in January, 2015, after which the Appellant briefly lost consciousness. The report indicates that Appellant's treatment records from that incident showed no cognitive or functional deficits, and a CT scan of his head was deemed unremarkable.

¶22 Dr. Galusha's report also indicates her review of previous records of treatment and evaluation of the Appellant by psychiatrist Janita Ardis, who diagnosed the Appellant in 2013 with depression, poly-substance abuse, and anti-social personality disorder. Dr. Galusha also noted the clinical interview and testing of Appellant by Dr. Terese Hall, after which Hall concluded that Appellant was not legally insane, had no "genuine mental health problems," and may have been malingering his symptoms.

¶23 Dr. Galusha's report references previous evidence of Appellant's educational problems, including a learning disability in expressive and receptive speech for which he received speech therapy and remedial education through the 9th grade. Appellant was given a battery of educational testing in 2001 (age 8) and 2005 (age 11). On two standardized tests of intelligence, Appellant's full scale intelligence quotient (IQ) was measured at 90 (low average) in 2001 and 85 (low average) in 2005. Appellant's performance on various tests of academic



achievement given during this time was consistently below average.

¶24 In March, 2019, Dr. Galusha administered another battery of neuropsychological and educational tests to Appellant at the request of appellate counsel. In her report, Dr. Galusha states that Appellant scored in the normal range on various tests of effort and appeared not to be feigning intellectual disability or mental disorder. Despite this impression, Dr. Galusha obtained a “significantly reduced” Full Scale IQ of 74 on the Wechsler Adult Intelligence Scale-IV, which she found “consistent with [Appellant’s] overall clinical presentation but lower than expected compared to prior testing.”

¶25 Appellant’s performance on several other tests of academic and cognitive function was mixed, with borderline reading ability, low average reading comprehension, mildly impaired to low average non-verbal problem solving and abstract reasoning, borderline verbal comprehension, a mildly impaired general fund of information, low average working memory, average on a sixteen-item verbal list-learning task, and mildly impaired immediate recall of a complex geometric figure.

¶26 Appellant’s scores on the Personality Assessment Inventory indicated his endorsement of some “items that presented his psychological functioning more negatively than the clinical picture would warrant.” His responses indicated a person with a history of substance abuse “who tends to be suspicious and angry,” “lacks good coping mechanisms,” and exhibits a “personality style with many anti-social character features.”

¶27 Based on her testing and evaluation of the Appellant, Dr. Galusha concludes:

Overall, the current findings suggest a decline in verbal functioning and aspects of executive functioning, the exact etiology of which is unknown but may be impacted by reported birth complications, head injuries, and chronic substance abuse, all of which can be associated with mood dysregulation, and/or impairment/decline in cognitive functioning. Neurological work-up, to include an MRI of the brain is recommended and would be useful to further elucidate the nature and cause of the observed impairments.

¶28 Dr. Galusha further opines that if “birth records regarding cyanosis, school records indicating special education, history of head injuries, and significant substance abuse” had been available at the time of trial, “a neuropsychological evaluation would have been warranted at that time.” Appellant’s remaining submissions document counsel’s unsuccessful efforts to obtain the brain MRI recommended by Dr. Galusha and his request to “grant him enough time to obtain the [brain MRI] prior to” any remanded evidentiary hearing on his Rule 3.11 Motion and corresponding ineffective assistance claims.

¶29 Considering Appellant’s claim in light of the trial record, the arguments in his brief, and the materials submitted in his Rule 3.11 Motion, the Court finds that Appellant has not shown clear and convincing evidence that suggests a strong possibility that trial counsel was ineffective in failing to develop and utilize the evidence presented here. Trial counsel conducted an extensive mitigation investigation including psychological experts, and ultimately made strategic decisions not to use expert testimony. However, the mitigating evidence presented in the second stage of trial was extensive, and included relevant evidence of birth complications, developmental delays, learning disability, academic failure, victimization by sexual abuse, family instability, abuse, and neglect, adolescent onset substance abuse and addiction, grief from the loss of two close family members, Appellant’s acts of kindness and ability to form meaningful relationships, and his saving a friend from a drug overdose.

¶30 Appellant argues that this omitted evidence of his low intellectual functioning “would have explained and countered” his many inaccurate and incriminating statements to police and his decision to testify. Appellate counsel also takes issue with the lack of expert defense testimony in the sentencing stage, arguing that Appellant’s assault on the victim was so “out of character” that counsel had to know “something was wrong.” Appellant argues that expert testimony was necessary to “explain how his life events could lead up to those actions.” Appellant also maintains that the omission of expert testimony in the sentencing stage allowed the State to argue the lack of expert testimony regarding much of the evidence mentioned in the mitigation instruction given to the jury.



¶31 We are not persuaded that trial counsel's omission to utilize or develop testimony of the type presented in Appellant's Rule 3.11(B) motion is clear and convincing evidence of a strong possibility that trial counsel was ineffective. At most, Appellant's submissions indicate some new corroboration for his claimed history of head trauma in 2015, and some evidence that he recently scored somewhat lower on testing of his academic and general intellectual functioning than in years past.

¶32 The Rule 3.11(B) submissions indicate that the head trauma Appellant suffered in 2015 was minimal. And viewed in light of the entire record, Appellant's lower scores on IQ and other testing in 2019 are open to serious doubt, and do not establish the kind of cognitive impairment that would either significantly diminish the reliability of the guilty verdict in the first stage of trial, or meaningfully shift the balance of aggravating and mitigating circumstances presented to the jury in the sentencing stage of trial. *Grissom v. State*, 2011 OK CR 3, ¶ 82, 253 P.3d 969, 995-96.

¶33 The record before us strongly indicates that trial counsel exercised reasonable professional judgment in the investigation and presentation of the mitigating evidence, even though the lens of hindsight can show how things might have been done differently. Appellant has not shown that counsel was ineffective for failing to utilize the type of evidence presented in his supplemental materials, and no evidentiary hearing is necessary. This much of the Appellant's claim, and his request for evidentiary hearing, are without merit.

¶34 Appellant also argues that trial counsel was ineffective for failing to challenge two jurors for cause. He points to the statements during *voir dire* of three prospective jurors who expressed a clear preference for the punishments of life imprisonment or death, and indicated at various times that they could not give the same consideration to the punishment option of life without parole, which they saw as pointless or a kind of compromise decision on punishment. Defense counsel successfully challenged two of these jurors for cause, and removed the third one with the seventh peremptory. Appellant also takes issue with counsel's failure to challenge yet another juror for cause, after she expressed the view that the death penalty would be her preference for child killers and serial killers.

¶35 Appellate counsel maintains that trial counsel has a constitutional "duty" to challenge any prospective juror whose *voir dire* suggests plausible reasons to remove the juror for cause. On the contrary, *Strickland* analysis requires that a reviewing court indulge a substantial measure of deference to counsel's strategic decisions. We have recognized that such deference makes the burden to prove professional deficiency in jury selection very "heavy indeed." *Young v. State*, 1998 OK CR 62, ¶ 72, 992 P.2d 332, 347.

¶36 We conclude that trial counsel's failure to challenge these prospective jurors for cause is not the kind of serious professional error that amounts to deficient performance under *Strickland*. And even if we assumed that counsel's omission was objectively deficient, Appellant fails to show how these errors create a reasonable probability of a different outcome at trial. Any claim that Appellant was denied an impartial jury "must focus on the jurors who ultimately sat" in judgment. *Rojem*, 2006 OK CR 7, ¶ 36, 130 P.3d at 295. Trial counsel removed these allegedly tainted jurors with peremptory challenges, and none of them served on the jury that convicted and sentenced him. This allegation of ineffective assistance requires no relief.

¶37 Appellant next argues that trial counsel was ineffective by failing to object to the admission of photographic evidence challenged in Propositions Four, Five, and Seven. Because we conclude in our analysis of those propositions that no reversible error occurred in the admission of these photographs, Appellant cannot demonstrate a reasonable probability that the outcome of his trial or this appeal would have been different if trial counsel had objected to this evidence. He has shown neither deficient performance nor prejudice under *Strickland*. *Phillips*, 1999 OK CR 38, ¶ 104, 989 P.2d at 1044.

¶38 Appellant's final challenge to trial counsel's representation is that counsel failed to seek redaction of what he perceives as unfairly prejudicial statements by both himself and investigators in his recorded interviews with police. Appellant cites no specific authority that the challenged portions of his statements were subject to redaction. The trial court determined that Appellant's recorded statements to police were voluntary and admissible. The interviews were directly relevant to the issues on trial. And again, even if we assume that

timely objections would have led to redaction of the few statements challenged here, we find no reasonable probability that the outcome of the proceeding would have been different. This is a sufficient ground for denying Appellant's claim. *Id.*

¶39 We find that Appellant has failed to show that trial counsel committed any errors so serious that they were not functioning as the counsel guaranteed by the Sixth, Eighth, and Fourteenth Amendments. Considering both the individual and cumulative impact of counsel's allegedly deficient performance, we find that even if counsel were unreasonably deficient in some particular aspect of representation, their allegedly deficient performance creates no reasonable probability of a different outcome in either stage of the trial. Proposition One is denied.

¶40 In Proposition Two, Appellant argues that trial counsel conceded guilt in closing argument without his express consent and contrary to his trial testimony, in violation of the Sixth and Fourteenth Amendments. He relies principally on *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018), in which the Supreme Court held that the Sixth Amendment guarantees a defendant's right to insist that counsel refrain from admitting guilt, even when counsel reasonably believes such a concession in the first stage of trial is the best strategy for avoiding the death penalty. *Id.*, 138 S.Ct. at 1505.

¶41 As already mentioned, Appellant chose to testify at trial that a third party named Jeremy Walker had murdered K.B. while Appellant was unconscious. Because trial counsel believed Appellant's planned testimony was false, they refused to participate in the direct examination for ethical reasons.<sup>1</sup> The trial court permitted Appellant to testify directly to the jury in narrative form, after which he was cross-examined by the prosecutor. The defense called no other first stage witnesses, and rested its case. Appellant now argues that defense counsel's first stage closing argument conceded guilt in violation of his right to control the ultimate objectives of his defense as recognized in *McCoy*.

¶42 In a brief first-stage closing argument that spans five pages of transcript, trial counsel made no reference to Appellant's testimony maintaining innocence. Counsel briefly expressed sympathy for K.B.'s mother, and conceded Appellant "did spend a lot of time with [the child], by just the force of circumstances."

Trial counsel also mentioned Appellant's weight loss and poor hygiene, saying "[t]hat's drug usage," and that Appellant was "going downhill" at the time.

¶43 Counsel characterized the argument Appellant had with Jennifer Young about cleaning the apartment and taking out the dog as "low-level," not enough to "get somebody [too upset]." Counsel then turned to the child's injuries, saying they "happened rapidly," and "then the 911 calls." Finally, counsel submitted to the jury that "the person who did this is probably trying to block things out . . . he can't imagine that he did this, but he did it. Okay. But he just could be blocking it out."

¶44 The trial court then sustained the prosecutor's objection to counsel arguing "facts not in evidence." Trial counsel then urged jurors to "look very closely at the requirements for malicious injury . . . [and] just ask yourself whether or not the killing . . . was malicious, and it's got to be beyond a reasonable doubt. I didn't make that up. That's the law. It's got to be beyond a reasonable doubt for each element of the crime. Thank you for your attention. This has been a relatively short trial, and thank you."

¶45 *Black's Law Dictionary* 262 (5th Ed. 1979) defines a concession as "a yielding to a claim or demand." *Webster's Ninth New Collegiate Dictionary* 271 (1986) says to "concede" is to "accept as true, valid, or accurate." The unabridged *Webster's Third New International Dictionary* 469 (1963) says to "concede" is to "acknowledge grudgingly or hesitantly;" or to "acknowledge as won by an opponent without formal determination of the result."

¶46 Viewing the first-stage closing argument in context, we find that trial counsel did not concede Appellant's guilt of first degree murder in violation of the Sixth Amendment. While counsel did not (and could not, ethically) maintain Appellant's innocence based on Appellant's testimony that Jeremy Walker was the real murderer, nor did trial counsel at any point concede that the State had proven Appellant's guilt of first degree murder. *Knapper v. State*, 2020 OK CR 16, ¶ 70, \_\_\_ P.3d \_\_\_, \_\_\_ (holding closing argument contained no concession, where defense counsel never said that Appellant was the killer, that defendant committed the charged offenses, or that defendant's guilt was uncontested).

¶47 Despite long, perhaps impossible, odds, counsel's first-stage argument pursued an

acquittal based on reasonable doubt of the elements of child abuse murder, specifically the element of willful or malicious injury being the cause of death. Counsel therefore did not concede Appellant's guilt according to the plain meaning of the term, and did not unconstitutionally usurp control of the objectives of Appellant's defense in violation of the Sixth Amendment. Proposition Two is denied.

¶48 In Proposition Three, Appellant argues the trial court violated his Eighth and Fourteenth Amendment rights by denying his challenges for cause to two prospective jurors whose views on capital punishment would have prevented or substantially impaired their ability to serve as fair and impartial jurors. *Ross v. Oklahoma*, 487 U.S. 81, 85 (prospective juror who declared that in the event of conviction, he would vote to impose death automatically, should have been removed for cause).

¶49 The trial court denied Appellant's challenges for cause to prospective jurors C.A. and D.H. C.A. gave several responses suggesting a strong preference for the death penalty, but also gave responses agreeing to consider the three available punishments for first degree murder. D.H. expressed a preference for the death penalty where the victim was defenseless, that she couldn't see the point of sentencing the defendant to life with the possibility of parole, and that option was not acceptable. However, D.H. eventually responded, to the apparent satisfaction of the trial court, that she could consider all three punishments.

¶50 This Court reviews the trial court's rulings on challenges for cause for abuse of discretion, which has been defined as a clearly erroneous conclusion, contrary to the logic and effect of the facts presented. *Nicholson v. State*, 2018 OK CR 10, ¶ 7, 421 P.3d 890, 894-95. Every capital trial juror must be willing to fairly and impartially consider the possible punishments of life, life without parole, and death. *Glossip v. State*, 2007 OK CR 12 ¶ 31, 157 P.3d 143, 150. When a prospective juror's views on capital punishment would prevent or substantially impair the performance of their duties in considering punishment, the trial court should, upon request, remove the juror for cause. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985).

¶51 When reviewing the denial of a challenge for cause, we consider the entire record of the prospective juror's responses on *voir dire*. *Rojem v. State*, 2009 OK CR 15, ¶ 3, 207 P.3d 385,

388. We also consider whether the prospective juror's stated views were informed by sufficient instructions on the law as well as the oath and responsibilities of a juror. *Eizember v. State*, 2007 OK CR 29, ¶¶ 41-42, 164 P.3d 208, 221-22. The law does not require that a prospective juror's bias appear with unmistakable clarity, and the court should resolve doubts regarding a prospective juror's ability to serve impartially in the defendant's favor. *Id.*

¶52 Prospective jurors are often unsure about the law of capital punishment and have a limited comprehension of what counsel and the trial court are asking them during capital-qualification of the jury. Equivocal or seemingly contradictory expressions of strong support for, or opposition to, a particular punishment, as well as a good faith willingness to consider all three punishments when actually instructed by the court to do so, are common in capital trials. See *Eizember*, 2007 OK CR 29, ¶ 43, 164 P.3d at 222 (noting that prospective juror's written responses on jury questionnaire that if convicted, defendant would be "on death row" reflected a misunderstanding of the law of capital punishment, and were not disqualifying in light of other statements in *voir dire*).

¶53 Such mixed responses typically leave the question of a particular juror's qualification within the trial court's sound discretion. We recognize that C.A. and D.H. at times expressed apparent biases in favor of capital punishment or against other non-capital options, as well as a willingness to follow the instructions of the court. Though these jurors present closer questions than some, the trial court's rulings are not contrary to the logic and effect of the facts presented about their views of capital punishment or their ability to follow the law.

¶54 Even if we assume that the trial court's refusal to remove these prospective jurors was erroneous, the relevant question is really whether, as a result of the trial court's rulings, Appellant was forced, over objection, to keep an "unacceptable" juror. *Eizember*, 2007 OK CR 29, ¶ 36, 164 P.3d at 220. The Court has not clearly defined when a trial juror will be judged "unacceptable" in this sense. However, our case law indicates that the term means something *less than* the express or implied bias that warrants removal for cause. On the other hand, reversal of a capital conviction is not warranted simply because a defendant was ultimately tried and sentenced by one or more

jurors whom the defendant would have preferred to remove.

¶55 Jurors whose attitudes are strongly identified with the adverse party, or who are otherwise unfavorably disposed toward the trial, but who are not disqualified for actual bias, can still be “undesirable.” *Rojem*, 2006 OK CR 7, ¶ 38 and n.11, 130 P.3d at 296 and n.11 (finding juror who did data entry for local police, whose brother was officer, who had read news reports, knew a prosecution witness, discussed the case with her mother, and was worried about financial impact of the case, was “undesirable” to defendant’s position, and established prejudice requiring reversal). But a mere preference for or against a particular juror seated over objection, standing alone, does not render that juror “undesirable” to a party’s position. *Grant v. State*, 2009 OK CR 11, ¶ 22, 205 P.3d 1, 12 (finding no prejudice where allegedly “unacceptable” juror was not challengeable for cause; had encountered some police officers during recent restaurant employment who had no connection to this case; and had assured the court that these brief contacts had no impact on her ability to serve).

¶56 Borrowing in part from a definition first proposed by Judge Lumpkin in *Jones v. State*, 2006 OK CR 17, ¶ 13, 134 P.3d 150, 159 (Lumpkin, J., concurring in part and dissenting in part), we now hold that an “unacceptable juror” – which the Court has at times referred to as a juror who is “undesirable” to the defendant’s position – means a trial juror: (1) who served over the defendant’s objection after the trial court denied the defendant an additional peremptory to remove the juror as unacceptable; (2) who voiced views or opinions in *voir dire* that raise a reasonable doubt about the juror’s bias against the defendant and/or the defendant’s position; and (3) whom any reasonable attorney in the position of defense counsel would have removed with a peremptory.

¶57 Applying this standard, we turn to whether the defendant was forced to keep an unacceptable juror. Defense counsel requested additional peremptory challenges to remove prospective jurors L.B. and A.F. Counsel argued that the juror L.B. had grandchildren the same age as the victim, and expressed concern that the trial would break her heart. L.B. had grown emotional in response to *voir dire* about her ability to view the photographic evidence, saying at one point that it breaks her heart to think of the child victim. Defense counsel requested

an additional peremptory to remove the prospective juror A.F. as unacceptable because she worked in the medical field and also had a son.

¶58 We find that neither of these trial jurors were unacceptable jurors under the applicable legal standard. Juror L.B.’s sentiments or emotional expressions did not raise a reasonable doubt that she would be undesirable to either the defendant or his position in the guilt or sentencing phases of trial. Her feelings about the difficulty of serving as a juror in this kind of case are surely common to most, if not all, capital trial jurors, and raise no real doubt on her ability to be fair and impartial. Likewise, Juror A.F.’s employment as a medical worker and being a parent of a young boy are insufficient to meet the definition of an unacceptable juror. Reasonable attorneys in the position of defense counsel might well have accepted these jurors and others like them, despite trial counsels’ misgivings.

¶59 None of the twelve jurors who sat in judgment were challenged by the Appellant for cause, and he has not established here that any of the jurors were other than impartial and reasonably acceptable. The trial court’s denial of his challenges for cause to jurors C.A. and D.H., even if in error, did not deny his Eighth and Fourteenth Amendment rights. *Jones v. State*, 2009 OK CR 1, ¶ 34, 201 P.3d 869, 880. Proposition Three is denied.

¶60 In Proposition Four, Appellant argues that the admission of four photographs of the victim during life deprived him of a fair trial. Appellant failed to object to these photographs at trial. We therefore review this claim only for plain error. *Simpson v. State*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 692-93. He must therefore show that plain or obvious legal error in the admission of these photographs affected the outcome of the proceeding. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. This Court will remedy a plain or obvious error only if it seriously affects the fairness, integrity, or public reputation of the proceedings, or results a miscarriage of justice. *Id.*

¶61 The Oklahoma Evidence Code specifically authorizes the admission of an “appropriate” photograph of the victim in a homicide prosecution “to show the general appearance and condition of the victim while alive.” 12 O.S.2011, § 2403. The State offered State’s Exhibit 1, an undated picture of K.B. inside his apartment, to show his general appearance

around the time of the crime. State's Exhibits 2 and 3 showed K.B.'s appearance on a specific date, May 17, 2015, the day before he died. The fourth challenged photograph, identified as State's Exhibit 4, shows K.B. on the evening of May 17, 2015.

¶62 Generally speaking, relevant evidence is admissible at trial. 12 O.S.2011, § 2402. Relevant evidence is evidence "having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." 12 O.S.2011, § 2401. The trial court may exclude relevant evidence when "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.

¶63 Appellant fails to show that the admission of these four photographs was plain or obvious error that affected the outcome of the proceeding. State's Exhibit 1 was an appropriate photograph showing the general appearance and condition of the victim. Admission of this photograph as authorized by section 2403 was not plainly or obviously erroneous, and thus provides no basis for reversal. The remaining photos meet the general test of relevancy under section 2401, by tending to establish the timing of K.B.'s injuries as May 18, 2015, and to refute Appellant's claims to police that some of the bruises were inflicted earlier.

¶64 Appellant's argument that the State was limited to a single photograph for this purpose is unpersuasive. The probative value of these three photographs, establishing K.B.'s appearance just a day before his fatal injuries while in Appellant's care, was not substantially outweighed by the danger of unfair prejudice or the other countervailing factors identified by section 2403. Because these photographs meet the basic test of relevance and are not plainly or obviously inadmissible under controlling law, Proposition Four is denied.

¶65 Appellant also challenges the admission of several allegedly gruesome photographs in Proposition Five. The admission or exclusion of evidence over a timely objection or offer of proof is ordinarily discretionary and will not be reversed unless clearly erroneous or manifestly unreasonable. *Hancock v. State*, 2007 OK CR 9, ¶ 72, 155 P.3d 796, 813, *overruled on other*

*grounds, Williamson v. State*, 2018 OK CR 15, 422 P.3d 252. Appellant preserved objections to the admission of some photographs, but not others. Our review of the trial court's rulings on these latter photographs is limited to plain error: Appellant must show that their admission plainly or obviously violated controlling law and affected the outcome at trial.

¶66 As for controlling law, the proper inquiry is not whether a relevant photograph admitted in a homicide trial is unpleasant, gruesome, or potentially inflammatory, but whether its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or needless presentation of cumulative evidence. 12 O.S.2011, § 2403; *Martinez v. State*, 2016 OK CR 3, ¶ 46, 371 P.3d at 1112-13. Photographs can be probative in numerous ways, by tending to prove "the nature, extent and location of wounds, establishing the *corpus delicti*, depicting the crime scene, and corroborating the medical examiner's testimony[.]" among other things. *Bench v. State*, 2018 OK CR 31, ¶ 61, 431 P.3d 929, 952.

¶67 The rules of evidence do not require the State to soft-pedal the violent or disturbing aspects of a crime in presenting evidence of the facts. Gruesome crimes result in gruesome photographs. *Id.*, 2018 OK CR 31, ¶ 61, 66, 431 P.3d at 952-953. The Evidence Code effectively creates a presumption that relevant photographs should be admitted as long as they are not "so unnecessarily hideous or repulsive that jurors cannot view them impartially." *Bosse v. State*, 2017 OK CR 10, ¶ 48, 400 P.3d 834, 853.

¶68 Appellant objected to twelve of the thirty-two photographs admitted at trial. He did not object to State's Exhibits 13-27, a series of photographs of the victim taken at the hospital, or to State's Exhibits 101, 103-110, 122-128, and 131. Trial counsel objected to State's Exhibits 111 and 132-143, a series of post-mortem and autopsy photographs taken at the medical examiner's office, as more prejudicial than probative, and needlessly cumulative to other evidence. The trial court overruled his objections and admitted all of the photographs.

¶69 Appellant's argument proceeds with the complaint that some of photographs were published during the testimony of more than one witness, and challenges the admission of individual photographs in comparison with other photographs showing the same or similar injuries. He essentially theorizes that some of the

pictures could have been excluded in favor of others that were slightly less prejudicial or would have diminished the overall prejudicial impact of the photographs.

¶70 We reject this piecemeal approach to the photographs. All of the photographs depicting this child either dying, or already dead, are disturbing. All of them meet the basic test of relevance. Some depict the child's condition and appearance when he was encountered by various emergency and medical personnel who testified at trial. Some document the medical interventions used to treat the child, an unpleasant but necessary aspect of proving the probable timing and source of marks and bruises on the victim's body. Some document the almost fifty individual areas of bruising to the child's body. Some document the observations of internal injuries during the autopsy. Again, all of these are pieces of evidence that individually tend to prove the nature of the crime.

¶71 Considering the probable cumulative probative value and prejudicial effect of the photographs, the trial court did not abuse its discretion in applying the rules of relevance and overruling defense objections to particular photographs. The trial court committed no plain or obvious error in the admission of any particular photograph or group of photographs. The repetition in some images raises no reasonable probability that the photographs unfairly influenced the jury's verdict. The admission of photographs was not reversible error, and did not deny the Appellant a fair and impartial trial. Proposition Five is therefore denied.

¶72 In Proposition Six, Appellant argues that the trial court's limitations on his testimony denied his Sixth Amendment right to present a defense. Appellant points to the fact that he testified in the narrative and without direct examination by his counsel, and on a few occasions, the trial court redirected him to give his account of what happened on the day of the alleged murder. He argues this unconstitutionally excluded important testimony about the motive of the third party he identified as the real killer, as well as the facts of a drug deal that happened on a different day.

¶73 The state and federal constitutions guarantee a criminal defendant the meaningful opportunity to present a complete defense,

including the right to "present his own version of events in his own words." *Rock v. Arkansas*, 483 U.S. 44, 51-52 (1987) (finding this right "[e]ven more fundamental to a personal defense than the right of self-representation"). However, the right to testify, like the right to present other defense witnesses, remains subject to reasonable regulation under established procedural and evidentiary rules. *Gore v. State*, 2005 OK CR 14, ¶ 21, 119 P.3d 1268, 1275 (citing *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)).

¶74 The record reflects that during an *in camera* hearing, in response to Appellant's question about how far back his trial testimony could go, the court indicated the Appellant should testify about the events on the day of K.B.'s death. Appellant asked if he could testify about the previous day, May 17th, and the trial court told him to tell the jury "whatever you saw happen to [K.B.] that day," but not to speculate about matters beyond his personal knowledge, such as "who, maybe God, or [Jeremy] Walker or something did something to him on the 17th."

¶75 Appellant asked the court about other witnesses who would say he and Jeremy Walker "hung out . . . that we were around each other and that we knew each other, is that not probable cause of him being a suspect, even though it was back so far?" The court replied that Appellant could testify that he and Walker had hung out, "but there's no [other] witnesses here. So you can only tell your personal story, your personal knowledge." Appellant then asked if he could reference a different "drug deal gone wrong" as the reason Jeremy Walker would kill the child.

¶76 The court instructed Appellant that he could not say why someone else would do something, due to his lack of personal knowledge, but he could testify to a drug deal with Walker on the day of K.B.'s death. The prosecutor was concerned that Appellant had misunderstood the court to say he was limited to a specific day or time. The court then clarified that Appellant wanted to testify that Walker had killed K.B. after doing a drug deal, while Appellant was in the bathroom, which proved to be his actual testimony. When the court asked whether the deal was on the day of the murder or the previous day, Appellant said, "That day." On cross-examination, Appellant testified that he had known Jeremy Walker for a long time and had sold drugs to him on many other occasions.

¶77 The real question presented here is whether the trial court's instructions directing the Appellant to avoid arguably tangential subjects, potential hearsay, or matters beyond his personal knowledge, and focus his testimony on the day when the child was injured and died, denied Appellant a fundamentally fair trial by excluding relevant evidence that could have resulted in his acquittal.

¶78 Viewing the trial court's rulings within the context of the Appellant's direct testimony and cross-examination, as well as the remaining trial evidence, we find that the trial court did not unfairly exclude evidence of Appellant's innocence. The trial court's directions were generally grounded in the rules of evidence against speculation, relating inadmissible hearsay, or lack of foundation from the witness's personal knowledge, and were not an abuse of discretion. We also infer that any testimony excluded by these rulings creates no reasonable probability of a different outcome, and did not prejudice Appellant's right to present a complete defense. Proposition Six is denied.

¶79 In Proposition Seven, Appellant argues that expert testimony on the ultimate issue denied him a fair trial. The State presented expert testimony by Dr. Brown, one of the treating physicians, that the amount of force necessary to inflict the victim's injuries would not be reasonable to a "rational adult." The State also elicited Dr. Brown's agreement with the expert opinion of Dr. Stuenkel that the victim was a "beaten child" who died from intentional abuse. Dr. Brown also agreed that no "reasonably functioning" person would make "a conscious decision to wait" to seek emergency help for a child with these injuries.

¶80 The Oklahoma Evidence Code provides that testimony from a qualified expert about "scientific, technical or other specialized knowledge" that will "assist the trier of fact to understand the evidence or to determine a fact in issue," is admissible if "based upon sufficient facts or data" derived from the proper application of reliable "principles and methods" applied to the facts of the case. 12 O.S.2011, § 2702.

¶81 Trial counsel raised no objection to the challenged testimony at trial, waiving review for all but plain or obvious error, as defined above. *Simpson*, 1994 OK CR 40, ¶ 2, 876 P.2d at 692-93. He must therefore show that this testimony was admitted in plain or obvious violation of section 2702 or other controlling law.

From our review, this testimony was based on the witness's specialized knowledge, training, and experience in medicine and the diagnosis and treatment of child abuse. His conclusions were derived from the facts of the case as he observed them during his treatment of the victim, as well as his consideration of the opinions of another recognized expert in the child abuse diagnosis and treatment.

¶82 Contrary to Appellant's argument, the testimony of Dr. Brown did not "merely tell[] a jury what result to reach," but rather shared with the trier of fact his informed inferences from the facts based on years of specialized medical training and experience. *Mitchell v. State*, 2006 OK CR 20, ¶ 67, 136 P.3d 671, 700. Moreover, considering Appellant's own testimony that the victim was "aggressively killed and murdered" by someone else, and his admission that he waited too long to call 911, we fail to see how Appellant's defense could be unfairly prejudiced by this evidence. Appellant has failed to show a plain or obvious error that affected the outcome of the trial. Proposition Seven is denied.

¶83 Appellant argues in Proposition Eight that the trial court erred by denying trial counsel's repeated mid-trial requests for a hearing to determine Appellant's competency to stand trial. The Oklahoma Statutes and the Due Process Clause of the Fourteenth Amendment provide that no person shall be subjected to a trial or other criminal proceedings while incompetent. 22 O.S.2011, § 1175.2(A); *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996). A defendant is competent to stand trial if he "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as a factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402 (1960); 22 O.S.2011, § 1175.1(1).

¶84 The defendant in a criminal prosecution is presumed by statute to be competent to stand trial until the contrary is shown by a preponderance of evidence. 22 O.S.2011, § 1175.4(B). To initiate a judicial inquiry into present competency, either the defendant, defense counsel, or the prosecutor must file an application alleging that the defendant is incompetent, which "shall state facts sufficient to raise a doubt as to the competency of the person." 22 O.S.2011, § 1175.2(A). The court itself may also commence such an inquiry based on its own

doubt concerning the defendant's present competency. *Id.*

¶85 Competency-to-stand-trial issues can implicate both substantive and procedural due process rights. *Walker v. Attorney General*, 167 F.3d 1339, 1343-44 (10th Cir. 1999). The trial court's refusal to hold a hearing, or an adequate hearing, in the face of facts raising a doubt of present competency, violates procedural due process, while the actual trial and conviction of a mentally incompetent defendant is a violation of substantive due process. *Smith v. Mullin*, 379 F.3d 919, 930 (10th Cir. 2004).

¶86 Appellant here raises a claim of procedural due process, alleging that the trial court failed to give proper weight to facts that met the necessary threshold to suspend the ongoing trial for at least a hearing on the application as required by section 1175.3(A)-(C). That threshold, of course, is that the application must state "facts sufficient to raise a doubt as to the competency of the person." § 1175.2(A).

¶87 Trial judges must always be "alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial," *Drope v. Missouri*, 420 U.S. 162, 181 (1975), and such questions "may surface at any time during the trial proceedings." *Gilbert v. State*, 1997 OK CR 71, ¶ 16, 951 P.2d 98, 106. When the question of competency is raised during trial, the court's ruling on whether a *bona fide* doubt has been shown is reviewed for an abuse of discretion, as defined above. *Grant*, 2009 OK CR 11, ¶ 9, 205 P.3d at 8.

¶88 On the fifth day of trial, defense counsel applied for a determination of the Appellant's competency, referencing conversations with the Appellant that morning indicating Appellant was delusional, did not understand what was going on in the courtroom, and could not rationally assist in his defense. The court then inquired of the Appellant whether he was understanding the proceedings, and if Appellant felt that he was delusional. Defense counsel then questioned the Appellant, eliciting Appellant's belief that God had told him he would be acquitted, and that he was also receiving communications from his deceased brother.

¶89 The trial court found insufficient doubt to suspend the trial, and denied the application. The court also denied defense counsel's subsequent motion for a mistrial. Later the

same day, defense counsel argued that the application could be decided only after the court formally set the matter for hearing and allowed the presentation of "additional evidence." The State opposed this argument by marking and offering a recorded phone call (Court's Exhibit 27) between Appellant and another person.<sup>2</sup>

¶90 The defense again pressed for a further opportunity to present evidence. The trial court declined, noting that the case was in its "third year," that the question was preserved for appeal, and "We're going to proceed to trial." The trial court overruled another defense motion for mistrial and granted counsel a continuing objection to its ruling. The court then observed that "there's nothing to indicate Mr. Davison is incompetent . . . . Saying that you talk to God or God talk[s] to you or if you talk to your dead brother does not suggest that you are incompetent in any way." The court noted that the Appellant had previously trifled with the court about whether he would enter a guilty plea, and expressed its view that "it's this game he's playing with (sic) that I have a problem with . . . . I'm not going to postpone this trial so that somebody can take a look at him."

¶91 Three days later, defense counsel filed another application for determination of competency, stating that events over the weekend had made it "abundantly clear" that Appellant was no longer competent to continue with the trial. The trial court allowed counsel to inquire of the Appellant, who testified that God had told him to go to trial, "to go against you, my family, everyone . . . to go against all, just stand in his name." Appellant affirmed his belief that Jeremy Walker was the real killer and that he would be acquitted. He testified that he had foreseen the outcome of the trial. Appellant agreed with counsel that no matter what he had been advised about the penalty phase, "If it's God's will, it's God's will."

¶92 We find no abuse of the trial court's discretion or denial of due process. In response to defense counsel's claims that Appellant was delusional, the trial court inquired whether Appellant understood the proceedings and felt his own mental state allowed him to proceed. The court found no impairment of his basic understanding of the nature and purpose of the trial or his need to make a defense. Appellant's belief that he was in communication with God or other spirits who had assured him of



deliverance, or to whom he had surrendered his fate, is nothing new in the annals of jurisprudence; and was not, of its own force, a strong reason for the trial court to doubt that Appellant was then competent to stand trial.

¶93 The trial court reasonably concluded that the facts raised insufficient doubt of present competence to suspend the proceedings. There was no abuse of the trial court's discretion in the denial of a further competency evaluation. Moreover, we reject the premise that Appellant was denied any required "hearing" on his various applications to suspend the trial and litigate present competency. The court duly entertained these requests, denying them only after assuring itself that the facts were insufficient to doubt that Appellant was presently competent. This procedure was proper, and the results were neither clearly erroneous nor contrary to the logic and effect of the facts presented. Proposition Eight is therefore denied.

¶94 In Proposition Nine, Appellant argues that the trial court's question to Appellant in front of the jury confirming that he was testifying against the advice of his counsel denied his right to present his defense and due process of law, and deprived him of a fair and impartial trial. Trial counsel raised no objection to the comments challenged on appeal, waiving all but plain or obvious error as defined above. The verbal exchange between the court and the Appellant now assigned as reversible error is as follows:

The Court: Mr. Davison, I understand that you want to testify; correct?

Appellant: Yes.

The Court: And that's against the advice of your counsel; correct?

Appellant: Yes.

¶95 Appellant reasons that there was "no need" to confirm, in the presence of the jury, that Appellant was testifying against the advice of counsel. Appellant also insists that even if the trial court's question "did not flat out tell the jury that defense counsel believed Mr. Davison's testimony was going to be a lie," the question "undeniably informed the jury that something was wrong with" Appellant's testimony; and because Appellant was his only witness, "there was a problem with his entire defense."

¶96 Aside from citations to cases recognizing his general right to present a defense, Appellant cites no controlling case law for the proposition that the trial court's question was plainly or obviously in error. This Court has adhered to the principle that "so long as a trial judge does not indicate to the jury his views of the issues in contention, he possesses considerable latitude" in conducting the trial, including "the right to question a witness for the purpose of clarifying testimony," as well as "the right to interrupt an improper line of questioning." *Brown v. State*, 1973 OK CR 109, ¶ 14, 506 P.2d 1396, 1399.

¶97 We find the trial court's question probably indicated to the jury (in a relatively neutral way) exactly why Appellant was testifying in the form of a narrative and without the assistance of trial counsel. We do not accept counsel's supposition that this question unfairly telegraphed to the jury the trial court's view that there was something "wrong" with either Appellant's decision or the truth of his testimony. The question actually emphasized that it was properly Appellant's decision to testify, and that he was doing so without the approval or assistance of his counsel. In this way, the trial court's question may have actually benefited Appellant, which seems to have been its intent. Appellant has definitely *not* shown that the question was so plainly or obviously erroneous that the trial court should have known not to ask it.

¶98 Appellant has also failed to show that the question could have affected the outcome of the trial. The jury had also heard evidence of several conflicting statements from the Appellant about the events on the day of K.B.'s death, including statements in which he admitted some personal role in inflicting the injuries and neglecting to seek emergency assistance. The direct and circumstantial evidence of Appellant's involvement in K.B.'s death was substantial, even overwhelming. We find the strong evidence of guilt, rather than the trial court's brief clarifying question about Appellant's testimony, ultimately explains the jury's verdicts in this case. Proposition Nine requires no relief.

¶99 In Proposition Ten, Appellant challenges the sufficiency of the evidence to prove the statutory aggravating circumstance of a probability that he would commit criminal acts of violence that would constitute a continuing threat to society. This Court reviews the evidence in the light

most favorable to the State to determine if any rational trier of fact could have found the existence of the alleged aggravating circumstance beyond a reasonable doubt. *Grissom*, 2011 OK CR 3, ¶ 61, 253 P.3d at 990.

¶100 The State may prove the continuing threat aggravating circumstance “through the introduction of Judgments and Sentences showing a history of violent criminal behavior or through the introduction of additional evidence detailing the defendant’s participation in other unrelated crimes, or both.” *Malone v. State*, 1994 OK CR 43, ¶ 39, 876 P.2d 707, 717-18 (footnotes omitted). The aggravator may also be established by evidence of the offender’s lack of remorse or the sheer callousness of the crime itself. *Id.*

¶101 In the light most favorable to the State, the crime itself involved tremendous violence against a defenseless victim who had been left in Appellant’s care. Appellant later offered multiple false statements to cover up his criminal acts, demonstrating a callous and remorseless state of mind. He attempted at one point to escape his restraints and assaulted a detention officer during transport, showing a continued willingness to use violence. Other evidence showed Appellant had engaged in domestic violence, a history of drug abuse, callousness, and lack of remorse (e.g., saying in a phone call after the crime that he had tried to save his ex-girlfriend’s “fucking child.”) Any rational factfinder could conclude beyond a reasonable doubt that Appellant’s violence “has demonstrated a threat to society,” and “a probability that this threat will continue to exist in the future.” OUJI-CR(2d) No. 4-74; 21 O.S. 2011, § 701.12(7). The evidence was legally sufficient to support the jury’s finding of this aggravating circumstance. Proposition Ten is denied.

¶102 In Proposition Eleven, Appellant argues that the statutory aggravating circumstance that the murder was especially heinous, atrocious, or cruel is too vague and overbroad to perform the narrowing function on capital sentencing discretion required by the Eighth Amendment. We have repeatedly rejected this claim and do so again here. *Martinez*, 2016 OK CR 3, ¶ 67, 371 P.3d at 1116; *Postelle v. State*, 2011 OK CR 30, ¶ 84, 267 P.3d 114, 144. Proposition Eleven is denied.

¶103 In Proposition Twelve, Appellant raises a number of claims previously rejected in similar cases, urging the Court to reconsider. Appellant argues that (1) sentencing-phase jury

instructions diminished the effect of mitigating evidence; (2) the trial court should have instructed jurors that they could consider life or life without parole after finding an aggravating circumstance; (3) the instructions permitted the jury to weigh aggravating circumstances against individual mitigating circumstances in violation of statute as well as the Eighth and Fourteenth Amendments; and (4) victim impact evidence has no place in Oklahoma’s capital sentencing scheme. This Court has repeatedly rejected substantially similar arguments. *Mitchell v. State*, 2010 OK CR 14, ¶¶ 120-23, 235 P.3d 640, 664 (rejecting the same or similar previously adjudicated capital claims). We decline to revisit those rulings here. Proposition Twelve requires no relief.

¶104 In Proposition Thirteen, Appellant contends that the cumulative effect of individually harmless errors warrants reversal of his conviction or a modification of his death sentence. We have found no individually harmful errors, and further find no accumulation of prejudicial effects from individually harmless errors. *Bench*, 2018 OK CR 31, ¶ 226, 431 P.3d at 981. No relief is warranted. Proposition Thirteen is denied.

#### MANDATORY SENTENCE REVIEW

¶105 The Oklahoma Statutes, at 21 O.S.2011, § 701.13(C), require this Court to determine whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and whether the evidence supports the finding of statutory aggravating circumstances. We find no grounds for reversal or modification of the verdict of guilt or sentence of death.

#### DECISION

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

**APPEAL FROM THE DISTRICT COURT OF  
OKLAHOMA COUNTY  
THE HONORABLE CINDY H. TRUONG,  
DISTRICT JUDGE**

#### **APPEARANCES AT TRIAL**

Melanie Freeman-Johnson, James Rowan, 320 Robert S. Kerr, Ste. 400, Oklahoma City, OK 73102, Attorneys for Defendant

Gayland Gieger, Kelly Collins, Asst. District Attorneys, 320 Robert S. Kerr, Ste. 505, Oklahoma City, OK 73102, Attorneys for the State

#### APPEARANCES ON APPEAL

Marva Banks, 320 Robert S. Kerr, Ste. 400, Oklahoma City, OK 73102, Attorney for Appellant

Mike Hunter, Attorney General, Jennifer J. Dickson, Ashley L. Willis, Asst. Attorneys General, 313 N.E. 21st St., Oklahoma City, OK 73105, Attorneys for Appellee

OPINION BY: LEWIS, P.J.

KUEHN, V.P.J.: Concur

LUMPKIN, J.: Concur

HUDSON, J.: Concur

WINCHESTER, J.: Concur

1. See Rule 3.3, *Oklahoma Rules of Professional Conduct*, 5 O.S.2011, Ch. 1, App. 3-A (generally prohibiting a lawyer from offering “evidence that the lawyer knows to be false”); and Comment (noting some jurisdictions have allowed counsel to present the defendant as a witness or have him give a narrative statement even if counsel knows that the statement is false); see also *Nix v. Whiteside*, 475 U.S. 157, 174 (1986) (holding the right to counsel includes no right to the assistance of counsel in a plan to commit perjury; counsel’s admonition to client not to give false testimony was not ineffective assistance under *Strickland*).

2. In this call, Appellant and the third party spoke about what was happening at the trial, some things Appellant found confusing, Appellant’s uncertainty about how his testimony would turn out, and so forth. Appellant stated during the call that after he gave his testimony, he would be cross-examined by the prosecutor.

Don't let distance keep you from getting involved

It's easy!

Attend section and committee meetings remotely via BlueJeans. Use a mobile device, phone or computer. Visit [www.okbar.org/bluejeans](http://www.okbar.org/bluejeans).

The graphic features a blue background with white and yellow text. At the top, it says "Don't let distance keep you from getting involved". Below this is a speech bubble that says "It's easy!". In the center, there is an illustration of a person's head and shoulders on a tablet screen, with a hand pointing at the screen. At the bottom, it says "Attend section and committee meetings remotely via BlueJeans. Use a mobile device, phone or computer. Visit [www.okbar.org/bluejeans](http://www.okbar.org/bluejeans)."



## LOOKING FOR SOMETHING?

### CHECK YOUR BLUE BOOK!

The Oklahoma Legal Directory is the official OBA directory of member addresses and phone numbers, plus it includes a guide to government offices and a complete digest of courts, professional associations including OBA committees and sections. To order a print copy, call 800-447-5375 ext. 2 or visit [www.legaldirectories.com](http://www.legaldirectories.com). A free digital version is available at [tinyurl.com/2018oklegaldirectory](http://tinyurl.com/2018oklegaldirectory).

# Opinions of Court of Civil Appeals

---

2020 OK CIV APP 58

**IN RE THE MARRIAGE OF: MARGARET  
A. CLEMENTS, Plaintiff/Appellant, vs.  
RICHARD D. CLEMENTS, Defendant/  
Appellee.**

**Case No. 117,592. May 12, 2020**

**APPEAL FROM THE DISTRICT COURT OF  
OKLAHOMA COUNTY, OKLAHOMA**

**HONORABLE BARRY L. HAFAR,  
TRIAL JUDGE**

**AFFIRMED AS MODIFIED AND  
REMANDED WITH DIRECTIONS**

George H. Brown, Tony Gould, BROWN & GOULD, PLLC, Oklahoma City, Oklahoma, for Plaintiff/Appellant

Betsy Ann Brown, Brayden Jennings, BIC LEGAL PLLC, Norman, Oklahoma, for Defendant/Appellee

JANE P. WISEMAN, CHIEF JUDGE:

¶1 Wife Margaret A. Clements appeals the trial court's order of November 16, 2018, in which it determined the division of Husband Richard D. Clements' OG&E retirement in an earlier decree awarded Wife "one-half (1/2) of the marital portion" rather than one-half of Husband's total OG&E pension. After review, we affirm as modified and remand with directions.

## **FACTS AND PROCEDURAL BACKGROUND**

¶2 On April 29, 1999, Husband and Wife entered into an agreed divorce decree which in part granted her (1) "One-half (1/2) [Husband's] Chamber retirement," (2) "One-half (1/2) [Husband's] OG&E stock and 401K investments," and (3) "One-half (1/2) [Husband's] OG&E retirement." After the divorce in June 1999, the trial court approved two Qualified Domestic Relations Orders (QDROs) for Husband's Chamber retirement and for the OG&E stock and 401K investments. Husband had worked for OG&E for only four years as of that time, and he had not yet vested in the retirement plan, which required five years. Therefore no qualified QDRO for this benefit could be

approved. Husband continued to work for OG&E, ultimately retiring in July 2017.

¶3 On March 8, 2017, Husband filed a QDRO for his OG&E retirement, which defined Wife's benefit as "50% of the Participant's accrued benefit between the date of marriage and the date of separation/divorce." Wife asserts she did not receive notice of the QDRO and it failed to include a certificate of mailing showing she received notice.

¶4 On December 29, 2017, Husband filed a motion to settle the QDRO stating that although Wife had already received half of both his Chamber retirement and OG&E stock and 401K investments, a QDRO was needed to distribute his OG&E retirement because he retired in July 2017. Husband, arguing Wife is entitled to half of the marital portion of the retirement, not half of his total retirement, asserted that based on the marital portion of his retirement, Wife was entitled to 9.8% of the total pension payment.

¶5 Wife responded that because she and Husband entered into a consent decree in which they specifically agreed Wife "would be entitled to a full one-half of [Husband's] OG&E retirement if he stayed long enough to become vested," she is entitled to this amount, not simply half of the marital portion. She emphasizes that the language in the decree unambiguously states she is to receive "One Half (1/2) [Husband's] OG&E retirement," not half of the marital portion of his retirement. The consent decree, she argues, is valid and enforceable with "the same force and effect as a contract" as long as it does not contravene public policy. And because the decree is a final order which was never appealed, the trial court, according to Wife, lacks jurisdiction to modify it. In her counter-motion to settle the QDRO, Wife asks the trial court to deny Husband's QDRO and to approve her attached QDRO.

¶6 After a hearing on February 9, 2018, the trial court directed the parties to include the language from the decree in the QDRO and did not determine whether the language in the decree meant half only of the marital portion of Husband's retirement or of all of it. The trial court concluded in part:

. . . I've got to go with the language that's in there, if there's a dispute as to what language that's to be in there. You're saying add "the marital portion," which very well may have been their intent. But then on the other hand, it may not. You know, we don't know. . . . So the language that's here may be unfortunate, but it is, you know, it is the language that they used at the time.

¶7 On July 24, 2018, Husband filed a motion to settle journal entry asserting, "The parties have been unable to agree as to the language to be contained in the Journal Entry and as such, request the court make a determination as to which Journal Entry should be executed by the court."

¶8 Wife filed a response and cross-motion to settle journal entry with an attached QDRO arguing in part:

4. Following this Court's [February 2018] decision, counsel for Plaintiff . . . submitted the QDRO to the third-party administrator for the OG&E Pension as to QDRO matters, Fidelity, for preapproval. The draft QDRO included the language ordered by this Court.

5. As this Court predicted, Fidelity rejected the QDRO as written for a lack of specificity. In fact, in its two-page rejection letter, Fidelity stated as follows:

"Please be advised, the Order must state the award as a specified percentage or amount of the Participant[s] vested accrued benefit in the Plan. . . . Additionally, the Order does not state a valuation date on which to value that benefit in order to determine the Alternate Payee's one half share."

Wife asked the trial court to settle the journal entry and enter the attached QDRO which she claimed "accurately reflects the orders of this Court entered on February 9, 2018."

¶9 On September 20, 2018, the trial court denied Husband's motion to settle and granted in part Wife's counter-motion to settle the QDRO, stating:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that [Wife's] Qualified Domestic Relations Order is approved in all respects except Paragraph 8 which will award Plaintiff "One-half of defendant's OG&E retirement." The Court's complete

ruling is found within the Transcript of Proceedings from February 9, 2018.

¶10 This ruling did not resolve the parties' dispute and was insufficient for the plan administrator to calculate Wife's award of benefits. On September 27, 2018, Wife filed a motion to reconsider this order stating:

In light of Fidelity's rejection of the QDRO ordered by the Court (ultimately filed herein on September 27, 2018), [Husband's] commencement of his OG&E Pension benefit is on hold and [Wife] cannot receive her share of the same. Therefore, for the reasons stated herein, [Wife] respectfully requests that the Court reconsider its Order entered herein on February 9, 2018, and the QDRO filed September 27, 2018 which adhered to this Court's Order.

Wife asked the trial court to "amend the QDRO filed September 27, 2018 by instead entering the QDRO proposed by [Wife] in her Counter-Motion to Settle" and grant Wife any further relief the court deemed just and equitable including attorney fees and costs.

¶11 In response to Wife's motion to reconsider, Husband argues her request "requires the Court to divide future earnings which is outside of the court's jurisdiction." Husband urges the trial court to "either (1) use the date of marriage to the date of divorce as the division dates as this incorporates the time the parties' property is lawfully divisible; or (2) determine the marital portion of the whole pension upon retirement which equates to 17% of [Husband's] pension." Husband further urges the trial court to "review the intent of the parties to determine the true meaning of the orders entered" as it was not Husband's "intent to divide an additional 18 years of accrued benefit after divorce."

¶12 On November 16, 2018, the trial court considered Wife's motion to reconsider and concluded:

The Court orders that [Husband's] OG&E Pension shall be divided by Qualified Domestic Relations Order [QDRO] awarding [Wife] one-half (1/2) of the marital portion. The parties were married on June 19, 1976 and the parties were divorced on April 29, 1999.

The trial court then ordered Husband's counsel to prepare an amended QDRO which was filed

that same day stating as to the provision in question:

8. The Court Orders that the Alternate Payee is entitled to one-half (1/2) of the Participant's vested accrued benefit in the Plan from the date of marriage June 19, 1976 to the date of divorce, April 29, 1999.

¶13 Wife appeals.

### STANDARD OF REVIEW

¶14 On September 20, 2018, the trial court denied Husband's motion to settle and granted in part Wife's counter-motion. On September 27, 2018, Wife filed a motion to reconsider this order. Because the motion to reconsider was filed within 10 days of the filing of the order, we will treat it as a motion for new trial. The Oklahoma Supreme Court in *Fox v. Mize*, 2018 OK 75, ¶ 5, 428 P.3d 314, held:

If timely filed . . . a motion to reconsider may be regarded as one for new trial under 12 O.S. 2011 § 651 (if filed within ten (10) days of the filing of the judgment, decree, or appealable order), or it may be treated as a motion to modify or to vacate a final order or judgment under the terms of 12 O.S.2011 § . . . 1031.1 (if filed after ten (10) days but within thirty (30) days of the filing of the judgment, decree, or appealable order).

"The standard of review for . . . denial of a motion for a new trial . . . is abuse of discretion." *Id.* ¶ 6. "A trial court abuses its discretion when a decision is based on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling." *Id.*

¶15 A court has jurisdiction to enter a QDRO that clarifies a decree but may not enter one that modifies or alters the decree. "In that a question concerning the jurisdictional power of the trial court to act as it did is implicated[,] our standard of review is *de novo*." *Jackson v. Jackson*, 2002 OK 25, ¶ 2, 45 P.3d 418. Whether an ambiguity exists "in the language of the decree is a decision made by the trial court." *Ryan v. Ryan*, 2003 OK CIV APP 86, ¶ 8, 78 P.3d 961. "If the court determines that the language is not ambiguous, the construction of the decree is also a matter of law for the court." *Id.* Matters of law invoke a *de novo* review "which involves a plenary, independent and non-differential examination of a trial court's legal rulings." *Jackson*, 2002 OK 25, ¶ 2.

### ANALYSIS

¶16 Wife argues the trial court erred when it modified the parties' consent decree by preventing her from receiving half of Husband's total OG&E retirement.

¶17 As set forth in *Jackson*, a trial court has jurisdiction to clarify a previously entered divorce decree dividing retirement benefits:

Although a trial court is without jurisdiction or authority to issue a QDRO that substantively alters a final property division previously made in a divorce action, a trial court has jurisdiction or authority to issue a subsequent post-property division QDRO to act as the statutorily-sanctioned mechanism by which the System gains lawful empowerment to pay a former spouse their portion of a System benefit previously awarded as part of the final property division in the divorce action.

....

[A] QDRO is generally the mechanism by which a divorce decree awarding retirement benefits to a spouse is enforced and collected with regard to the particular retirement program covered by the decree.... [A] trial court has the authority to issue a subsequent QDRO if an initial one contains some ambiguity concerning the proper division of a retirement benefit under an earlier entered divorce decree, as long as the later QDRO does not alter what was awarded initially by the decree, but conforms to it.

*Id.* ¶¶ 1, 15.

¶18 To determine whether the Amended QDRO impermissibly modified or properly clarified the consent decree, "[w]e use principles of contract law" and interpret "a consent judgment 'as other contracts' and ascertain the intent of the parties." *Holleyman v. Holleyman*, 2003 OK 48, ¶ 11, 78 P.3d 921. "The intent of the parties at the time they entered into an agreement controls the meaning of their written contract." *Id.* ¶ 13; *see also* 15 O.S.2011 § 152 ("A contract must be so interpreted as to give effect to the mutual intention of the parties, as it existed at the time of contracting, so far as the same is ascertainable and lawful.").

¶19 The April 29, 1999, agreed divorce decree granted Wife (1) "One-half (1/2) [Husband's] Chamber retirement," (2) "One-half (1/2) [Hus-

band's] OG&E stock and 401K investments," and (3) "One-half (1/2) [Husband's] OG&E retirement." Less than two months after the June 1999 divorce, the trial court approved two QDROs for Husband's Chamber retirement and for his OG&E stock and 401K investments. On June 23, 1999, a QDRO was filed dividing Husband's Chamber retirement stating in part:

4. The Alternate Payee is hereby assigned a portion of the vested benefits payable to the Participant under the Retirement Plan for Employees of Greater Oklahoma City Chamber of Commerce (the "Plan"), in an amount equal to fifty percent (50%), net any loans, as of April 29, 1999.

....

6. . . . Once the benefits assigned to the Alternate Payee pursuant to this Order have been disbursed, the Alternate Payee shall have no further interest of any kind whatsoever [in the] remainder of the Participant's accrued benefits under the Plan.

That same day, a second QDRO was entered dividing Husband's OG&E stock and 401K investments similarly stating in part:

4. The Alternate Payee is hereby assigned a portion of the vested benefits payable to the Participant under the OGE Energy Corp. Employees' Stock Ownership and Retirement Savings Plan (the "Plan"), in an amount equal to fifty percent (50%), net any loans, as of April 29, 1999.

This QDRO also has an identical paragraph 6 as quoted above. It is undisputed that the assets in the first two QDROs, entered within two months after the consent decree was approved, had vested and were divided based on what had accrued during the marriage. Because the OG&E retirement had not yet vested at the time of the divorce, no qualified QDRO could be approved.

¶20 We recognize, as did the Supreme Court in *Jackson*, that "[o]nce a ruling has become final (either for want of an appeal or in consequence of an appellate court's decision), any controversy over the meaning and effect of the decision must be resolved by resort solely to the face of the judgment roll."<sup>1</sup> *Jackson*, 2002 OK 25, ¶ 18. "Furthermore, mere ambiguity will not affect a judgment's validity, unless none of its terms is susceptible to construction which

will make it conformable to law." *Id.* "Also, merely entering a second judgment cannot, *per se*, vacate a prior judgment in the same action." *Id.* "An unclear judgment should be construed so as to carry out its evident purport and intent, rather than defeat it, and a court should consider the situation to which it was applied and the purpose sought to be accomplished." *Id.*

¶21 The *Jackson* Court explained:

The purpose and function of a court in construing a divorce decree earlier entered is to give effect to that which is already in the judgment, although expressed ambiguously, and the court has no authority to add new provisions to the decree or to change substantive provisions already in the decree, under the guise of construing said decree.

*Id.* ¶ 19.

¶22 In this case, we conclude the trial court correctly determined Wife is entitled to half of the *marital* portion only of Husband's OG&E retirement rather than half of Husband's total OG&E retirement. Without question, both parties knew Husband's OG&E retirement had not vested at the time of the divorce in April 1999. This seems to indicate that if Wife is held to receiving half only of Husband's "vested retirement during coverture," she would receive nothing because the benefit did not vest until after the divorce. The Amended QDRO approved by the trial court attached to the order appealed currently states:

8. The Court Orders that the Alternate Payee [Wife] is entitled to one-half (1/2) of the Participant's vested accrued benefit in the Plan from the date of marriage June 19, 1976 to the date of divorce, April 29, 1999.

Wife argues that under this language, she receives nothing from Husband's retirement, which thus contradicts the decree's language that she receive half, rendering the provision without substance. If Husband received no OG&E retirement because he left OG&E after the divorce but before his retirement vested, Wife – like Husband – would receive nothing in OG&E retirement benefits. But once Husband vested, the decree's provision became effective and enforceable. We agree that this language creates confusion as to what Wife is awarded.



¶23 In her motion to reconsider, Wife proposes the following language for inclusion in the Amended QDRO:

8. The Alternate Payee is entitled to Fifty percent (50%) of the Participant's vested accrued benefit as of the Alternate Payee's commencement date.

This language reflects one of Fidelity's options explaining what a QDRO must state when it describes an Alternate Payee's separate interest award. However, we agree with Husband that this represents an award to Wife of one-half of his entire retirement benefit, only four years of which accrued during the marriage, and is not, as we explain below, a sustainable construction under the record before us.

¶24 A contract term is ambiguous if it can be reasonably interpreted as having two or more meanings. *K&K Food Servs., Inc. v. S&H, Inc.*, 2000 OK 31, ¶ 8, 3 P.3d 705. Because this is a consent decree, we cannot rely on the statutory restrictions on distributions of future income binding on the court in entering a non-consent decree. We acknowledge that "parties to a consent decree may agree to obligations between themselves that exceed those required by law." *Holleyman v. Holleyman*, 2003 OK 48, ¶ 8, 78 P.3d 921. Husband and Wife were free to contract "with respect to disposition of their property" and could achieve by contract what the trial court was prohibited from doing. *Perry v. Perry*, 1976 OK 57, ¶ 8, 551 P.2d 256; see also *Kittredge v. Kittredge*, 1995 OK 30, 911 P.2d 903.

¶25 As we can see from the parties' positions and Fidelity's rejection of the initial QDRO, the decree is ambiguous on the question of whether Wife is awarded one-half of Husband's benefits that accrued during the marriage (four years) or one-half of his benefits that accrued until he retired (22 years). Although the decree's language awarding Wife "half of Husband's OG&E retirement" is ambiguous, we must give effect to what is in the decree and cannot "add new provisions to the decree or [] change substantive provisions already in the decree." *Jackson v. Jackson*, 2002 OK 25, ¶ 19, 45 P.3d 418.

¶26 As previously noted, the meaning of the ambiguous provision must be resolved solely by resorting to the judgment roll. *Id.* ¶ 18. In this respect, we are assisted by the decree itself. The two other marital assets divided in the decree and subject to QDROs – Husband's Chamber retirement and his OG&E stock and 401K investments – were divided on the basis of

assets accrued during coverture only. Although Wife seeks to distinguish Husband's OG&E retirement from these two because it was not yet vested when the decree was entered, we see no credible or equitable reason to draw this distinction as to its division. In *Baggs v. Baggs*, 2016 OK 117, ¶ 14, 385 P.3d 68, the Court said: "Generally, a pension right burdened with a conjugal interest is a type of marital asset divided between the parties to a divorce." The *Baggs* Court, citing *Carpenter v. Carpenter*, 1983 OK 2, ¶ 23, 657 P.2d 646, continued:

[W]e do not deem it significant whether the pension is "vested" in the sense that it is now due and owing, whether it is conditional or contingent upon continued employment for a prescribed period or terminable upon the occurrence []or non-occurrence of some future event. . . . In any of these events, it is a valuable right which has been purchased through joint efforts of the spouses to the extent that it has been acquired or enhanced during the marriage, and as such becomes jointly acquired property during the marriage.

*Baggs*, 2016 OK 117, ¶ 15. Neither party would receive any portion of the retirement if Husband left OG&E's employ before he vested. And, if he remained and vested – which he did – there is nothing in the judgment roll to justify distributing this asset differently from the other two assets subject to QDROs.

¶27 Nor is there any equitable argument to be made for such a distinction. Distribution to the parties using a "currently accrued" basis represents an equitable distribution of assets acquired during coverture, but adding one-half of 18 years of Husband's benefits that accrued after the divorce appears substantially inequitable. We interpret the phrase "one-half of Husband's OG&E retirement" as awarding Wife one-half of Husband's plan assets that accrued during the marriage.

¶28 We conclude that relying on the face of the judgment roll, the trial court correctly construed the decree to say Wife is entitled to half of the marital portion only of Husband's OG&E retirement, that is, the portion that accrued during coverture and not beyond.

¶29 We affirm the trial court's order and remand with directions to the trial court to issue an Amended QDRO that is consistent with this Opinion awarding Wife one-half of



Husband's OG&E retirement benefits that accrued during the marriage.

### CONCLUSION

¶30 For the reasons stated, we affirm the decision of the trial court as modified and remand with directions.

### ¶31 AFFIRMED AS MODIFIED AND REMANDED WITH DIRECTIONS.

THORNBRUGH, P.J., and RAPP, J., concur.

JANE P. WISEMAN, CHIEF JUDGE:

1. "The judgment roll has been defined to include the petition, process, return, pleadings, reports, verdicts, orders and all acts and proceedings of the court." *Federal Deposit Ins. Corp. v. Duerksen*, 1991 OK CIV APP 39, ¶ 11, 810 P.2d 1308; see also 12 O.S.2011 § 32.1.

### 2020 OK CIV APP 59

#### IN THE MATTER OF THE ESTATE OF GEORGE THOMAS WHITEHOUSE, Deceased: KAREN BRIERTON, Appellant, vs. TAWANNAH BURRIS, Appellee.

Case No. 117,879. June 8, 2020

APPEAL FROM THE DISTRICT COURT OF  
PITTSBURG COUNTY, OKLAHOMA

HONORABLE TIM MILLS, TRIAL JUDGE

### AFFIRMED

Mark B. Houts, HOUTS LAW, PLLC, Edmond,  
Oklahoma, for Appellant

Michael W. Boutot, Tulsa, Oklahoma, for  
Appellee

STACIE L. HIXON, JUDGE:

¶1 Karen Brierton (Brierton) appeals an order appointing Tawannah Burris (Burris) the personal administrator of the estate of Brierton's brother, George Thomas Whitehouse (Whitehouse), and finding a common law marriage existed between Whitehouse and Burris. On review, we affirm the trial court's May 11, 2019 Order of Appointment of Personal Representative and Finding of Common Law Marriage.

### BACKGROUND

¶2 Whitehouse died in a motorcycle accident in August 2018. Burris contended she was Whitehouse's common law wife and petitioned for Letters of Administration. Whitehouse's sister, Brierton, objected to the appointment. The trial court conducted a non-jury trial on November 20 and December 31, 2018, to determine whether Burris was Whitehouse's common law spouse

and entitled to appointment as his personal administrator.

¶3 Burris met and began dating Whitehouse in 2002. Whitehouse moved into Burris' home in 2003, and resided with Burris until his death, with the exception of a few months in 2009. In 2014, Burris' house burned. She testified that she and Whitehouse were reduced to living in a recreational vehicle while the house was rebuilt. Burris told Whitehouse she understood if he wanted to leave. She testified that Whitehouse told her that to do so, they would have to get divorced because they were married, in sickness and in health, for better or worse, richer or poorer, until death parted them.

¶4 Burris contended she and Whitehouse did things as a married couple from that day. She and Whitehouse filed joint tax returns as a married couple thereafter until his death. In 2015, Burris added Whitehouse as the beneficiary to her retirement account, identifying him as her spouse. Whitehouse signed the required form. Friends of Whitehouse testified they were aware he filed taxes jointly with Burris and was her retirement beneficiary.

¶5 Burris and Whitehouse maintained a joint checking account and owned multiple vehicles together. Their automobile insurance application, though signed only by Burris, identified them as husband and wife. Whitehouse was identified as Burris' husband on their cell phone plan. He was also listed as Burris' husband on a medical intake form when he took Burris to the emergency room in 2018. Burris paid for Whitehouse's funeral and laid him to rest in a joint burial plot that they will share.

¶6 Burris appeared to be a significant source of financial support for Whitehouse. Brierton acknowledged that her brother's estate was largely comprised of a potential claim arising from the motorcycle accident. She acknowledged her interest in contesting Burris' appointment was "possibly" the large lawsuit waiting after the appointment.

¶7 To contest Burris' status, Brierton presented evidence of Whitehouse's reputation as a "tomcat" or womanizer. He did not wear a wedding ring and his facebook status reflected he was single. Multiple women testified to a sexual relationship with Whitehouse and claimed that he told them Burris was only a roommate. These women,<sup>1</sup> as well as Whitehouse's female friends and his siblings, contended he and Burris did

not share a bedroom and did not have a marital or sexual relationship.

¶8 Burris contended she and Whitehouse resided together as husband and wife. Other witnesses admitted that Burris and Whitehouse sometimes slept in the same room. However, Burris was diagnosed with cancer in late 2014, and was still undergoing chemotherapy at the time of Whitehouse's death. Witnesses, including Burris, testified her illness dampened their intimacy, and that Whitehouse had mentioned he sought the company of other women as a result. Most of Whitehouse's paramours testified to being intimate with Whitehouse before 2014, or from 2016 through the time of his death.<sup>2</sup> Burris presented evidence she had been intimate with Whitehouse up to a week before his death. While she denied knowing he was involved with any particular woman, her communications to Whitehouse suggested she was aware and frustrated by his activities.

¶9 Whitehouse's best friend and siblings also testified Burris was Whitehouse's roommate and/or that he did not consider Burris his wife. Brierton presented evidence that Burris did not identify herself as Whitehouse's wife on hospital paperwork after the accident, or on her application for his death certificate and acknowledged Whitehouse's sister was entitled to make Whitehouse's end of life decisions. Burris did not identify herself as Whitehouse's wife in his obituary, though she did identify herself as "of the home."

¶10 Burris testified she did not insert herself into Whitehouse's end of life decisions because she was not sure of her legal rights as common law spouse and claimed that a surgeon told her that Whitehouse's sister had the right to direct his care. She contended she told one nurse at the hospital that Whitehouse was her husband. Though Whitehouse's best friend denied the marital relationship, she admitted she also told a nurse at the hospital that Burris was Whitehouse's wife.

¶11 Burris presented testimony of witnesses indicating that Whitehouse and Burris acted like a couple. Whitehouse's cousin also testified she had learned from Whitehouse that he had become Burris' retirement beneficiary and that Whitehouse had joked in relation that Burris would have to divorce him to keep him from that money. Burris' cousin testified she had introduced Whitehouse as Burris' husband at a family gathering to no objection, and considered them husband and wife.

¶12 Weighing conflicting evidence of the relationship between Burris and Whitehouse, the trial court found Burris proved by clear and convincing evidence that she was Whitehouse's common law wife. The court determined Burris had demonstrated an actual agreement to be husband and wife, that the relationship was permanent, and that Whitehouse and Burris cohabitated as husband and wife from 2014 until his death. The trial court found it undisputed that Whitehouse was not in an exclusive relationship with Burris, but declined to find that his promiscuity cancelled a common law marriage. The trial court noted that it was arguable that Burris and Whitehouse did not hold themselves out as married "in such a manner that was readily discernible to the public" and that Whitehouse was "downright deceptive to virtually everyone" about his marriage. However, the trial court ultimately determined that there was ample credible testimony that Burris and Whitehouse held themselves out as husband and wife to friends and in public to support its finding of common law marriage.

¶13 By Order of March 11, 2018, the court found Burris was Whitehouse's wife and sole heir and appointed her administrator of his estate.

¶14 Brierton appeals.

## STANDARD OF REVIEW

¶15 "On appellate review, a trial court's determination of the existence of a common law marriage will not be disturbed if it is not clearly against the weight of evidence." *Standefer v. Standefer*, 2001 OK 37, ¶ 11, 26 P.3d 104 (quoting *Mueggenborg v. Walling*, 1992 OK 121, ¶ 5, 836 P.2d 112). "Because the trial court is in the best position to evaluate the demeanor of the witnesses and to gauge the credibility of the evidence, we will defer to the trial court as to the conclusions it reaches concerning those witnesses and that evidence." *Stephens Production Co., a division of SF Holding Corp. v. Larsen*, 2017 OK 36, ¶ 12, 394 P.3d 1262 (citing *Mueggenborg*, 1992 OK 121, ¶ 7).

## ANALYSIS

¶16 Brierton contends the trial court's findings of fact negate a finding of common law marriage because the trial court did not find evidence of all five elements she contends must be established to support common law marriage. Brierton also contends the trial court erred by failing to hold Burris was estopped<sup>3</sup>

from claiming common law marriage, and that the Oklahoma Legislature has previously abrogated common law marriage.<sup>4</sup>

## 1. Evidence of common law marriage

### a. Applicable law

¶17 “A common law marriage is formed when ‘the minds of the parties meet in consent at the same time.’” *Standefor*, 2001 OK 37, at ¶ 11 (quoting *Reaves v. Reaves*, 1905 OK 32, 82 P. 490). Earlier cases emphasized specific elements tending to prove the existence of common law marriage. These elements are: (1) an actual and mutual agreement between the spouses to be husband and wife; (2) a permanent relationship; (3) an exclusive relationship; (4) proved by cohabitation as man and wife; (5) and the parties to the marriage must hold themselves out publicly as husband and wife. *Estate of Stinchcomb*, 1983 OK 120, ¶ 10, 674 P.2d 26.

¶18 *Standefor* clarified that elements two through five are evidence of the required mutual agreement or consent to enter into the marital relationship. The Court explained that, “[s]ome evidence of consent to enter into a common law marriage are cohabitation, actions consistent with the relationship of spouses, recognition by the community of the marital relationship, and declarations by the parties.” *Id.* The party seeking to establish a common-law spousal relationship has the burden to demonstrate the existence of the marriage by clear and convincing evidence. *Standefor*, 2001 OK 37, ¶ 11.

¶19 Contrary to *Standefor*, Brierton contends that elements two through five are not merely evidence of the existence of a mutual agreement to marry. She asserts that Burris was required to show all five elements and that a failure of proof on any element was fatal to Burris’ claim. Brierton concludes the trial court found only the elements of actual agreement, a permanent relationship and cohabitation, and that its finding is therefore unsupported by evidence. While this assertion is not wholly consistent with the trial court’s actual findings of fact, it is also contrary to current Oklahoma law.

¶20 Brierton claims that after *Standefor*, Oklahoma courts have “reaffirmed” the five-part test, citing *State ex rel. Oklahoma Bar Ass’n v. Casey*, 2012 OK 93, 295 P.3d 1096, and *Matter of Estate of Brown*, 2016 OK 112, 384 P.3d 496. *Casey*

was a disciplinary proceeding considering whether counsel breached ethical duties during an action concerning common law marriage. *Casey* referenced the five elements reflecting a common law marriage but did not determine whether a common law marriage was formed in that case, or how the test should be applied. *Id.* at ¶ 13 (quoting *Vann v. Vann*, 1939 OK 495, ¶ 21, 96 P.2d 76).

¶21 Meanwhile, *Casey* also reminded that “Oklahoma has long recognized that such an agreement [to be married] may arise through the parties’ declarations, admissions, or conduct; but no particular form of expression is required . . . and thus, the mutual agreement may be express or implied.” *Id.* at ¶ 13 (citing *Reaves*, 1905 OK 32, ¶ 8; *In re Graham’s Estate*, 1934 OK 674, 37 P.2d 964). Brierton’s rigid application of the evidentiary elements is not supported by *Casey*’s acknowledgment that there is no one form of expression required to establish a mutual agreement to be married. Brierton’s argument also ignores the difference between the fact of the marriage and the proof required to establish it.

¶22 Similar to *Casey*, *Estate of Brown*, 2016 OK 112, cites the elements in a footnote without application.<sup>5</sup> We decline to hold that either *Casey* or *Estate of Brown* overruled *Standefor*. Neither actually applied the purported five-part test. They cannot be read to signal a departure from *Standefor*’s recognition that common law marriage is created by an actual and mutual agreement to be husband and wife, with the remaining elements considered as evidence of that agreement.

¶23 Having addressed the applicable law, we address the trial court’s ruling. The trial court’s conclusions of law are somewhat unclear. The court stated that all five elements must be proven independently, but that it would give greater weight to element one (an actual and mutual agreement); hence, Brierton’s contention that the trial court’s ruling was unsupported by evidence if all elements were not met.

¶24 However, the trial court also appeared to acknowledge that elements two through five were to be considered as evidence of the required actual and mutual agreement. Though the court’s language was conflicting and did not correctly describe applicable law, its application of the evidence seems to follow *Standefor*. Even if this were not the case, “[w]e will not

reverse the trial court when it ‘reaches the correct result but for the wrong reason.’” *Save the Illinois River, Inc. v. State ex rel. Okla. State Election Bd.*, 2016 OK 86, ¶ 9, 378 P.3d 1220 (citation omitted). We next consider whether the trial court’s ruling is not clearly against the weight of evidence under applicable law.

### *b. The trial court’s findings of fact*

¶25 The crux of Brierton’s argument is not that there was no evidence of elements within the proposed five-part test, but that Burris failed to establish two elements – that Burris and Whitehouse held themselves out publicly as married, and exclusivity. Because these factors are *evidence* to be weighed in considering whether an actual and mutual agreement to be husband and wife was established, lack of these elements does not itself establish reversible error. To the extent Brierton argues that the lack of these elements renders the trial court’s findings contrary to the weight of evidence, we disagree.

¶26 The trial court did not find that Burris failed to establish she and Whitehouse held themselves out as being married.<sup>6</sup> The trial court found that the evidence was conflicting, and that Whitehouse did not disclose his marriage to his sexual partners or his siblings (seemingly to foster his promiscuity). However, as the trial court found, other evidence showed Burris and Whitehouse held themselves out not only to certain family and friends as being married, but to the Internal Revenue Service,<sup>7</sup> their auto insurer, Burris’ medical providers, and to the administrator of her retirement account. Though some witnesses testified they did not refer to one another as husband and wife, they also testified that they appeared to live as a married couple. *See e.g. Maxfield*, 1953 OK 390, ¶ 25 (“[W]e are cited to no case requiring the parties to make a formal acknowledgment of their agreement.”)

¶27 On the issue of a marital relationship, permanent and exclusive of all others, the trial court found that Whitehouse had intimate relationships with other women while in a relationship with Burris. Brierton presents no authority that Whitehouse’s sexual promiscuity precluded common law marriage as a matter of law.<sup>8</sup> While we find no Oklahoma Supreme Court authority directly on point, we are inclined to agree with the trial court that infidelity or an extra-marital affair does not cancel a marriage. *See e.g., Adams v. Boan*, 559 So.2d

1084, 1987 (Ala. 1990)(“Once married, by common law or by ceremony, the spouses are married. There is no such thing as being a ‘little bit’ married; and once married, one spouse’s *liaison amoureuse* does not end the marital status. . . .”)

¶28 Though Whitehouse’s promiscuity was evidence disputing a mutual agreement to be husband and wife, Burris presented evidence at trial that supported that agreement. The trial court is in the best position to weigh the evidence and credibility of the parties. The court’s finding of common law marriage is not clearly against the weight of the evidence, even if others might reach a different conclusion from the same set of facts.

### *2. Estoppel*

¶29 Brierton contends that Burris is estopped from claiming common law marriage to Whitehouse because she did not assert herself as his wife on several occasions, largely associated with Whitehouse’s end-of-life decisions, citing *Matter of Estate of Brown*, 2016 OK 112. In that case, the Court affirmed the holding that a decedent’s first wife was estopped from claiming they remained married after his death. Despite the lack of a formal divorce proceeding, the first wife had married another man and decedent had taken a common law wife, without her apparent objection. The first wife’s conduct prevented her from claiming she remained married, under the principal that “if you do not speak when you ought to speak, you shall not speak when you want to speak.” *Id.* at ¶ 11. *See also In re Estate of Allen*, 1987 OK 45, 738 P.2d 142 (wife who was not legally divorced from decedent was estopped from claiming she remained married and had rights to former husband’s estate, after entering into common law marriage with another).<sup>9</sup>

¶30 “To constitute estoppel by silence requires not only opportunity to speak, but also an obligation to speak.” *Sautbine v. Keller*, 1966 OK 209, ¶ 17, 423 P.2d 447. “In order for the silence of a party to constitute an estoppel against him, it must have occurred under such circumstances as to have made it his imperative duty to speak, and the party in whose favor the estoppel is invoked must have been misled into doing that which he would not have done but for such silence.” *Heckman v. Davis*, 1916 OK 243, ¶ 8, 155 P. 1170. Brierton bore the burden of demonstrating estoppel. *Sullivan v. Buckthorn Ranch Partnership*, 2005 OK 41, ¶ 30, 119 P.3d 192.

¶31 The question of whether an estoppel exists is one of fact or a mixed question of law and fact. *Oxley v. General Atlantic Resources, Inc.*, 1997 OK 46, ¶ 20, 936 P.2d 943. We will not reverse the trial court's findings unless clearly against the weight of the evidence.

¶32 While instances where Burris failed to identify herself as Whitehouse's wife are relevant to establishing or refuting a common law marriage, Brierton presented no evidence at trial of any instance in which she was misled to her detriment by Burris' silence, to support such an argument. Meanwhile, Burris testified that she was unsure of her rights as a common law spouse with regard to Whitehouse's medical care, as relevant to whether she avoided any asserted duty or imperative to speak. While the trial court did not expressly address this issue, the court's decision "is presumptively deemed to include a finding of every fact necessary to support it." *Willis v. Sequoyah House, Inc.*, 2008 OK 87, ¶ 15, 194 P.3d 1285, n.18. The trial court's apparent determination that estoppel did not apply is not clearly against the weight of evidence.

### 3. Abrogation by statute

¶33 Brierton contends that the Oklahoma Legislature intended to abrogate common law marriage through statutes concerning marriage licenses, now codified at 43 O.S. 2011, §§ 4 and 5. Brierton acknowledges her proposition is contrary to a century of Oklahoma Supreme Court jurisprudence, but nevertheless claims that the Legislature enacted sections 4 and 5 in response to *Reaves*, 1905 OK 32, and intended therein to eliminate common law marriage.

¶34 *Reaves*, 1905 OK 32, considered whether a common law marriage was valid despite a prior territorial law requiring a marriage license and certain requirements regarding the ceremony. The Court found the marriage valid, noting that "[s]tatutes regulating marriage are usually directory merely, and when such statutes do not expressly prohibit or forbid other forms of marriage, a common-law marriage. . . is valid." *Id.* (syllabus 3).

¶35 Title 43 O.S. 2011, § 4 provides that "[n]o person shall enter into or contract the marriage relation, nor shall any person perform or solemnize the ceremony of any marriage in this state without a license. . . ." Section 5 sets forth the required contents of an application for marriage license, establishes the required fee and

issuance of license once these requirements are satisfied, and provides that "the provisions hereof are mandatory and not directory except under the circumstances set out in the provisions of Section 3<sup>0</sup> of this title." *Id.* § 5(E). Brierton contends the language of section 5(E) is a direct response to *Reaves*, and was intended to abrogate common law marriage.

¶36 Brierton's argument ignores basic but pertinent information. *Reaves* was decided in 1905. While the Oklahoma Legislature enacted statutes pertaining to marriage licenses in 1910, the "mandatory" language on which Brierton relies was first included in 1959, fifty-four years after *Reaves* was issued. See 43 O.S. Supp. 1959, § 5. Section 5(E) was not enacted in response to *Reaves*. Further, the "mandatory" language is included in section 5 only, concerning the marriage license application. Section 4, which requires the license, contains no such language. Neither section contains the express language to forbid common law marriage required by *Reaves*.

¶37 Additionally, the Oklahoma Supreme Court rejected a similar argument after briefing was completed in this appeal. In *Erlandson v. Coppedge*, 2019 OK 66, 451 P.3d 909 (Mem), the Court assumed original jurisdiction and issued a writ of mandamus to the trial court to proceed on a petition for dissolution of common law marriage. The trial court dismissed the petition, erroneously finding section 5(E) was added in 1999 to abrogate common law marriage. The Court noted that the language in section 5(E) had been in the statute since 1959,<sup>11</sup> and that the Court had continually recognized common law marriage since that time. In its order, the Court again recognized that "Oklahoma recognizes two forms of marriage: ceremonial and common law," stating that "[f]or the Legislature to abolish common law marriage, it must be explicit." *Id.* Brierton's argument supplies no basis to reverse the trial court's order.

### CONCLUSION

¶38 The trial court's determination weighed the requisite elements as evidence of whether Burris and Whitehouse reached an actual and mutual agreement to be husband and wife, in accordance with Oklahoma law. Though reasonable minds could differ, the trial court's determination as the finder of fact that Burris was Whitehouse's common law wife is not clearly against the weight of evidence. Brierton's estop-

pel argument is unsupported by evidence and her argument that common law marriage has been abrogated by statute is contrary to law. We affirm the trial court's Order of Appointment of Personal Representative and Finding of Common Law Marriage of March 11, 2019.

**¶39 AFFIRMED.**

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

STACIE L. HIXON, JUDGE:

1. The trial court's order notes apparent credibility issues, or "questionable moral character" of these witnesses, potentially referring to prior convictions and/or outstanding warrants pending when these witnesses appeared to testify. However, the trial court did conclude that Whitehouse engaged in relations with other women during his relationship with Burris.

2. The trial court admitted an unnotarized affidavit of a woman who claimed to have known Whitehouse for approximately thirteen years before his death and to have been intimate for nearly that time. The trial court indicated it would give that unsworn statement the weight it deserved.

3. Burris asserts that Brierton waived her estoppel argument by omitting it from her Petition in Error, though that argument was raised and considered by the trial court. Brierton's Petition in Error is deemed amended to include propositions in the Brief in Chief. See Supreme Court Rule 1.26(b).

4. Brierton also proposes that common law marriage is disfavored in Oklahoma, citing only case law from other jurisdictions and Oklahoma decisions affirming findings that various parties did not prove common law marriage under their unique facts. Brierton also contends that *Maxfield v. Maxfield*, 1953 OK 390, 258 P.2d 915, demonstrates that Oklahoma courts are less inclined to find common law marriage after one party is deceased, based solely on a remark in that case that its most recent cases had concerned matters where one party was deceased. Though it may be more difficult for the movant to show common law marriage by clear and convincing evidence after the other party is deceased, *Maxfield* pronounces no rule of "disfavor." Brierton suggests the trial court's ruling should be viewed against this backdrop of disfavor, but identifies no particular error to which this proposition is addressed. We decline to address it further and will apply well-established Oklahoma law.

5. *Estate of Brown*, 2016 OK 112, concerned a petition by a decedent's first wife to revoke letters of administration assigned to decedent's common law second wife. The Court considered whether the first wife was estopped to claim she was married to decedent, despite never formally divorcing (though she remarried another man). The Court did not review the trial court's findings of a common law marriage. Aside from the Oklahoma Supreme Court cases of *Casey* and *Brown*, Brierton also relies on *Oklahoma Dept. of Mental Health and Substance Abuse v. Pierce*, 2012 OK CIV APP 73, 283 P.3d 894 in support of her position. *Pierce* mentions the five elements, but also cites and follows *Standefer*. Brierton's reliance on *Ortiz v. Cooper Tire & Rubber Co.*, 2015 WL 1498713 (W.D. Okla. Mar. 31, 2015), and the Attorney General's opinion in *Question Submitted by: The Honorable Larry E. Adair, Speaker, District 86*, 2004 OK AG 10, ¶ 3, is likewise unpersuasive. *Ortiz* cites *Standefer* and does not examine the application of evidence of common law marriage, but denied summary judgment on a question of fact. The Attorney General opinion does not address proof of a common law marriage, but considered a separate issue of who may marry under Oklahoma law.

6. Brierton also misstates this element, contending that a showing of cohabitation as husband and wife and holding one's self out in the community as being husband and wife "require the parties have a reputation in the community for being married to each other," relying on *Richard v. Richard*, 1935 OK 436, 45 P.2d 101 and *In re Miller's Estate*, 1938 OK 289, 78 P.2d 819. The case law on which Brierton relies concerns the admissibility of reputation evidence, along with cohabitation, as circumstantial evidence of common law marriage, i.e., whether others in the community viewed or believed them to be married. It does not establish "reputation" as a required element, though such evidence may be relevant to establishing that the parties held themselves out as husband and wife publicly, just as direct evidence that

Whitehouse and Burris held themselves out publicly was relevant to that consideration.

7. Brierton also states that "[t]he Oklahoma Supreme Court has held that tax returns alone will not prove a common-law marriage," citing *Casey*, 2012 OK 93, ¶ 17. Brief, p. 18. This statement misstates *Casey*, which contains no holding as to the weight joint tax returns bear in establishing common law marriage. That case does not review a finding of common law marriage, but concerned whether counsel exposed their client to unnecessary legal consequences in a declaratory judgment action through their admissions of filing joint tax returns, while disclaiming an intent to be married.

8. Brierton cites *Sanders v. Sanders*, 1997 OK CIV APP 67, 948 P.2d 719, to suggest that the sole reason the Court affirmed a determination that movant and decedent were not married at common law was because movant had engaged in a sexual relationship with another man. However, in *Sanders*, which pre-dated *Standefer*, the Court considered a host of conflicting evidence, including an admission by movant to counsel that she was not the decedent's wife.

9. Brierton also cites *Sanders*, 1997 OK CIV APP 67, 948 P.2d 719, in support of her estoppel argument. The issue on review in *Sanders* was whether the trial court's finding that a woman was not the decedent's common law wife was against the weight of the evidence and does not address estoppel.

10. Section 3 addresses who may marry, and requirements pertaining to marriage between those under 18.

11. In *Erlandson*, the trial court's determination that common law marriage had been abrogated was based on an erroneous determination that section 5(E) had been added to the statute in 1999.

**2020 OK CIV APP 60**

**PNC BANK, NATIONAL ASSOCIATION,  
Plaintiff/Appellant, vs. UNKNOWN  
SUCCESSOR TRUSTEES OF THE ROBERT  
C. KECK REVOCABLE LIVING TRUST,  
DATED FEBRUARY 25, 1998, IF ANY,  
Defendant/Appellee, JOHN DOE, as  
Occupant of the Premises, and JANE DOE,  
as Occupant of the Premises, Defendants.**

**Case No. 118,048. July 23, 2020**

**APPEAL FROM THE DISTRICT COURT OF  
TULSA COUNTY, OKLAHOMA**

**HONORABLE DOUGLAS E. DRUMMOND,  
TRIAL JUDGE**

**AFFIRMED**

**Blake C. Parrott, BAER, TIMBERLAKE, COULSON & CATES, P.C., Oklahoma City, Oklahoma, for Plaintiff/Appellant**

**Michael W. McCoy, MCCOY LAW OFFICE,  
Broken Arrow, Oklahoma, for Defendant/  
Appellee**

**KEITH RAPP, JUDGE:**

¶1 The plaintiff, PNC Bank, National Association (PNC Bank) appeals an Order Granting Defendant's Motions to Vacate and Dismiss. The caption lists Unknown Successor Trustees of the Robert C. Keck Revocable Living Trust Dated February 25, 1998, if any, as appellant, and John Doe, as occupant of the premises, and Jane Doe, as occupant of the premises, only as defendants. The Record contains an Answer

filed by Robert C. Keck, as trustee of the Robert C. Keck Revocable Living Trust Dated February 25, 1998. Therefore, the appellee here will be referred to as “Keck Trust.”

## BACKGROUND

¶2 On June 15, 2017, PNC Bank filed this action to recover the balance due and in default on a line of credit promissory note (Instrument) and to foreclose a mortgage securing the obligation. The primary ruling at issue in this appeal is the trial court’s ruling that the action is barred by the five-year Statute of Limitations provided by 12 O.S. Supp. 2019, § 95(A)(1).<sup>1</sup> In addition, the trial court ruled that the instrument evidencing the debt was not a negotiable instrument, thereby invoking the five-year period.

¶3 PNC Bank stated in the petition’s affidavit exhibit that it acquired the note and mortgage from the original obligee. Keck Trust incurred the debt on February 25, 1998. PNC Bank stated that the original Instrument was lost and attached a document represented to be a computer record copy.

¶4 The Instrument is styled “Pruprime Plus Home Equity Line of Credit.” The credit limit is \$72,000.00. The unpaid balance was alleged to be \$69,000.00 plus interest. The “promise to pay” provision is to pay the line of credit advances. The Instrument calls for a minimum monthly payment of finance charges of the then current line of credit only for a specified period and thereafter a designated fraction of the amount drawn on the credit line plus finance charges, also on a monthly basis. The Instrument authorizes the holder to declare the entire balance due in full in the event of default. The Instrument also provides that the law of Georgia shall govern.

¶5 The petition alleged the date of default to be October 17, 2010, and that no payments have been made since that time. The petition asked for *in rem* judgment of foreclosure for the whole amount due.

¶6 On July 11, 2000, Keck Trust executed the mortgage which is the subject of this action. The mortgage recites that it is given to secure a revolving line of credit. The definitions in the mortgage describe the above line of credit Instrument as the secured obligation. The mortgage authorizes the lender to accelerate the balances of the loan in the event of default. The applicable law provision lists federal law and Georgia law as governing, except Oklaho-

ma law applies as to procedural matters related to the enforcement of lender’s rights and remedies against the mortgage property.<sup>2</sup>

¶7 Keck Trust filed an Answer. In the Answer, Keck Trust raised several defenses including that the Instrument evidencing the debt is not a negotiable instrument and enforcement is barred by the Statute of Limitations, but without specifying which limitation period.

¶8 PNC Bank filed a motion for summary judgment. The motion set out the obligation, the mortgage securing the obligation, the default and an account of the amount due and owing. The motion also stated that PNC Bank was entitled to enforce the obligation and mortgage represented by the original Instrument and mortgage.

¶9 Keck Trust responded and moved to dismiss the action. The response denied that PNC Bank was entitled to enforce the obligation. The response then added additional facts in support of the Statute of Limitations defense and motion to dismiss. Some of these additional facts appear in the petition and some do not. PNC Bank then argued that the response was insufficient.

¶10 The trial court granted the summary judgment to PNC Bank. Within thirty days, Keck Trust filed a Motion to Vacate and to Dismiss Case. The arguments in support of the motion reiterated the summary judgment response and emphasized the Statute of Limitations. The trial court held a hearing and called for additional briefing on the Statute of Limitations issue.

¶11 At this juncture, the “additional facts” became undisputed although the parties differed about the legal conclusions to be drawn from the facts. The “additional facts” pertained to the litigation history. This history shows:

1. PNC Bank sued on June 14, 2005, and called the entire obligation due.
2. The 2005 case was dismissed by PNC Bank on January 11, 2006.
3. PNC Bank filed again on August 29, 2006, and called the entire obligation due.
4. The second case was dismissed by PNC Bank on January 4, 2007.
5. PNC Bank filed a third case on November 27, 2007, and called the entire obligation due.

6. The third case was dismissed by PNC Bank on December 6, 2007.

7. PNC filed again on July 15, 2008, and called the entire obligation due.

8. PNC Bank dismissed the fourth case in January of 2010.

9. PNC Bank filed again on January 13, 2012, and called the entire obligation due. The claimed default date was October 17, 2010.

10. PNC Bank dismissed this fifth case on August 17, 2012.

11. PNC filed the present case on June 15, 2017. The petition alleges a default date of October 17, 2010. The petition also alleges acceleration of all sums due.

¶12 The primary argument advanced by Keck Trust is that when PNC Bank accelerated the obligation in its January 13, 2012 action, this established a date for the beginning of the Statute of Limitations and the time to bring a lawsuit expired five years later. Keck Trust argued for the five-year period on the ground that the Instrument evidencing the obligation was not a negotiable instrument because it did not provide for a sum certain. Thus, the six-year period applicable to negotiable instruments would not apply.

¶13 Keck Trust maintained that PNC Bank, having accelerated the obligation, cannot deaccelerate. Keck Trust argued that deacceleration is either barred legally, or, if permitted, requires an affirmative act which was not done, or that the provisions of the note and mortgage prevent deacceleration, or were not followed.

¶14 PNC Bank first disputes the argument that the Instrument is not negotiable. PNC Bank maintains that the \$72,000.00 credit line limit satisfied the sum certain requirement.<sup>3</sup> Next, PNC Bank argues the rule that the Statute of Limitations runs as to each individual installment when the obligation is an installment payment obligation. This appears to be an argument for only a partial bar of the claim.

¶15 In a supplemental response, PNC Bank argued that the voluntary dismissal of the previous case operated to deaccelerate the acceleration of the installments as pled in the prior case. PNC Bank further maintained that the voluntary dismissal restored the parties to their prior (not accelerated) state.

¶16 The trial court entered a detailed Order Granting Defendant's Motions to Vacate and Dismiss. PNC Bank appeals.

## STANDARD OF REVIEW

¶17 Here, the trial court's vacation of the summary judgment was an exercise of its authority to do so pursuant to 12 O.S. Supp. 2019, § 1031.1. This decision is reviewed for abuse of virtually unlimited discretion. "Trial judges enjoy plenary term-time control with 'a very wide and extended discretion' that has been described as 'almost unlimited.' While the power to entertain a *new-trial* motion is limited to § 651 grounds, the § 1031.1 term-time power is *coextensive* with the common law and hence remains unfettered by statutory grounds." *Schepp v. Hess*, 1989 OK 28, ¶ 9, 770 P.2d 34, 38 (citations omitted).

¶18 The decision about which Statute of Limitations would apply and the decision to apply the selected Statute of Limitations present issues of law. The relevant facts are not in dispute. "Issues of law are reviewable by a *de novo* standard. An appellate court claims for itself plenary, independent and non-deferential authority to re-examine a trial court's legal rulings." *Neil Acquisition, L.L.C. v. Wingrod Investment Corp.*, 1996 OK 125, n.1, 932 P.2d 1100.

## ANALYSIS AND REVIEW

### a. Choice of Statute of Limitations

¶19 As recognized by the trial court, the choice is between a six-year limitation, 12A O.S.2011, § 3-118(a)<sup>4</sup>, applicable to negotiable instruments, and a five-year limitation applicable to written agreements. 12 O.S. Supp. 2019, § 95(A)(1).

¶20 The statutes define a negotiable instrument and its elements. To qualify as a negotiable instrument, an instrument must strictly comply with the statute. *Shepherd Mall State Bank v. Johnson*, 1979 OK 135, ¶ 4, 603 P.2d 1115, 1117. One requirement is that the instrument must be to pay a fixed sum of money. Title 12A O.S.2011, § 3-104(a) provides:

- a) Except as provided in subsections (c) and (d) of this section, "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order.<sup>5</sup>



¶21 *Resolution Trust Corp. v. Oaks Apartments Joint Venture*, 966 F.2d 995, 1001-02 (5th Cir. 1992), disposes of the issue. After reviewing the terms of the line of credit Instrument here and citing *Resolution Trust Corp.* and other authority, the trial court ruled that the Instrument was not a negotiable instrument because according to 12A O.S.2011, § 3-104, a writing is not a negotiable instrument unless it is signed by the maker or drawer; contains an unconditional promise or order to pay a sum certain and no other promise; and is payable on demand or at a definite time. In *Resolution Trust Corp.*, the instrument called for payment of two million dollars “or so much thereof as may be advanced.” Here, Keck Trust was obligated to pay “the line of credit advances.”

¶22 The trial court then ruled that the six-year limitation applicable only to negotiable instruments did not apply and the five-year limitation period did apply.

¶23 After independent review of the Instrument and the authority, this Court holds that the Instrument is not a negotiable instrument. The trial court’s ruling that the Instrument is not a negotiable instrument and that the five-year Statute of Limitations applies is also affirmed pursuant to Okla.Sup.Ct.R. 1.202(d), 12 O.S.2011, Ch. 15, App. 1.<sup>6</sup>

#### **b. Whether PNC Bank’s Claim is Barred**

¶24 When a debtor under an installment payment obligation defaults on the installments, the Statute of Limitations begins as to each installment. *Oklahoma Brick Corp. v. McCall*, 1972 OK 70, 497 P.2d 215. The reason is that the obligation matures to becoming due as to each installment and thus provides the basis for being able to sue in case of default.<sup>7</sup> In other words, prior to an installment becoming due and a default occurring, the creditor could not successfully prosecute a cause of action as to future installments.

¶25 However, here, there is a provision in the Instrument and the mortgage authorizing acceleration of all installments in the event of default. PNC Bank does not dispute that when there is an acceleration provision, and it is duly exercised, the applicable Statute of Limitations commences on the date of acceleration and makes the entire obligation then due. *See* 12A O.S.2011, § 3-118(a), which makes this rule applicable to negotiable instruments.

¶26 The trial court concluded that Oklahoma law is that the Statute of Limitations begins to run as to the entire obligation when the installments are accelerated after default. The trial court cited several cases from other jurisdictions. The citations include *EMC Mortgage Corp. v. Patella*, 720 N.Y.S.2d 161 (N.Y. App. Div. 2001) (“The law is well settled that, even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt.”) (citations omitted); *Imbody v. Fifth Third Bank*, 12 N.E.3d 943 (Ind. Ct. App. 2014) (statute generally begins to run only when the creditor exercises its option to accelerate); *Sparta State Bank v. Covell*, 495 N.W.2d 817 (Mich. Ct. App. 1992) (acceleration of installments starts the Statute of Limitations). The trial court also referenced an unreported case from the United States Northern District of Oklahoma where that court concluded that acceleration of the installments of an installment note causes the Statute of Limitations to run against the entire obligation. *Monroe v. Bank of America Corp.*, Case No. 17-CV-248-JED-JFJ, 2018 WL 1525357 (N.D. Okla. 2018).

¶27 In *Monroe*, Monroe sought a declaratory judgment that an installment note and mortgage were barred by the Statute of Limitations because Bank of America, N.A. (BANA) had accelerated the obligation. On March 10, 2011, BANA filed an action in the Tulsa County District Court to collect the note and accelerate the balance of installments. This lawsuit was dismissed without prejudice on October 17, 2012. The Court rejected a motion to dismiss Monroe’s claim. In doing so, the court concluded that an election to accelerate the maturity of a note caused the statute of limitations to begin to run against the whole amount due and payable.<sup>8</sup>

¶28 The *Monroe* court also examined early Oklahoma law where, in its syllabi, the Oklahoma Supreme Court stated:

1. A provision in a note and mortgage that, if the mortgagor shall fail to perform any of the conditions therein, such as failure to make due and prompt payment of any installment, or part of the principal or interest, or neglect to pay taxes, the entire principal sum shall become due and payable at the option of the mortgagee, is a legal and valid provision. Such a provision for acceleration is permissive only and not self-executing; *it makes the*

*whole debt due and collectible only in case the mortgagee elects to exercise the option.*

2. Where the note and mortgage provide for acceleration, the statute of limitation does not begin to run from date of partial default, but only from the maturity of the full principal or of the last installment of the principal, *unless the creditor elects to declare the whole amount due.*
3. The exercise of an option to accelerate maturity of a note should be in a manner clear and unequivocal so as to leave no doubt as to the holder's intention. Such an intention may be evidenced by declarations, but to be effective the declaration must be followed by an affirmative act towards enforcing the declared intention.

*Union Central Life Ins. Co. v. Adams*, 1934 OK 693, Syl. 1, 2, 3, 38 P.2d 26 (emphasis added).

¶29 However, *Union Central Life Ins. Co.* came before the Court in 1971 and was overruled, in part. The *Monroe* court analyzed the subsequent ruling and concluded that Oklahoma law provides that when an acceleration authority in an installment obligation is exercised the entire obligation becomes due and the Statute of Limitations starts when the creditor accelerates the obligation.

¶30 In its analysis, the *Monroe* court stated:

*Union Central* was later overturned in part by the Oklahoma Supreme Court in *Oklahoma Brick Corp. v. McCall*, 497 P.2d 215 (Okla. 1972). In *McCall*, the court provided that, contrary to the statement of law in *Union Central*, the statute of limitations begins to run on an installment note against each installment on the day following its maturity. *Id.* at 217. The court noted that the statement of law in *Union Central* was "not warranted by the facts and not necessary to the decision in the case," since the central issue in *Union Central* concerned the possible acceleration of a note. *Id.* at 216. *McCall*, thus, clarified how the statute of limitations generally applies to installment notes, but it did not disturb the rule that an election to accelerate the maturity of a note causes the statute of limitations to begin to run against the whole amount due.

This interpretation is supported by *Bankers Trust Co. of California, N.A. v. Wallis*, 280 P.3d 974 (Okla. Civ. App. 2012). In *Wallis*,

two homeowners executed a note and mortgage payable in monthly installments. *Id.* at 975. The bank initially filed a foreclosure suit on February 29, 2000. *Id.* This original foreclosure suit was dismissed without prejudice for failure to prosecute, and a new case was filed in May 2005. *Id.* The trial court in the new case determined that the filing of the initial suit accelerated the due date of the debt. *Id.* at 977 n.10. On appeal, the Oklahoma Court of Civil Appeals applied the statute of limitations starting from the February 29, 2000, "accelerated due date" to determine that the 2005 case was timely filed. *Id.* at 976 n.8. Although the note and mortgage had contemplated installments through 2012, *see id.* at 976, this did not prevent the statute of limitations from beginning to run when the bank elected to accelerate the due date for the entire balance.

Defendant Wilmington's [Savings Bank] argument that the alleged acceleration in 2011 did not cause the statute of limitations to begin to run is contrary to Oklahoma law.

*Monroe*, 2018 WL 1525357, 3-4. This Court agrees with the analysis and conclusion in *Monroe*.

¶31 The trial court's ruling that PNC Bank accelerated the installments and made the entire balance due in its January 2012 lawsuit is affirmed pursuant to Okla.Sup.Ct.R. 1.202(d), 12 O.S.2011, Ch. 15, App. 1. The trial court's findings of fact, conclusions of law, and decision are adequately and correctly explained in the trial court's Order Granting Defendant's Motions to Vacate and Dismiss.

¶32 This brings the review to the question of whether PNC Bank can legally deaccelerate, or unwind, its acceleration of the balance due and, if so, what is required and did PNC Bank meet the requirement to deaccelerate. In the absence of a reversal of the acceleration by PNC Bank of this obligation, it is clear that the five-year Statute of Limitations bars PNC Bank's claim.

### c. Deacceleration and Did It Occur

¶33 Deacceleration is the undoing of the acceleration. *Progressive Acquisition, Inc. v. Lytle*, 806 P.2d 239 (Utah Ct. App. 1991). A lender may revoke its election to accelerate the mortgage.

¶34 First, however, the installment contract must authorize the lender to accelerate the entire debt in the event of default. *Cahill v. Kilgore*, 1960 OK 88, 350 P.2d 928 (acceleration clause in mortgage permits acceleration of installments); see, *Harris v. Heron*, 1944 OK 219, ¶ 4, 149 P.2d 94, 94-95 (authorities cited are authority for the rule that payment to be made in installments under contract which gives the payee an option to accelerate the date of payment is for the benefit of payee).

¶35 In all cases involving acceleration there was existing contractual authority for acceleration. In the absence of a contractual right to accelerate, each installment breach is a separate cause of action and a separate start of the Statute of Limitations. *Oklahoma Brick Corp. v. McCall*, 1972 OK 70, 497 P.2d 215. Thus, acceleration is a fundamental change in the debtor-creditor contractual relationship, so a contract provision is absolutely required.

¶36 Deacceleration is likewise a fundamental change in the debtor-creditor contractual relationship. Acceleration transforms an installment debt into a single payment debt which is due and payable. Deacceleration transforms that single payment debt into an installment obligation and the future payments are no longer due and payable immediately.

¶37 Therefore, it is mandatory that there must be a deacceleration clause in the instrument evidencing the debt or the instrument evidencing security for the debt. Moreover, this Court notes that here the parties have contractually anticipated that any change or amendment to the contract must be in writing. The parties' contracts here do not have a deacceleration clause.

¶38 Second, the lender deaccelerates by an affirmative act of revocation occurring during the statute of limitations period following the action where acceleration was invoked. *Bank of New York Mellon v. Alli*, 109 N.Y.S.3d 398 (N.Y. App. Div. 2019). This includes timely notice of acceleration to the debtor. This notice can be waived in the contract. *Cruce v. Eureka Life Ins. Co. of America*, 696 S.W.2d 656, 656-57 (Tex. App. 1985) (citations omitted).<sup>9</sup>

¶39 The Texas appellate courts speak of abandonment of the acceleration of the debt installments.

Once a lender has accelerated the maturity date of the note, the lender can restore the

original maturity date – and therefore reset the running of limitations – by abandoning the acceleration as though it had never happened. Abandonment is based on the concept of waiver, which requires the showing of three elements: (1) the party has an existing right; (2) the party has actual knowledge of the right; and (3) the party actually intends to relinquish the right, or engages in intentional conduct inconsistent with the right.

The best means of achieving an abandonment is through written notice of rescission. But that method is not exclusive. Abandonment can also be accomplished through an agreement between the parties or through other joint actions. For example, abandonment is considered complete when the borrower resumes making installment payments after an event of default and the lender accepts those payments without exacting any remedies available to it despite a previously declared acceleration.

Whether a lender has abandoned an acceleration is generally a question of fact. But when the facts are admitted or clearly established, abandonment may sometimes be determined as a matter of law.

*Swoboda v. Ocwen Loan Servicing, LLC*, 579 S.W.3d 628, 632-33 (Tex. App. 2019) (citations omitted).

¶40 In *Andra R. Miller Designs, LLC v. U. S. Bank, N.A.*, 418 P.3d 1038 (Ariz. Ct. App. 2018), an express notice of deacceleration was required. The bank had recorded a cancellation of a trustee's deed sale.<sup>10</sup> The Court stated that a mere recording of a cancellation of a sale did not operate as a deacceleration. However, the cancellation also contained express notice of deacceleration, so the limitations period did not expire.

¶41 The Appellate Record here shows: (1) There is no specific provision in the Instrument or the mortgage authorizing deacceleration or providing instruction on how to accomplish deacceleration; (2) There is no separate agreement of the parties for deacceleration; (3) The alleged date of default precedes the petition filing date and there is no showing that Keck Trust renewed payments according to the installment provisions; (4) There is a series of lawsuits and dismissals; and, (5) There is no specific, overt act on the part of PNC Bank expressly informing Keck Trust that PNC Bank

deaccelerated its acceleration of the Instrument and mortgage. In addition, the Appellate Record does not show any specific prejudice to Keck Trust.

¶42 PNC Bank relies upon its voluntary dismissal as the evidence of its deacceleration and argues also that the voluntary dismissal returned the parties to their status prior to the dismissed lawsuit. The Appellate Record does not show any notice from PNC Bank accompanying or following the dismissals stating that it no longer accelerated the installments.

¶43 PNC Bank cites *Deutsche Bank Trust Co. Americas v. Beauvais*, 188 So.3d 938 (Fla. Dist. Ct. App. 2016) for the proposition that a voluntary dismissal serves as a deacceleration. However, that is not the precise holding of the Florida court.

¶44 Deutsche Bank sued and accelerated the obligation in 2007. The Florida court stated that this triggered the statute of limitations. That court further ruled that the dismissal of that action restored the parties to their original position. The second lawsuit *involved a subsequent default*. The Florida court ruled:

We therefore conclude that dismissal of a foreclosure action accelerating payment on one default does not bar a subsequent foreclosure action on a later default *if the subsequent default occurred within five years of the subsequent action*.

*Id.* at 944 (emphasis added).

¶45 The Florida Court of Appeal cases follow from *Singleton v. Greymar Associates*, 882 So.2d 1004 (Fla. 2004). *Singleton* involved a second foreclosure action after the first was involuntarily dismissed by the trial court. Under Florida law, an involuntary dismissal constitutes an adjudication on the merits, so the debtor alleged *res judicata*. The Court ruled that “when a second and separate action for foreclosure is sought for a default that involves a separate period of default from the one alleged in the first action, the case is not necessarily barred by *res judicata*.” *Singleton*, 882 So.2d at 1006-07.

¶46 The Florida Supreme Court explained *Singleton* and subsequent cases in *Bartram v. U.S. Bank, N.A.*, 211 So.3d 1009 (Fla. 2016). *Singleton* was a *res judicata* based decision which ruled that an action on a second and independent default was not barred by the *res judicata*

effect of the involuntary dismissal of the first action.

¶47 However, the *Bartram* case involved an extension of *Singleton* to the case where the first action was voluntarily dismissed. The *Bartram* decision extended *Singleton* to the involuntary dismissal category but retained the subsequent default element.

The Fifth District properly extended our reasoning in *Singleton* to the statute of limitations context in a mortgage foreclosure action. Here, the Bank’s initial foreclosure action was involuntarily dismissed. Therefore, as we previously explained in *Singleton*, the dismissal returned the parties back to “the same contractual relationship with the same continuing obligations.” *Bartram* and the Bank’s prior contractual relationship gave *Bartram* the opportunity to continue making his mortgage payments, and gave the Bank the right to exercise its remedy of acceleration through a foreclosure action if *Bartram* subsequently defaulted on a payment separate from the default upon which the Bank predicated its first foreclosure action. Therefore, the Bank’s attempted prior acceleration in a foreclosure action that was involuntarily dismissed did not trigger the statute of limitations to bar future foreclosure actions *based on separate defaults*.

*Bartram*, 211 So.3d at 1022 (emphasis added).

¶48 The facts here distinguish the case under review from *Bartram*, *Singleton*, and *Deutsche Bank Trust Co. Americas*. Here, unlike those cases there is no subsequent, independent default by Keck Trust occurring after the dismissal and before the limitations period expired. PNC Bank alleged the default date to be October 17, 2010, a date almost seven years prior to the filing of the present lawsuit on June 15, 2017. In other words, PNC Bank is not claiming that Keck Trust defaulted *after* PNC Bank’s voluntary dismissal and *before* the Statute of Limitations expired. Based upon their facts and specific rulings, the Florida cases do not provide authority for PNC Bank’s argument. The same factual situation exists in PNC Bank’s other reference, *Bank of New York Mellon Corp. v. Anton*, 230 So.3d 502 (Fla. Dist. Ct. App. 2017) (the complaint in the second action alleged that mortgagee also failed to make all subsequent payments after prior dismissal).

¶49 This action by PNC Bank has additional facts. PNC Bank seeks an *in rem* judgment foreclosing its mortgage. The mortgage document provides that the mortgagee has the right to “declare the entire indebtedness immediately due and payable.”<sup>11</sup> The mortgage further provides:

Amendments. What is written in this Mortgage and in the Related Documents is Grantor’s entire agreement with Lender concerning the matters covered by this Mortgage. To be effective, any change or amendment to this Mortgage must be in writing and must be signed by whoever will be bound or obligated by the change or amendment.<sup>12</sup>

¶50 Thus, the parties have specifically contracted for acceleration and for any amendments or changes. The parties’ contract does not provide authority for deacceleration. PNC Bank’s argument here that the voluntary dismissal returns the parties to their prior status fails because the prior status requires deacceleration and there is no contractual authority for deacceleration or affirmative action to deaccelerate.

¶51 After review of the facts of this case and the authorities, this Court holds as follows. The function of the following is to provide a legal foundation and certainty in commercial installment transactions regarding the commencement of the Statute of Limitations when a creditor accelerates an installment obligation and the cessation of the running of the Statute of Limitations when the creditor deaccelerates.

¶52 First, when, as here, the instruments evidencing a debt payable in installments or security for the debt contain a provision authorizing the creditor, in the event of a default, to accelerate the future installments to make the entire debt due, then a creditor may accelerate the debt installments after default.<sup>13</sup> The creditor must conform to any contractual provisions. Unless waived in the contract, the creditor must give the debtor notice of acceleration by means reasonably calculated to inform the debtor of the acceleration.

¶53 Second, in the event that a creditor brings a legal action to recover the debt or foreclose the security and exercises the right to accelerate installments, the Statute of Limitations begins to run as to the entire obligation on the date the creditor exercises that right.

¶54 Third, a creditor may deaccelerate the election to accelerate, provided that the right to deaccelerate is included in the debt instruments or security instruments that authorize acceleration. The creditor must conform to the contractual provisions relating to deacceleration. The creditor must give notice of the deacceleration action to the debtor by means reasonably calculated to inform the debtor of the deacceleration and that the debtor’s installment obligation is reinstated. When the creditor has successfully deaccelerated, the parties are returned to their contractual relationship, including the acceleration clause in the event of a subsequent default. This does not preclude the parties from including in their debt instruments provisions and criteria for reinstatement of the debtor’s obligation after default.

¶55 Fourth, a mere voluntary dismissal of an action to recover a debt or foreclose security and which action includes acceleration of installments for a debt will not toll the running of the Statute of Limitations. In order to deaccelerate, there must be contractual authority for that action. The creditor must take affirmative action evidencing intent to deaccelerate and give notice to the debtor of deacceleration.

¶56 Here, PNC Bank has not met the criteria to deaccelerate the act of acceleration in the lawsuit filed in January 2012. As found above, the five-year Statute of Limitations applies and it has not been tolled. The action now under review was commenced more than five years later and involves the same default date. The current action is barred by the five-year Statute of Limitations. For the reasons stated above, the trial court did not err.

## CONCLUSION

¶57 Here, PNC Bank has sued to foreclose a mortgage securing a line of credit debt instrument payable in installments. More than five years ago, PNC Bank sued on the same obligation for the same default. In that action, PNC Bank exercised its contractual right to accelerate the installments and claim the entire debt to be due. PNC Bank voluntarily dismissed the earlier lawsuit. The trial court ruled that the debt instrument was not a negotiable instrument because it was not a promise to pay a sum certain. This ruling invoked the five-year Statute of Limitations rather than the six-year period applicable to negotiable instruments. The trial court dismissed the present action on

the ground that it is barred by the five-year Statute of Limitations.

¶58 The trial court's rulings that the debt instrument is not a negotiable instrument and that the five-year Statute of Limitations is invoked are summarily affirmed pursuant to Okla.Sup.Ct.R. 1.202(d), 12 O.S.2011, Ch. 15, App. 1. The issue then becomes whether PNC Bank deaccelerated by voluntarily dismissing the action PNC Bank had filed more than five years prior to the present action.

¶59 Deacceleration, like acceleration, must be authorized by the debt or security instruments. Here, there is no contractual authority to deaccelerate. Moreover, deacceleration requires an affirmative act and notice to the debtor, neither of which occurred here. The mere act of voluntary dismissal without more does not serve to deaccelerate a creditor's acceleration of the installment by the creditor or toll the Statute of Limitations. This action by PNC Bank is barred by the five-year Statute of Limitations in 12 O.S. Supp. 2019, § 95(A)(1), and the trial court correctly dismissed the action on that ground. The Order Granting Defendant's Motions to Vacate and Dismiss is affirmed.

¶60 **AFFIRMED.**

BARNES, P.J., and FISCHER, J., concur.

KEITH RAPP, JUDGE:

1. This statute provides:

A. Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

1. Within five (5) years: An action upon any contract, agreement, or promise in writing.

2. The parties argued the Oklahoma Statute of Limitations and the trial court applied the Oklahoma Statute of Limitations.

3. It does not appear that the entire line of credit was drawn by Keck Trust.

4. Section 3-118(a) reads:

(a) Except as provided in subsection (e) of this section, an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six (6) years after the due date or dates stated in the note or, if a due date is accelerated, within six (6) years after the accelerated due date.

5. The Uniform Commercial Code Comments discusses the requirements and states, "Second, the amount of money must be 'a fixed amount.'" Commentary provides useful assistance in interpretation of a statute. *Wilkerson Motor Co., Inc. v. Johnson*, 1978 OK 12, 580 P.2d 505.

6. The trial court's findings of fact, conclusions of law, and decision are adequately and correctly explained in the trial court's Order Granting Defendant's Motions to Vacate and Dismiss.

7. "The term 'then due', when applied to a debt, means the date on which payment may be required. The word 'owing' naturally implies a 'legal obligation' and has been construed to mean 'absolutely and unconditionally bound to pay.'" *Ingram v. Liberty National Bank and Trust Co. of Oklahoma City*, 1975 OK 45, ¶ 11, 533 P.2d 975, 977 (citations omitted).

8. The court did not enter a final judgment because a question existed regarding whether the six-year or five-year statute applied. This question does not exist here.

9. *Contra Baseline Financial Services v. Madison*, 278 P.3d 321, 322-23 (Ariz. Ct. App. 2012).

10. The sale cancellation is legally the equivalent of a dismissal of a lawsuit.

11. Mortgage, p. 6. Record, Tab 1, Ex. B.

12. Mortgage, p. 7. Record, Tab 1, Ex. B.

13. This Court's ruling does not preclude the parties to debt instruments from amending their agreements at any time to provide for deacceleration.

## 2020 OK CIV APP 61

### IN THE MATTER OF THE PROTEST TO THE DENIAL OF THE SALES TAX CLAIM FOR REFUND OF AT THE BEACH, LLC: AT THE BEACH, LLC, Claimant/Appellant, vs. OKLAHOMA TAX COMMISSION, Respondent/Appellee.

Case No. 118,119. October 23, 2020

ADMINISTRATIVE APPEAL FROM THE  
OKLAHOMA TAX COMMISSION

#### REVERSED

Jeffery S. Ludlam, Spencer Habluetzel, HALL & LUDLAM, PLLC, Oklahoma City, Oklahoma, for Claimant/Appellant,

Joseph P. Gappa, Elizabeth Field, Sharon R. Sitzman, OKLAHOMA TAX COMMISSION, Oklahoma City, Oklahoma, for Respondent/Appellee.

B.J. Goree, Judge:

¶1 At the Beach, LLC, (Claimant) pays sales tax to the Oklahoma Tax Commission each month. Due to an error in computation, Claimant made significant overpayments of its tax liability and it sought refunds according to Oklahoma's Uniform Tax Procedure Code. At the time Claimant overpaid its tax, the statute permitted a taxpayer to file a verified claim within three years from the date of the erroneous payment. But the statute was amended. By the time Claimant filed its claims, the new statute shortened the period to two years. Applying the two-year statute, the Commission denied a portion of the claims. Claimant appeals, asserting the three-year statute applies. We agree with Claimant and reverse the order for the reasons that follow.

#### The Parties' Arguments

¶2 Our task is to determine which statute applies.<sup>1</sup> The analysis begins with the Oklahoma Constitution. Article 5, §54 mandates that repeal of a statute shall not affect any accrued right.<sup>2</sup> The Tax Commission concluded that Claimant accrued a right to a sales tax refund but it had no substantive right to a statute of

limitations, the latter being purely procedural. According to the OTC, the amended statute does not alter Claimant's right to a sales tax refund – it limits (permissibly) the remedy by changing the operable time period. Thus, the Commission's argument is that the amended statute of limitations is to be given retroactive effect.

¶3 Claimant, on the other hand, argues that the time period is part of the right created by the statute. As an inherent element of the right to claim a refund, Claimant proposes the three-year period is substantive in nature and so the subsequent amendment shortening that period may only be given prospective effect.<sup>3</sup>

#### Analysis

¶4 The parties agree that 68 O.S. §227(a) allows a taxpayer to be refunded the amount of sales tax erroneously paid due to an error of computation. 68 O.S. §227(a).<sup>4</sup> The 2014 version of the statute [68 O.S. Supp. 2014 §227(b)] provides "Any taxpayer who has so paid any such tax may, within three (3) years from the date of payment thereof file with the Tax Commission a verified claim for refund of such tax so erroneously paid."

¶5 That paragraph was superseded August 26, 2016, and the new law [68 O.S. Supp. 2016 §227(b)(2)] provides: "Upon the effective date of this act, with respect to the [sales tax and use tax], any taxpayer who has so paid such sales or use tax may, within two (2) years from the date of payment thereof file with the Tax Commission a verified claim for refund of such tax so erroneously paid."

¶6 In summary, §227 allows for refund claims relating to state taxes.<sup>5</sup> Until August 26, 2016, a taxpayer who has erroneously overpaid may file a claim for a refund within *three* years from the date of payment. After August 26, 2016, a taxpayer who has erroneously overpaid may file a claim for a refund within *two* years from the date of payment. It is plain that the Legislature intended to limit the time for a claimant to request a refund, and the period accrues on the date the tax is overpaid.<sup>6</sup> What is unclear, though, is whether the Legislature was placing a limit on the *right* or on the *remedy*.

¶7 There are two types of statutes of limitation, those that affect the right *Hiskett v. Wells*, 1959 OK 273, ¶11, 351 P.2d 300, 303, and those that affect only the remedy. *Trinity Broadcasting Corp. v. Leeco Oil Co.*, 1984 OK 80, ¶9,

692 P.2d 1364, 1367. The distinction is determinative here because when a statute of limitations is amended, as in the present case, the amendment cannot be given retroactive effect if it affects accrued rights. *Cole v. Silverado Foods, Inc.*, 2003 OK 81, ¶7, 78 P.3d 542, 546.

¶8 When a statute creates a new liability, gives rise to an action to enforce it that was unknown to the common law, and fixes the time within which the action may be commenced, that time period is a limit on the right. *Hiskett, Id.* "A substantive statute of limitation is a condition or limitation on the right sought to be enforced." *Hiskett*, (syllabus by the Court).

¶9 Statutes affecting procedure only, as distinguished from those that affect substantive rights, may be applied retroactively. *Trinity*, ¶6. Statutes of limitation are viewed as procedural rather than substantive. *Id.* (holding that an amendment effected merely a procedural change and could be applied to pre-existing causes of action that were not barred at the time of passage). A statute of limitations does not vest rights in the length of a viable claim (until that claim becomes barred by the statute). *Cole*, ¶9. When such a statute becomes effective, it affects causes of action already in existence. *Id.*

¶10 Our analysis is significantly guided by *Sun Oil Company v. Oklahoma Tax Commission*, 1980 OK 150, 620 P.2d 896. *Sun Oil* acknowledged 68 O.S. 1971 §227 is a procedure for refund of taxes erroneously paid and stated, "if a taxpayer brought his claim within its purview he had a substantive right to the refund." *Sun Oil*, ¶8. In addition to granting a substantive right, §227 prescribes an administrative remedy to recover taxes erroneously paid. *Sun Oil, Id.* at ¶12. Although *Sun Oil* discussed the grounds for a valid refund claim rather than the *time period* for bringing it, we are persuaded the Court characterized §227 as a statute that created both a right and a remedy. This right did not previously exist at common law. *Sullivan v. Oklahoma Tax Commission*, 1954 OK 266, ¶11, 283 P.2d 521, 523 ("[T]he State cannot be sued for the recovery of taxes paid in the absence of legislative consent, and the right to recover taxes so paid must therefore be found in a statute").

¶11 The rationale for *Sun Oil* is equally applicable in the instant case. The Court observed that the claimant was seeking a refund of money paid to satisfy tax liabilities that accrued under the statute *before* it was amended. *Sun*



*Oil*, ¶8. Likewise, *At the Beach* is seeking a refund of its tax liability that accrued before 2016 when the Legislature shortened the time period for making the claim.

¶12 Shortening the time period of §227 would diminish the compensation Claimant would be entitled to under the former statute. This consequence suggests the amended statute affects a substantive right. “After-enacted legislation that *increases or diminishes* the amount of recoverable compensation or alters the elements of the claim or defense by imposition of new conditions affects the parties’ substantive rights and liabilities.” *Cole*, ¶15. This is true even in cases where the claim is not filed until after the amendment takes effect. *Amos v. Spiro Public Schools*, 2004 OK 4, ¶8, 85 P.3d 813, 816.

### Conclusion

¶13 Title 68 O.S. §227 grants a taxpayer a right to a refund of tax erroneously paid which did not exist at common law. It is a substantive right that is conditioned on a timely filed claim. The right accrues when the erroneous tax is paid and the time period to file the claim is an inherent part of that right. A subsequent amendment of the statute cannot affect accrued rights. Claimant, *At the Beach*, gained a substantive right to sales tax refunds provided that it met the claims procedures within the purview of 68 O.S. Supp.2014 §227(b). Title 68 O.S.

Supp.2016 §227(b)(2), and its two-year limitation period in particular, cannot be applied retroactively because doing so would affect an accrued right in violation of Oklahoma Constitution, Art.5, §54. Therefore, Oklahoma Tax Commission Order No. 2019-07-09-05 dated July 9, 2019, is REVERSED.

BELL, P.J., and BUETTNER, J., concur.

B.J. Goree, Judge:

1. The question involves interpretation of tax statutes which is a legal issue that calls for *de novo* review. *Matter of Protest of Hare*, 2017 OK 60, §9, 398 P.3d 317, 319..

2. “The repeal of a statute shall not revive a statute previously repealed by such statute, nor shall such repeal affect any accrued right, or penalty incurred, or proceedings begun by virtue of such repealed statute.” Okla. Const., Art.5, §54.

3. Because we agree with Claimant that the order of the OTC must be reversed because it erroneously applied 68 O.S. Supp.2016 §227(b) (2) retroactively, we decline to decide whether that statute violates the constitutional prohibition against the enactment of special legislation. Okla.Const. Art.5, §46.

4. “Any taxpayer who has paid to the State of Oklahoma, through error of fact, or computation, or misinterpretation of law, any tax collected by the Tax Commission may, as hereinafter provided, be refunded the amount of such tax so erroneously paid, without interest.” 68 O.S. Supp. 2014 §227(a). This portion of §227 was not changed by the 2016 amendment.

5. The title of the 2016 enactment is: “An Act relating to revenue and taxation; amending 68 O.S. 2011, Section 227, as amended by Section 2, Chapter 274, O.S.L. 2014 (68 O.S. Supp. 2015, Section 227), which relates to refund claims for state taxes; and modifying period of limitation with respect to sales and use tax refund claims.”

6. Generally, a statute of limitations begins to run when a cause of action accrues, and a cause of action accrues at the time when a litigant first could have maintained his action to a successful conclusion. *Sherwood Forest No. 2 Corp. v. City of Norman*, 1980 OK 191, ¶10, 632 P.2d 368, 370.



**HEY!**

**Checked out your OKBA member benefits lately?**

Every member has access to free and discounted services. Don't miss out!  
Visit [www.okbar.org/memberbenefits](http://www.okbar.org/memberbenefits) now.



# CONSUMER BROCHURES

The OBA has consumer brochures to help nonlawyers navigate legal issues. Many lawyers and firms find them helpful in explaining basic legal issues. Topics include landlord and tenant rights, employer and employee rights, small claims court, divorce, information for jurors and more! Only \$4 for a bundle of 25. To order, visit [www.okbar.org/freelegalinfo](http://www.okbar.org/freelegalinfo).



# Disposition of Cases Other Than by Published Opinion

---

## COURT OF CRIMINAL APPEALS Thursday, November 19, 2020

**F-2018-4** — Tavarreon Mingo Dickerson, Appellant, was tried by jury for the crime of first degree murder in Case No. CF-2016-2342 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at life imprisonment. The trial court sentenced accordingly. From this judgment and sentence Tavarreon Mingo Dickerson has perfected his appeal. The judgment and sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

**F-2019-509** — James Don Booker, Appellant, was tried by jury for four counts of lewd molestation in Case No. CF-2016-2606 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at three years imprisonment on each count. The trial court sentenced accordingly, ordered the sentences served consecutively, and imposed a \$500.00 fine on each count. From this judgment and sentence James Don Booker has perfected his appeal. The judgment and sentence is AFFIRMED. Opinion by Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

## COURT OF CIVIL APPEALS (Division No. 1) Wednesday, November 18, 2020

**118,262** — Phillip B. Carthen, Petitioner/Appellant, v. Oklahoma Office of Management & Enterprise Services, Respondent/Appellee. Appeal from the District Court of Payne County, Oklahoma. Honorable Stephen R. Kistler, Trial Judge. Plaintiff/Appellant Phillip B. Carthen (Carthen) appeals the trial court's dismissal of his claims against the Oklahoma Office of Management & Enterprise Risk Management (OMES) relating to Carthen's alleged bodily injuries arising from a bus crash. Finding Carthen failed to state a claim for relief, the trial court granted OMES's motion to dismiss. Carthen appeals. We AFFIRM. Opinion by Buettner, J.; Bell, P.J., and Goree, J., concur.

**117,323** — Angela Diaz, Petitioner/Appellant, v. Anthony Diaz, Respondent/Appellee. Appeal from the District Court of Delaware County, Oklahoma. Honorable Barry Denney, Trial Judge. Petitioner/Appellant Angela Diaz (Wife) appeals the trial court's division of property in the Divorce Decree dissolving the marriage between Wife and Respondent/Appellee Anthony Diaz (Husband). Specifically, Wife disputes the division of a settlement received by Husband and Wife as the result of a class action lawsuit. The entirety of Wife's settlement and a portion of Husband's settlement were placed in a joint bank account, and a portion of Husband's settlement went to an annuity in only his name. In the original Decree of Dissolution, the trial court held that the amounts deposited in the joint banking account were marital. The court also determined Husband's annuity to be marital property, dividing it equally between Husband and Wife. Husband appealed and the Court of Civil Appeals reversed the characterization of the annuity and remanded for further proceedings. On remand, the trial court determined 80% of the annuity to be for Husband's individual damages and thus his separate property, and 20% to be marital property. Wife appeals. Because the trial court's order was not an abuse of discretion or clearly against the weight of the evidence, we AFFIRM. Opinion by Buettner, J.; Bell, P.J., and Goree, J., concur.

**117,628** — In Re The Marriage of Dye: Dallas Dye, Petitioner/Appellee, v. Ashley Dye, Respondent/Appellant. Appeal from the District Court of Cleveland County, Oklahoma. Honorable Michael D. Tupper, Trial Judge. Respondent/Appellant Ashley Dye (Wife) appeals the decree of dissolution of the marriage between her and Petitioner/Appellee Dallas Dye. Wife disputes the trial court's division of the marital assets. She argues the trial court failed to divide the marital businesses and otherwise failed to make a fair and equitable division of the remaining assets. Because the trial court failed to divide the marital business and award alimony in lieu of property to Wife to reflect her share of the divided marital assets, we REVERSE AND REMAND to the trial court.

Opinion by Buettner, J.; Goree, J., concurs and Bell, P.J., dissents.

**118,520** — Jordi Lee Curtis, Petitioner/Appellee, v. Sherman Levi Grubb, IV, Respondent/Appellant, and State of Oklahoma ex rel. Department of Human Services, Child Support Enforcement, Respondent. Appeal from the District Court of Harper County, Oklahoma. Honorable Aric Alley, Trial Judge. Sherman Levi Grubb, IV, Respondent/Appellant, appeals the trial court's denial of his motion for new trial following an order in paternity proceedings commenced by Jordi Lee Curtis, Petitioner/Appellee. Appellant failed to provide a record demonstrating the alleged errors constituted an abuse of discretion. **AFFIRMED**. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

**119,100** — Garvin Agee Carlton, P.C., Plaintiff/Appellant, v. Brent Coon, P.C., Defendant/Appellee. Appeal from the District Court of Garvin County, Oklahoma. Honorable Michael D. Tupper, Trial Judge. Garvin Agee Carlton, P.C., Plaintiff/Appellant, commenced an action against Brent Coon & Associates, Defendant/Appellee, to recover a contingency fee for legal services performed as local counsel. It is undisputed that the parties entered into a fee sharing contingency contract relating to a recovery by a client who did not confirm the agreement in writing as required by Rule 1.5(e)(2) of the Oklahoma Rules of Professional Conduct. The district court's summary judgment determining the contract is unenforceable is **AFFIRMED**. Opinion by Goree, J.; Buettner, J., concurs and Bell, P.J., dissents.

### Wednesday, November 25, 2020

**117,408** — Prosperity Bank, Plaintiff/Appellant/Counter-Appellee, v. JTG Ventures, LLC and Jeffrey Wolf, Defendants/Appellees/Counter-Appellants. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Daman H. Cantrell, Judge. Plaintiff/Appellant/Counter-Appellee, Prosperity Bank (Bank), appeals from the trial court's judgment, entered on a jury verdict, in favor of Defendants/Appellees/Counter-Appellants, JTG Ventures, LLC, and Jeffrey Wolf, in Bank's action to foreclose a commercial mortgage and enforce a promissory note and guaranty agreement. Specifically, Bank asserts it is entitled to judgment as a matter of law on its guaranty claim against Wolf, the trial court erred in refusing to submit its proffered instruction concerning circumstan-

tial evidence and the court abused its discretion by allowing Defendants to amend their answer. Defendants counter-appeal, claiming the trial court erred in giving and rejecting certain jury instructions, by granting an order enforcing the assignment of rents, by issuing contempt citations and by denying Defendants' motion to file a counterclaim. For the reasons set forth below, we affirm the trial court's judgment. Opinion by Bell, P.J., Buettner, J., and Goree, J., concur.

**118,678** — In The Matter Of: E.R., A.C., B.C., K.C., N.C., Alleged Deprived Children. State of Oklahoma, Petitioner/Appellee, v. Nieisha Cray, Respondent/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Trevor Pemberton, Trial Judge. Respondent/Appellant, Nieisha Cray (Mother), appeals from the trial court's order entered upon a jury verdict terminating her parental rights to her minor children, E.R., born April 17, 2004; A.C., born February 14, 2011; B.C., born May 28, 2013; K.C., born March 20, 2016; and N.C., born July 11, 2016, deprived children. Petitioner/Appellee, the State of Oklahoma (State), sought termination of Mother's parental rights pursuant to 10A O.S. Supp. 2015 §1-4-904(B)(5) on the basis that Mother failed to correct the following conditions that led to the deprived children adjudication even though she has been given at least three (3) months to correct the conditions: Mother's home was unfit and unsafe due to mental health, domestic violence and Mother's failure to protect the children. The trial court determined the children are Indian Children under the Oklahoma Indian Child Welfare Act, 10 O.S. 2011 §40.1 *et seq.*, and the Indian Child Welfare Act, 25 U.S.C.A. §1901 *et seq.* (jointly ICWA), and that State met ICWA's active efforts requirements. The trial court found State demonstrated beyond a reasonable doubt by the testimony of a qualified witness that Mother's continued custody of the children is likely to result in serious emotional or physical damage/harm to the children. And, after a jury trial, the court found, by clear and convincing evidence, that Mother's parental rights should be terminated under §1-4-904(B)(5) for failure to correct the conditions that led to the deprived children adjudication notwithstanding that Mother was provided more than the statutory time to do so and that termination of Mother's rights was in the children's best interest. The court also found active efforts to provide remedial services and rehabilitative programs to prevent the breakup of the Indian

family have been made and have proven unsuccessful. After reviewing the record, we AFFIRM. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

**118,699** — In The Matter Of: E.R., A.C., B.C., K.C., N.C., Alleged Deprived Children. State of Oklahoma, Petitioner/Appellee, v. Donald Cray, Respondent/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Trevor Pemberton, Trial Judge. Respondent/Appellant, Donald Cray (Father), appeals from the trial court's order entered upon a jury verdict terminating his parental rights to his minor children, A.C., born February 14, 2011; B.C., born May 28, 2013; K.C., born March 20, 2016; and N.C., born July 11, 2016, deprived children. Petitioner/Appellee, the State of Oklahoma (State), sought termination of Father's parental rights pursuant to 10A O.S. Supp. 2015 §1-4-904(B)(5) on the basis that Father failed to correct the following conditions that led to the deprived children adjudication even though he has been given at least three (3) months to correct the conditions: domestic violence, failure to protect, inadequate shelter, lack of proper parental care and guardianship and threat of harm. The trial court determined the children are Indian Children under the Oklahoma Indian Child Welfare Act, 10 O.S. 2011 §40.1 *et seq.*, and the Indian Child Welfare Act, 25 U.S.C.A. §1901 *et seq.* (jointly ICWA), and that State met ICWA's active efforts requirements. The trial court found State demonstrated beyond a reasonable doubt by the testimony of a qualified witness that Father's continued custody of the children is likely to result in serious emotional or physical damage/harm to the children. And, after a jury trial, the court found, by clear and convincing evidence, that Father's parental rights should be terminated under §1-4-904(B) (5) for failure to correct the conditions that led to the deprived children adjudication notwithstanding that Father was provided more than the statutory time to do so and that termination of Father's rights was in the children's best interest. The court also found active efforts to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family have been made and have proven unsuccessful. After reviewing the record, we AFFIRM. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

**118,187** — BancFirst, an Oklahoma state banking corporation, Plaintiff/Appellee, v. Larry M. Stiles, an individual, Arnon R. Obrien,

a/k/a Arnon R. O'Brien, an individual, Petrostar Oil Company, LLC, an Oklahoma limited liability company, L&A Spendthrift Trust of 2007, L&A Spendthrift Trust of 2012, and Bosco Joe's BBQ & More, LLC, a Nevada limited liability company. Defendants/Appellants. Appeal from the District Court of Seminole County, Oklahoma. Honorable Timothy Olsen, Judge. Defendants/Appellants Larry M. Stiles, Arnon R. O'Brien, Petrostar Oil Company, LLC, L&A Spendthrift Trust of 2007, L&A Spendthrift Trust of 2012, and Bosco Joe's BBQ & More, LLC (Appellants) appeal from the trial court's second modified judgment *nunc pro tunc*. The trial court previously granted Plaintiff/Appellee BancFirst's motion to enforce mediation agreement, finding the mediation term sheet executed by the parties was a valid and enforceable agreement and ordering Appellants to comply with their obligations under the term sheet. After Appellants failed to do so, the trial court entered a judgment carrying out the terms to which the parties had agreed. Appellants contend the court erred because (1) BancFirst did not plead any claims or pray for any relief against one of Appellants; and (2) the judgment does not correctly reflect the mediation agreement. We AFFIRM. Opinion by Mitchell, P.J.; Pemberton, J., and Goree, J., (sitting by designation) concur.

#### (Division No. 2)

Friday, November 20, 2020

**117,956** — Melody Sharver and Quennion Sharver, Plaintiffs/Appellants, vs. LaDeen F. Sharver, Defendant/Appellee. Appeal from Order of the District Court of Seminole County, Hon. Timothy L. Olsen, Trial Judge. Appellants Melody and Quennion (David) Sharver appeal the district court's denial of their petition for quiet title and cancellation of a deed to Appellee LaDeen Sharver. The appellate record shows that Melody and David failed to establish a presumption of undue influence by LaDeen in the challenged transaction. The order appealed is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Fischer, J.; Barnes, P.J., and Rapp, J., concur.

**118,359** — Satera Washington, as Special Administrator of the Estate of Christopher Wortham, Jr., Plaintiff/Appellant, vs. Diversified Construction of Oklahoma, Inc., Defendant/Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Don Andrews, Trial Judge. In this wrongful death action, Plaintiff Satera Washington, Special Administrator for

the Estate of Christopher Wortham, Jr. (Decedent), appeals the trial court's order granting summary judgment in favor of Defendant Diversified Construction of Oklahoma (Diversified). Plaintiff also appeals the trial court's order denying her motion for new trial. The trial court determined, as a matter of law, that Diversified was a statutory employer of Decedent and, therefore, the exclusive remedy against Diversified was before the Workers' Compensation Commission. The evidence Diversified offered in support of its summary judgment motion was controverted and insufficient to establish, as a matter of law, a claim of immunity pursuant to the workers' compensation "Exclusive Liability/Immunity" provisions found at 85A O.S. Supp. 2014 § 5. The trial court erred in concluding as a matter of law that Diversified's status was that of a principal employer and in entering summary judgment in favor of Diversified based on that defense. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division II, by Fischer, J.; Barnes, P.J., and Rapp, J., concur.

**(Division No. 3)**  
**Thursday, November 19, 2020**

**118,750** — In the Matter of M.H. and S.H., Deprived Children; State of Oklahoma, Petitioner/Appellee, v. Ashlee Humphrey, Respondent/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Susan Johnson, Judge. Respondent/Appellant Ashlee Humphrey (Mother) challenges the termination of her parental rights to two of her children, M.H. and S.H. Mother contends Petitioner/Appellee the State of Oklahoma (the State) did not prove by clear and convincing evidence that she failed to correct the conditions leading to M.H. and S.H.'s deprived adjudication and that termination of Mother's parental rights was in the children's best interest. She further alleges she did not knowingly and voluntarily waive her right to a jury trial. The trial court's factual findings are supported by sufficient evidence, and the record does not show Mother's waiver was unknowing or involuntary. Accordingly, we AFFIRM. Opinion by Mitchell, P.J., Swinton, V.C.J., and Pemberton, J., concur.

**Wednesday, November 25, 2020**

**117,868** — Tycoon Motorsports, LLC, Plaintiff/Appellee, vs. EZ Trac Trailers, Inc., Defendant/Appellant. Appeal from the District Court

of Marshall County, Oklahoma. Honorable Wallace Coppedge, Trial Judge. EZ Trac Trailers, Inc. ("Appellant") seeks review of the trial court's February 11, 2019 order, which found the boat trailers sold by Appellant to Tycoon Motorsports, LLC ("Appellee") were defective in their design and/or workmanship and did not fit the particular purpose for which they were designed, and granted damages in favor of Appellee. Appellant also seeks review of the trial court's June 24, 2019 order granting Appellee's Motion for Attorney Fees. Appellant first contends continued use of the trailers following the discovery of the defects was the proximate cause of damages and precludes recovery for breach of warranty and consequential damages. Appellant next submits the trial court erred in awarding the purchase price of the trailers as damages for breach of warranty. Appellant's third contention is, if the judgment is reversed in whole or part, the order granting attorney fees should also be reversed. Because Appellant's first proposition of error was not presented before the trial court, we cannot address the issue on appeal. We do find, however, the trial court erred in awarding the purchase price of the trailers, and therefore, we reverse and remand to the trial court to evaluate damages pursuant to 12 O.S. §§ 2-714 - 2-715. Lastly, we affirm the trial court's order granting attorney fees. AFFIRMED IN PART, REVERSED IN PART. Opinion by Pemberton, J.; Swinton, V.C.J., and Mitchell, P.J., concur.

**117,886** — In The Matter Of: E.B.M. and E.D.M., Alleged Deprived Children, Angela Sumpter, Respondent/Appellant, vs. The State of Oklahoma, Petitioner/Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Rodney Sparkman, Trial Judge. Appellant Angela Sumpter (Mother) appeals an order terminating her parental rights to the minor children, E.B.M. and E.D.M., after a jury trial on the petition to terminate filed by Appellee State of Oklahoma (State). The order adopts the jury's separate verdicts in favor of termination for Mother's failure to correct the conditions that led to the children's adjudication as deprived, wilful failure to contribute to the children's support, and a child less than four years in foster care six out of most recent twelve months before the termination petition was filed. 10A O.S. 2011 §§ 1-4-904(B)(5), (B)(7), and (B)(17). The order is supported by clear and convincing evidence, and makes the requisite findings required by 12 O.S. 2011 § 2611.10, and is AFFIRMED. Opinion

by Swinton, V.C.J.; Mitchell, P.J., concurs and Pemberton, J., concurs Specially.

**118,536** — Vickie Elaine Franks, Petitioner/Appellant, vs. Little Dixie Community Action Agency, Compsource Mutual and The Oklahoma Workers' Compensation Commission, Re-spondents/Appellees. Vickie Elaine Franks ("Appellant") seeks review of the Order Affirming the Decision of the Administrative Law Judge, entered by the Oklahoma Workers' Compensation Commission ("Commission") sitting en banc, on December 16, 2019. Appellant contends the Commission acted arbitrarily and capriciously by failing to require application of the Fifth Edition of the A.M.A. Guides to rate Appellant's permanent partial disability of the spine. Upon review of the record and applicable law, we find, in the underlying context, the Sixth Edition of the A.M.A. Guides allows for but does not require reliance on the Fifth Edition. Therefore, we AFFIRM. Opinion by Pemberton, J.; Mitchell, P.J., and Swinton, V.C.J., concur.

**Monday, November 30, 2020**

**117,745** — Board of County Commissioners of the County of Ellis, Petitioner/Appellee, vs. J. Thurmond Ranch, LLC and Irvin Ranch, LLC, Respondents/Appellants. Appeal from the District Court of Ellis County, Oklahoma. Honorable Laurie Hays, Trial Judge. J. Thurmond Ranch, LLC and Irvin Ranch, LLC ("Appellants") seek review of the trial court's November 1, 2018 order, which granted an easement by prescription to Appellee Board of County Commissioners of Ellis County ("Appellee") to a road through Appellants' property. Appellants first contend the evidence at trial did not support a finding that Appellee acquired the contested road through adverse possession. They next submit the trial court erred in concluding that Appellee acquired a thirty-three foot wide easement along the contested road. We REVERSE the judgment as the trial court's finding of adverse possession was against the clear weight of the evidence. Opinion by Pemberton, J.; Mitchell, P.J., and Swinton, V.C.J., concur.

**118,055** — OU Federal Credit Union, Plaintiff, vs. Genevieve B. Arciga, Defendant/Appellee, vs. BRSI, LLC., Third-Party Defendant/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Aletia Haynes Timmons, Trial Judge. Third-Party Defendant/Appellant BRSI, LLC

(BRSI) appeals from an order denying in part and granting in part its motion to compel arbitration filed in a case involving Defendant/Appellee Genevieve B. Arciga's (Arciga) attempt to purchase a vehicle from BRSI. There were two separate agreements involved because Arciga did not qualify for the purchase of the original vehicle, and BRSI attempted to sell her a different vehicle, financed with Plaintiff OU Federal Credit Union (OUFCU). OUFCU filed suit against Arciga for default, and Arciga filed a counter-claim and brought in BRSI as a third-party, asserting fraudulent inducement. BRSI filed a motion to compel arbitration. The trial court granted the motion to compel arbitration as to the first agreement, but found that the second agreement to arbitrate did not have an authentic signature, and therefore denied the motion to compel as to the second agreement. We AFFIRM. Opinion by Swinton, V.C.J.; Mitchell, P.J., and Pemberton, J., concur.

**118,122** — In Re the Marriage of Plummer: Keith G. Plummer, Petitioner/Appellant, vs. Danette D. Plummer, Respondent/Appellee. Appeal from the District Court of Johnston County, Oklahoma. Honorable Laura J. Corbin, Judge. Petitioner/Appellant Keith G. Plummer (Husband) and Respondent/Appellee Danette D. Plummer (Wife) accumulated a substantial marital estate during their twenty-eight-year marriage, resulting in a contentious three-day divorce trial. Husband challenges several of the court's support alimony and property division rulings. Specifically, he contends the court erred by (1) awarding support alimony; (2) awarding additional support alimony for Wife to obtain a degree; (3) using the date of filing rather than the date of trial to value to parties' retirement accounts; and (4) overvaluing a Volkswagen van. The trial court is vested with wide discretion on these matters. *See McLaughlin v. McLaughlin*, 1999 OK 34, ¶12, 979 P.2d 257. We "will not disturb the trial court's judgment regarding property division or alimony absent an abuse of discretion or a finding that the decision is clearly contrary to the weight of the evidence." *Id.* We find the court's award for Wife to obtain a degree should be modified to \$29,000. The court's decisions are otherwise not clearly contrary to the weight of the evidence or otherwise an abuse of discretion. We AFFIRM AS MODIFIED. Opinion by Mitchell, P.J.; Swinton, V.C.J., and Pemberton, J., concur.

**(Division No. 4)**  
**Thursday, November 12, 2020**

**118,797** — In the Matter of the Adoption of A.N.S. a Minor Child: Carlos Diaz, Appellant, vs. Adam Richard Conder and Sheri Nicole Conder, Appellees. Appeal from Order of the District Court of Oklahoma County, Hon. Richard Kirby, Trial Judge. Carlos Diaz (Natural Father) appeals the trial court's determination that the adoption of A.N.S. without his consent by Stepfather was in the child's best interests and the subsequent grant of the petition for adoption. In view of the evidence presented at the hearing, we hold that the trial court's finding that the adoption of A.N.S. was in her best interests was supported by clear and convincing evidence. **AFFIRMED.** Opinion from the Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C.J., and Thornbrugh, P.J., concur.

**Tuesday, November 17, 2020**

**118,312** — In the Matter of the Guardianship of S.F. and M.F., Children under the age of 18: Lisa Mullins, Appellant, vs. Leah Dawn Cole, Appellee. Appeal from an Order of the District Court of Okmulgee County, Hon. Cynthia D. Pickering, Trial Judge. Lisa Mullins (Grandmother) appeals an order appointing Leah Dawn Cole (Aunt) general guardian of the minor children, SF and MF. Based on our review of the record, we find the court's order appointing Aunt guardian of the minor children is not against the clear weight of the evidence or contrary to law. "[T]he trial court heard the parties testify and observed their demeanor on the witness stand and is in better position to evaluate their testimony than is this court from an examination of the record of the testimony on these items." *In re Guardianship of C.D.A.*, 2009 OK 47, ¶ 10, 212 P.3d 1207 (quoting *Gibson v. Dorris*, 1963 OK 235, ¶ 3, 386 P.2d 186). Accordingly, the trial court's September 10, 2019 order appointing Aunt general guardian of the minor children, SF and MF, is affirmed. **AFFIRMED.** Opinion from the Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C.J., and, Thornbrugh, P.J., concur.

**118,114** — Dagmar Irene Blackshire, Plaintiff/Appellee, vs. Antonio Wayne Pitts, Defendant/Appellant. Appeal from an Order of the District Court of Oklahoma County, Hon. Sheila Stinson, Trial Judge. Antonio Wayne Pitts (Pitts) appeals an order denying his motion to vacate. The appellate record, however, does not contain the judgment Pitts seeks to vacate.

In addition, the record does not contain any pleadings, transcripts from the hearings, briefs, or exhibits that were before that trial court. Notably, the underlying judgment is not identified in Pitts' motion, appellate brief in chief, or anywhere in the appellate record. In the absence of a complete record, this Court must presume the trial court did not abuse its discretion. Accordingly, the trial court's order denying Pitts' Motion to Vacate Judgment is affirmed. **AFFIRMED.** Opinion from the Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C.J., and Thornbrugh, P.J., concur.

**Wednesday, November 18, 2020**

**118,523** — Betty Lively, Plaintiff/Appellant, vs. City of Duncan, a municipal corporation, Defendant/Appellee. Appeal from an Order of the District Court of Stephens County, Hon. Ken J. Graham, Trial Judge. Betty Lively (Lively) brought suit against the City on a negligence theory of recovery, and she appeals the trial court's decision granting the City summary judgment. When viewing the City's evidentiary materials, rather than arguments of counsel, in the light most favorable to Lively, the evidence at best supports conflicting inferences as to the cause of the property damage. Such conflict was properly resolved by the trier of fact, rather than the trial court. We therefore reverse the trial court's order sustaining the City's motion for summary judgment and remand this case to the trial court 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.

**Thursday, November 19, 2020**

**117,958** — Live Well Home Care, LLC, Plaintiff/Appellee, vs. Diana Marlene Elrod and Southwest Home Health Care, Inc., Defendants/Appellees, and Nicole Olcott, Appellant. Appeal from an order of the District Court of Tulsa County, Hon. Caroline Wall, Trial Judge, granting a motion to approve and confirm the sale of Appellee Southwest Home Health Care, Inc.'s business assets which were held in a receivership estate to Live Well Home Care, LLC. Former Southwest Home employee and Appellant, Nicole Olcott objected to the sale for several reasons, including but not limited to (1) the sale violating "the due process rights of the creditors," (2) "[t]here has been no public announcement of the sale or published advertise-



ment to solicit bids for the assets,” and (3) “Olcott appears to have the same creditor status (*i.e.*, an unsecured creditor with an unliquidated claim) as [Live Well]. Yet [Live Well] . . . is apparently being provided preferential status over other unsecured creditors.” Although Olcott had standing to object to the order approving and confirming the sale, we ultimately conclude, after reviewing the record and relevant law, that the trial court did not abuse its discretion in its “order authorizing and approving motion of receiver to approve sale of the business assets of the receivership estate and confirming sale.” We affirm the trial court’s order. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, C.J.; Thornbrugh, P.J., and Hixon, J., concur.

**Friday, November 20, 2020**

**118,927** — Covington Specialty Insurance a/s/o Spectrum Painting d/b/a Spectrum Plaza, Plaintiff/Appellant, vs. Firewater Supply Company, Defendant/Appellee. Appeal from an order of the District Court of Tulsa County, Hon. Caroline Wall, Trial Judge, granting the motion for summary judgment filed by Firewater Supply Company (Tenant) against Plaintiff Covington Specialty Insurance Company a/s/o Spectrum Painting d/b/a Spectrum Plaza (Insurer). Insurer argues the trial court erred in “finding that the *Sutton* Rule [*Sutton v. Jondahl*, 1975 OK CIV APP 2, 532 P.2d 478] precluded [it] from recovering in a subrogation action against [Tenant]” because “the evidence in the record establishes that the parties intended to contractually impose liability on [Tenant] for any damage to the leased premises resulting from [Tenant’s] negligence and, significantly, that the parties did not intend for [Tenant] to be a co-insured on its landlord’s policy.” We are not persuaded by Insurer’s argument that the indemnity and/or liability provision in the Lease constitutes an “express agreement” to the contrary as stated in *Sutton* in order to assert a subrogation claim against Tenant. Insurer further asserts paragraph 8(d) regarding “Tenant’s Insurance” constitutes an “express agreement” to the contrary as announced in *Sutton*. Insurer argues the “Lease expressly requires that [Tenant] purchase and maintain comprehensive public liability insurance naming [Landlord] as an ‘additional insured’ during the terms of the Lease, and such liability insurance included coverage for damages to the Lease Premises resulting from fire.” We are not persuaded this paragraph constitutes an “express

agreement” requiring Tenant to provide fire insurance. Paragraph 8(b) of the Lease clearly requires Landlord to provide fire insurance, which it did. Paragraph 8(d) requires Tenant to provide insurance for “public liability” protecting Landlord and Tenant from third-party claims. As Tenant correctly states in its reply to Insurer’s response, the public liability insurance provision does not require Tenant to obtain fire insurance to protect Landlord. We conclude, as did the trial court, that the “public liability” provision in paragraph 8(d) does not comprise an “express agreement” as anticipated in *Sutton*, and Insurer therefore may not seek subrogation from Tenant. Finding no disputed material facts, we affirm as a matter of law the trial court’s decision granting summary judgment to Tenant. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, C.J.; Thornbrugh, P.J., and Hixon, J., concur.

**ORDERS DENYING REHEARING  
(Division No. 1)**

**Thursday, November 19, 2020**

**118,156** — Curtis Mark Myers, Plaintiff, vs. Larry Steve Myers, as Co-trustee of the Patterson Revocable Living Trust; and Guy W. Jackson, as Trustee Executor of the Patterson Revocable Living Trust, Defendants, Danny Bob Myers, an individual, and Walter Kent Myers, an individual, Plaintiffs/Appellees, vs. Guy W. Jackson, individually and as Trustee of the Patterson Revocable Living Trust dated August 29, 2007, Defendant/Appellant, and Larry Steve Myers, individually and as Co-trustee of the Patterson Revocable Living Trust dated August 29, 2007, and Richard Franklin Myers, Defendants. Appellant’s Petition for Reharing, filed November 5th, 2020 is *DENIED*.

**(Division No. 2)**

**Wednesday, October 21, 2020**

**117,664** — Starr Zovak, Petitioner/Appellee, vs. David Kempf, Respondent/Appellant. Appellant’s Petition for Reharing is hereby *DENIED*.

**Tuesday, October 24, 2020**

**118,542** — Michael C. Washington, Plaintiff/Appellant, vs. John Pettis, Jr., Defendant/Appellee. Appellant’s Petition for Reharing filed November 2, 2020, is hereby *DENIED*.

**118,643** — Michael C. Washington, Plaintiff/Appellant, vs. Major Lewis Jemison, Defendant/



Appellee. Appellant's Petition for Re-hearing filed November 2, 2020, is hereby *DENIED*.

**(Division No. 3)**

**Tuesday, October 20, 2020**

**117,289** — In Re the Marriage of: Shane Franklin Bishop, Petitioner/Appellee, vs. Denley Ann Bishop, Respondent/Appellant. Respondent/Appellant's Motion for Rehearing on the Opinion filed October 9, 2020, is *DENIED*.

**117,701** (Cons. w/117,702, 117,703) — In the Matter of the Estate of Joe I. Norton Jr.: Shane Lewis, Plaintiff/Appellee, vs. Frances G. Norton, Defendant/Appellant. Appellee's Petition for Rehearing, filed October 12, 2020, is *DENIED*.

**Tuesday, October 24, 2020**

**118,237** — In the Matter of K.E.W., Deprived Child: State of Oklahoma, Petitioner/Appellee, vs. James Patrick Keenan, Jr., Respondent/Appellant. Appellant's Petition filed November 4, 2020, is *DENIED*.

**(Division No. 4)**

**Monday, November 2, 2020**

**118,211** — Gerald Edward Poe, Petitioner, vs. Multiple Injury Trust Fund and the Workers' Compensation Commission, Respondent. Petitioner's Petition for Rehearing is hereby *DENIED*.



## Every call is a client waiting to happen.

Business calls are on the rise, and you don't get a second chance to make a first impression. That's why solo and small firm attorneys across North America have been trusting Ruby® Receptionists since 2003.

With Ruby, every call is answered by a live, friendly, professional receptionist who delivers exceptional experiences. Trust is built from the first interaction and enhanced with every call, increasing the likelihood that you've got a client for life.

**Oklahoma Bar members always get a 6% monthly discount!**



**You never get a second chance to make a first impression.**



LEARN MORE AT [callruby.com/OKBar](http://callruby.com/OKBar)  
OR CALL 844-569-2889

**ruby**

# CLASSIFIED ADS

## SERVICES

### OF COUNSEL LEGAL RESOURCES – SINCE 1992

Exclusive research and writing. Top quality: trial, appellate, state, federal, U.S. Supreme Court. Dozens of published opinions. Reversals on certiorari. **MaryGaye LeBoeuf, 405-728-9925, marygayelaw@cox.net.**

WANT TO PURCHASE MINERALS AND OTHER OIL/GAS INTERESTS. Send details to: P.O. Box 13557, Denver, CO 80201.

PERFECT LEGAL PLEADINGS. Automated Oklahoma Legal Pleadings. Save hours and errors by utilizing the most comprehensive Oklahoma legal pleading production system available – Perfect Legal Pleadings. Works with Microsoft Word. PerfectLegalPleadings.org.

## POSITIONS AVAILABLE

THE OKLAHOMA BAR ASSOCIATION HEROES program is looking for several volunteer attorneys. The need for FAMILY LAW ATTORNEYS is critical, but attorneys from all practice areas are needed. All ages, all counties. Gain invaluable experience, or mentor a young attorney, while helping someone in need. For more information or to sign up, contact 405-416-7086 or [heroes@okbar.org](mailto:heroes@okbar.org).

**EDINGER LEONARD & BLAKLEY, PLLC**, an Oklahoma City AV and US News Best Law Firm focused on complex commercial litigation, is currently expanding and diversifying its practice areas. ELB is seeking established attorneys and practice groups in the areas of health care, bankruptcy, estate planning, real estate, banking and business litigation. ELB is located in the Classen Curve area in the newly remodeled NBC Bank Building, with underground parking. ELB offers a low overhead alternative with no personal lease obligations in a highly professional setting. **Inquiries should be directed to [KBlakley@ELBAttorneys.com](mailto:KBlakley@ELBAttorneys.com) or 405.848.8300. All inquiries will be confidential.**

NORMAN BASED FIRM IS SEEKING A SHARP AND MOTIVATED ATTORNEY to handle HR-related matters. Attorney will be tasked with handling all aspects of HR-related items. Experience in HR is required. Firm offers health/dental insurance, paid personal/vacation days, 401k matching program and a flexible work schedule. Members of our firm enjoy an energetic and team-oriented environment. Position location can be for any of our Norman, OKC or Tulsa offices. Submit resumes to [justin@polstontax.com](mailto:justin@polstontax.com).

## POSITIONS AVAILABLE

WATKINS TAX RESOLUTION AND ACCOUNTING FIRM is hiring attorneys for its Oklahoma City and Tulsa offices. The firm is a growing, fast-paced setting with a focus on client service in federal and state tax help (e.g. offers in compromise, penalty abatement, innocent spouse relief). Previous tax experience is not required, but previous work in customer service is preferred. Competitive salary, health insurance and 401K available. Please send a one-page resume with one-page cover letter to [Info@TaxHelpOK.com](mailto:Info@TaxHelpOK.com).

NORMAN BASED LAW FIRM IS SEEKING SHARP, MOTIVATED ATTORNEYS for fast-paced transactional work. Members of our growing firm enjoy a team atmosphere and an energetic environment. Attorneys will be part of a creative process in solving tax cases, handle an assigned caseload and will be assisted by an experienced support staff. Our firm offers health insurance benefits, paid vacation, paid personal days and a 401k matching program. No tax experience necessary. Position location can be for any of our Norman, OKC or Tulsa offices. Submit resumes to [Ryan@PolstonTax.com](mailto:Ryan@PolstonTax.com).

JUDGE ADVOCATE GENERAL'S (JAG) CORPS for Oklahoma Army National Guard is seeking qualified licensed attorneys to commission as Judge Advocates. Selected candidates will complete a six-week course at Fort Benning, Georgia followed by a ten- and one-half week Military Law course at the Judge Advocate General's Legal Center on the beautiful campus of University of Virginia in Charlottesville, Virginia. This is not a full-time employment position. Judge Advocates in the Oklahoma National Guard will ordinarily drill one weekend a month and complete a two-week Annual Training each year. Benefits include low cost health, dental, and life insurance, PX and commissary privileges, 401(k) type savings plan, free CLE, and more! For additional information contact CPT Rebecca Pettit, email [Rebecca.l.pettit.mil@mail.mil](mailto:Rebecca.l.pettit.mil@mail.mil) or call 405-228-5052.

THE U.S. ATTORNEY'S OFFICE FOR THE WESTERN DISTRICT OF OKLAHOMA is seeking applicants for one or more Assistant U.S. Attorney positions which will be assigned to the Criminal Division. Salary is based on the number of years of professional attorney experience. Applicants must possess a J.D., be an active member of the bar in good standing (any U.S. jurisdiction) and have at least three (3) years post-J.D. legal or other relevant experience. See vacancy announcement 21-OKW-10972121-A-02 at [www.usajobs.gov](http://www.usajobs.gov) (Exec Office for US Attorneys). Applications must be submitted online. See How to Apply section of announcement for specific information. Questions may be directed to Lisa Engelke, Administrative Officer, via e-mail at [lisa.engelke@usdoj.gov](mailto:lisa.engelke@usdoj.gov). This announcement will close on December 11, 2020.

## POSITIONS AVAILABLE

OKC AV RATED LAW FIRM SEEKING ASSOCIATE with excellent litigation, research, and writing skills, 1-5 years' experience for general civil/commercial defense practice, health care law. Must have solid litigation experience for all phases of Pretrial discovery and Trial experience with excellent research and writing skills. Submit a confidential resume with references, writing sample and salary requirements to Box BC, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

### VACANCY ANNOUNCEMENT

The Wyandotte Nation Tribal Court is in search of an individual to fill the position of Supreme Court Justice. To be eligible for selection or confirmation as a Justice of the Supreme Court, a person shall: be an attorney, be a licensed attorney who is in good standing with the licensing authorities where licensed; who possesses a demonstrated background in tribal court practice and has demonstrated moral integrity and fairness in their business, public and private life; and has never been convicted of a felony or an offense, except traffic offenses, for a period of two years next preceding their appointment. The two-year period shall begin to run from the date the person was unconditionally released from supervision of any sort as a result of a conviction. The candidate must have regularly abstained from the excessive use of alcohol and use of illegal drugs or psychotic chemical solvents. The candidate must not be less than twenty-five (25) years of age.

**Indian preference will apply for qualified candidates.**

**Please submit your resume or CV to Samantha Proctor, Court Administrator via email to [sproctor@wyandottenation.org](mailto:sproctor@wyandottenation.org) by Dec. 20, 2020.**

MANSELL ENGEL & COLE is hiring paralegals for its beautiful office in downtown Oklahoma City. The firm focuses in plaintiff's insurance bad faith litigation. Firm is a laidback atmosphere and does not require billing time. Previous civil litigation and federal filing experience is preferred, but not required. Willing to invest in someone talented and eager to learn this area of the law. Competitive salary, health insurance and 401K available. Please send a cover letter and resume to Adam Engel ([aengel@meclaw.net](mailto:aengel@meclaw.net)) and Jordyn Cartmell ([jcartmell@meclaw.net](mailto:jcartmell@meclaw.net)).

MEDIUM SIZED PRIVATE INVESTMENT FIRM IN OKC has an opening for in-house counsel. This position is an excellent opportunity for a long-term position with a fast-growing company. In-house counsel must have business as well as litigation experience. This position does relate to oil or gas. This is an immediate opening, send resume to [hiringmanagerokc1@gmail.com](mailto:hiringmanagerokc1@gmail.com).

SOUTH OKLAHOMA CITY LAW FIRM has opening for attorney with Workers' Compensation experience and attorney with Social Security experience. Please send replies to Box CP, Oklahoma Bar Association, P. O. Box 53036, Oklahoma City, OK 73152.

## POSITIONS AVAILABLE

EL RENO ASSISTANT DISTRICT ATTORNEY. District Attorney Mike Fields seeks an experienced prosecutor for a newly created family justice center located within the Canadian County Juvenile Justice Center. Duties will include prosecuting domestic violence, sexual assault, child abuse and juvenile cases while acting as a liaison with family justice center partners, including service providers, law enforcement, legal aid and family justice center staff to promote better outcomes for victims of violence. Compensation includes salary plus full state benefits including retirement.

WATONGA ASSISTANT DISTRICT ATTORNEY. District Attorney Mike Fields seeks an experienced prosecutor for the Blaine County District Attorney's Office. Duties include prosecuting a wide range of criminal cases, providing civil advice to county officials and overseeing the day-to-day operations of the office. Compensation includes salary plus full state benefits including retirement.

ASSISTANT DISTRICT ATTORNEY POSITION AVAILABLE: Grant Position. Primary responsibilities include the criminal prosecution of all domestic violence and sexual assault offenses, both felony and misdemeanor, provide training and advice to local law enforcement on cases involving domestic violence and sexual assault, and perform other duties as assigned. Requires a J.D. from an accredited law school, legal experience in criminal law and prior courtroom experience (3+ years) preferred. Must be admitted to the Oklahoma State Bar and be in good standing. Salary DOE. Send resume by mail postmarked no later than December 28, 2020, to the following address: LeFlore County District Attorney's Office, Attn: Margaret Nicholson, 100 S. Broadway, Room 300, Poteau, OK 74953, Office 918-647-2245, Fax 918-647-3209.

ESTABLISHED OKLAHOMA CITY CIVIL LITIGATION LAW FIRM seeks an associate attorney with at least three (3) years civil litigation experience to assist with business transactions, employment law matters and litigation. Must have experience in civil litigation discovery matters. Must be self-motivated, organized and able to handle caseload independently. Strong analytical writing and oral advocacy skills are required. Firm offers a competitive salary and benefits package. Resumes should be sent to Cheek & Falcone PLLC, Attn: Angela Hladik, 6301 Waterford Blvd., Suite 320, Oklahoma City, OK 73118 or [ahladik@cheekfalcone.com](mailto:ahladik@cheekfalcone.com). All applications will remain confidential.

ESTABLISHED OKLAHOMA CITY CIVIL LITIGATION LAW FIRM seeks a legal secretary/legal assistant. Must be detail oriented, organized and experienced with docketing. Transcription experience is a plus. Firm offers a competitive salary and benefits package. Resumes should be sent to Cheek & Falcone PLLC, Attn: Angela Hladik, 6301 Waterford Blvd., Suite 320, Oklahoma City, OK 73118 or [ahladik@cheekfalcone.com](mailto:ahladik@cheekfalcone.com). All applications will remain confidential.

FRIDAY., DEC. 18, 2020

9 - 11:40 A.M. MORNING PROGRAM

12:40 - 3:30 P.M. AFTERNOON PROGRAM



MCLE 3/0 MORNING PROGRAM

MCLE 3/1 AFTERNOON PROGRAM



FEATURED PRESENTER:

**Cynthia Sharp, Esq.**

*Business Development Leader,*

*ABA GPSolo Trainer of the Year, 2019*

Stay up-to-date and follow us on



TO REGISTER GO TO [WWW.OKBAR.ORG/CLE](http://WWW.OKBAR.ORG/CLE)



## MORNING PROGRAM

# THE LAWYER'S GUIDE TO FINANCIAL PLANNING

This program explores essential financial and tax concepts that all lawyers must know in order to properly guide clients as well as to secure their own economic futures. The content of the program is based upon my book *The Lawyers' Guide to Financial Planning* published by ABA Book Publishing in June of 2014.



## AFTERNOON PROGRAM

# 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.



THURSDAY & FRIDAY,  
DEC. 10 & 11, 2020  
9 A.M. - 2:50 P.M.



MCLE 12/1 BOTH DAYS

6/0 DAY ONE

6/1 DAY TWO

Stay up-to-date and follow us on



TO REGISTER GO TO [WWW.OKBAR.ORG/CLE](http://WWW.OKBAR.ORG/CLE)



TEXAS CREDIT  
APPROVED

# 2020 LEGAL UPDATES

## DAY ONE:

### **Bankruptcy Law**

*Sam G. Bratton, II, Doerner Saunders Daniel & Anderson, Tulsa*

### **Labor and Employment Law**

*Jake Crawford and Charlie Plumb, McAfee & Taft, Tulsa*

*Josh Solberg, McAfee & Taft, Oklahoma City*

### **Health Law**

*David Hyman, Tulsa*

*Eric Fisher, Crowe & Dunlevy, Oklahoma City*

### **Criminal Law**

*Barry L. Derryberry, Assistant Federal Public Defender, Tulsa*

### **Oklahoma Tax Law**

*Rachel Pappy, Partner, Polston Tax Resolution & Accounting*

### **Insurance Law**

*Rex Travis, Travis Law*

## DAY TWO:

### **Business and Corporate Law**

*Gary Derrick, Derrick and Briggs, LLP, Oklahoma City*

### **Family Law**

*Professor Robert Spector, University of Oklahoma College of Law, Norman*

### **Real Property Law**

*Kraettli Epperson, Mee Mee Hoge & Epperson, PLLP, Oklahoma City*

### **Estate Planning & Probate Law**

*David P. Hartwell, Oklahoma City*

### **Law Office Management and Technology**

*Jim Calloway, Director of Management Assistance Program, OBA*

### **Ethics**

*Gina Hendryx, General Counsel, OBA*