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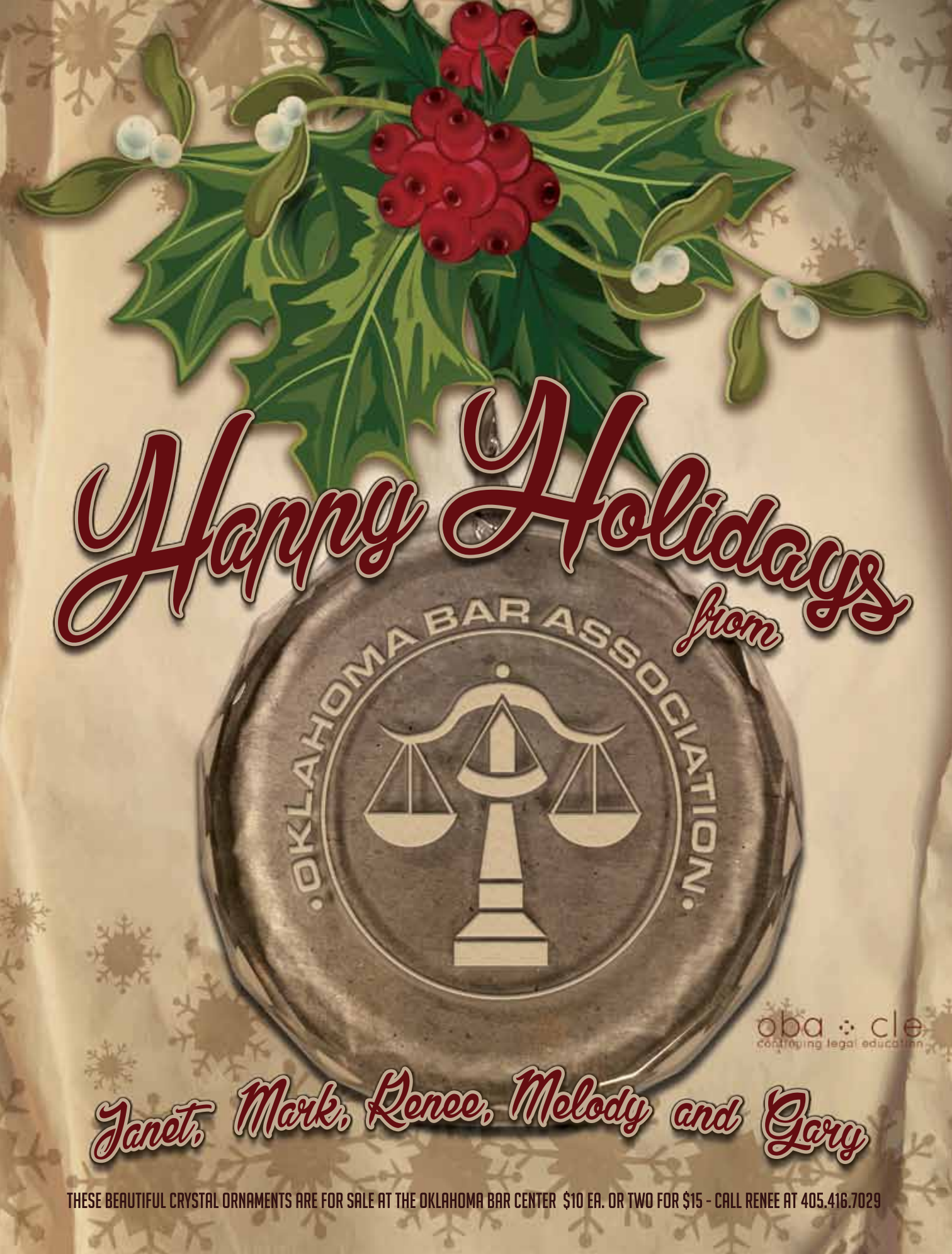
Court Issue



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THE OKLAHOMA BAR
Journal

Volume 91 – No. 24 – Dec. 18, 2020

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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. December 2, 2020

SUPPLEMENT TO ORDER CORRECTING OPINION

The purpose of this Supplement to Order Correcting Opinion is to include the public domain cite which was omitted in the Order Correcting Opinion filed on November 24, 2020 and which modified said opinion as set forth herein.

The court's opinion filed herein on November 24, 2020 is corrected at the endof paragraph 13 to read as follows:

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

In all other respects the opinion shall remain unchanged.

DONE BY ORDER OF THE SUPREME COURT THIS 2nd DAY OF DECEMBER, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

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. November 24, 2020
As Corrected December 8, 2020

ORDER CORRECTING OPINION

The concurring in part and dissenting in part opinion of Justice Rowe, filed herein on November 24, 2020, is corrected to reflect the following change. In the first sentence of Paragraph 7, the word "deceased" will be replaced with the word "Decedent." The sentence shall now read: "Because the Decedent died a resident of Oklahoma, today's opinion is necessarily limied to the application of 58 O.S. §5. In all other respects, the November 24, 2020 concurring in part and dissenting in part opinion of Justice Rowe shall remain unchanged.

DONE BY ORDER OF THE SUPREME COURT THIS 8th DAY OF DECEMBER, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

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 23, 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 98

STATE OF OKLAHOMA *ex rel.*, OKLAHOMA BAR ASSOCIATION, Complainant, v. CAROLYN JANZEN, Respondent.

Rule 7.2 RGDP. SCBD No. 6903
December 8, 2020

ORIGINAL PROCEEDING FOR ATTORNEY DISCIPLINE PURSUANT TO RULES 7.1 AND 7.2 RULES GOVERNING DISCIPLINARY PROCEEDINGS

¶0 The Oklahoma Bar Association initiated summary disciplinary proceedings against Respondent pursuant to Rules 7.1 and 7.2 of the Rules Governing Disciplinary Proceedings following Respondent's plea of "no contest" in the felony crime of Obtaining Property by Trick or Deception, False Pretenses, Confidence Game. Respondent has not provided any response or evidence to mitigate the severity of discipline. The Bar recommended the appropriate discipline was disbarment. After *de novo* review, this Court finds that Respondent is guilty of misconduct and the appropriate discipline is disbarment.

RESPONDENT DISBARRED

Gina L. Hendryx, General Counsel, Oklahoma Bar Association, Oklahoma City, Oklahoma, for Complainant,

Carolyn Janzen, Hinton, Oklahoma, Respondent.

OPINION

EDMONDSON, J.

¶1 Janzen was admitted to the Oklahoma Bar Association on October 18, 1994. She was stricken from the Membership Rolls for failure to pay dues effective September, 2004. In July, 2010, Janzen misrepresented herself to be an attorney practicing law in the State of Oklahoma, to individuals seeking legal services. She was paid approximately $7,100 to provide legal representation relating to a court proceeding in Greer County. Janzen never appeared in court in this matter. Instead, she made excuses why she could not appear and requested continuances of court dates. It was later brought to the attention of the court in December, 2011 that Janzen was stricken from the OBA membership rolls effective September 20, 2004 and she did not have a current license to practice law in the State of Oklahoma.

¶2 On April 23, 2012 a Probable Cause Affidavit for Arrest Warrant was issued in Greer County, State of Oklahoma v. Carolyn Janzen, CF-2012-30 in this matter. On February 20, 2020 Janzen entered her Plea of No Contest to the felony of False Pretenses/Con Game, 21 O.S. O.S. 1541.2 wherein she admitted to representing herself as an attorney knowing her license to practice law was suspended. Janzen admitted that she took money on the pretense of providing legal representation in a litigation matter with the intent to cheat and deprive the victims of $7,100 for practicing as their lawyer. Janzen agreed to an 8 year sentence in the custody of the Oklahoma Department of Corrections with all years suspended. She was ordered to pay a $1,000 fine, restitution of $7,100, with a notation that she had already paid $1,000 of restitution, and court costs. Janzen was ordered to make monthly payments to begin March 10, 2020.

¶3 The Bar Association filed a Notice of Suspended Sentence on March 13, 2020 initiating this summary disciplinary proceeding pursuant to Rules 7.1 and 7.2 of the Rules Governing Disciplinary Proceedings (RGDP), 5 O.S. 2011 ch. 1, app. 1-A. Proof of Service of Notice of Suspended Service was filed April 7, 2020 with a copy of the certified mail receipt with the signature Carolyn Janzen dated March 30, 2020. We entered an Order of Immediate Interim Suspension on March 27, 2020 wherein Janzen was directed to show cause no later than May 18, 2020 why this Order of Interim Suspension should be set aside. We also ordered that Janzen had until June 17, 2020 to show cause in writing why a final order of discipline should not be imposed, to request a hearing or to file a brief and any evidence tending to mitigate the severity of discipline. No response was filed responsive to either of these directives.

¶4 On August 10, 2020 it came to the Court's attention that the address on file with the Court Clerk contained a typographical error and an Order Correcting Address was filed and another Order was issued. Janzen was ordered to show cause no later than August 21, 2020 why the order of interim suspension should be set aside, and further directed that she had until September 17, 2020 to show cause in writing why a final order of discipline should not be imposed, to request a hearing or to file a brief and any evidence to mitigate the severity of discipline. Janzen did not file any responsive pleading with this Court in this matter and she did not provide any evidence to mitigate the severity of discipline in this matter. The Bar Association filed a response recommending disbarment as the appropriate discipline in this disciplinary matter.

¶5 The Rules Governing Disciplinary Proceedings, 5 O.S. 2011, ch. 1, app. 1-A (RGDP), outline a summary discipline proceeding for immediate suspension of a lawyer's license to practice law and final discipline of a "lawyer who has been convicted or has tendered a plea of guilty or nolo contendere pursuant to deferred sentence plea agreement in any jurisdiction of a crime which demonstrates such lawyer's unfitness to practice law." *Id.,* Rule 7.1. Pursuant to Rule 7.2, this summary proceeding was initiated by filing certified copies of the Information, Probable Cause Affidavit for Arrest Warrant, Plea of No Contest, Record of Proceedings in Open Court-Felony, and Rules of Probation from Janzen's felony proceeding.[1] The certified copies "are conclusive evidence of the commission of the crime and constitute the charge and suffice as the basis for discipline." *State ex rel. Oklahoma Bar Ass'n v. Cooley*, 2013 OK 42, ¶ 1, 304 P.3d 453, 454, citing RGDP, Rule 7.2.

¶6 The summary disciplinary process is initiated when the crime "demonstrates such lawyer's unfitness to practice law." Rule 7.1. Im-plicit in our Order of Immediate Interim Suspension, is that the nature of Janzen's crime demonstrates her unfitness to practice law. Although every criminal conviction does not necessarily reflect a lawyer's unfitness to

practice law, we have recognized that crimes involving "dishonesty, breach of trust, or serious interference with the administration of justice facially demonstrate a lawyer's unfitness to practice law for purposes of a Rule 7 summary disciplinary proceeding." *Cooley*, 2013 OK 42, ¶ 13, 304 P.3d at 456.

¶7 This Court exercises exclusive original jurisdiction to carry out its nondelegable responsibility to discipline lawyers and to regulate the practice of law in order to safeguard the interests of the public, the judiciary and the legal profession. *State ex rel. Oklahoma Bar Ass'n v. Shofner*, 2002 OK 84, ¶ 5, 60 P.3d 1024, 1026. We exercise *de novo* review with respect to every aspect of a disciplinary inquiry. *Cooley,* 2013 OK 42, ¶ 4, 304 P.3d at 454. The professional discipline imposed is based upon the respondent's conduct, any prior history of respondent's professional misconduct, and the discipline imposed upon other lawyers for similar acts of misconduct. *State ex rel. Oklahoma Bar Ass'n v. Smith*, 2016 OK 19, ¶ 36, 368 P.3d 810, 818.

¶8 In cases involving mishandling of client funds, we recognize three levels of culpability: 1) commingling; 2) simple conversion; and 3) misappropriation, i.e. theft by conversion or otherwise. *State ex rel. Oklahoma Bar Ass'n v. Kleinsmith,* 2018 OK 5, ¶ 9, 411 P.3d 365, 368. We are clear that "a lawyer found guilty of intentionally inflicting grave economic harm in mishandling clients' funds is deemed to have committed this most grievous degree of offense." *Id.*, 2018 OK 5, ¶ 10, 411 P.3d at 369. This Court has previously held that disbarment is the appropriate discipline for an attorney who has knowingly converted or misappropriated client trust funds. *Id.*, 2018 OK 5, ¶ 11, 411 P.3d at 369, *see also, State ex rel. Oklahoma Bar Ass'n. v. Rymer,* 2008 OK 50,187 P.3d 725.

¶9 Janzen's license to practice law had been stricken from the membership rolls since September 20, 2004. Almost eight years later, she knowingly misrepresented herself as a licensed attorney in order to obtain money under false pretenses for legal representation. Janzen's criminal conduct was intentional and moreover, she used her prior attorney licensure status in creating this deception. Her actions resulted in a gross breach of trust and serious interference with the administration of justice. Janzen's plea to a felony involving intentional dishonesty regarding her licensure status for personal gain facially demonstrates her unfitness to practice law and her blatant disregard for the Bar and this Court. Janzen has not filed any response to this summary proceeding and has not provided any evidence to support the mitigation of the severity of discipline in this matter. The Bar Association has recommended disbarment. We hold that the appropriate discipline for Janzen's conviction is disbarment. It is the order of this Court that Janzen's disbarment is to be effective from the date of her suspension from the practice of law, March 27, 2020.

RESPONDENT DISBARRED.

¶10 ALL JUSTICES CONCUR

2020 OK 99

ORLANDO ARVIZU, Plaintiff/Appellant, v. DAVID STANLEY OF NORMAN, LLC, and BBVA COMPASS FINANCIAL CORP., Defendants/Appellees,

Case No. 117,583. December 7, 2020

ORDER OF SUMMARY DISPOSITION

¶1 Rule 1.201 of the Oklahoma Supreme Court Rules provides that "[i]n any case in which it appears that a prior controlling appellate decision is dispositive of the appeal, the court may summarily affirm or reverse, citing in its order of summary disposition this rule and the controlling decision." Okla. S. Ct. Rule 1.201.

¶2 After reviewing the record in this case, THE COURT FINDS that our decision in *Sutton v. David Stanley Chevrolet, Inc.*, 2020 OK 87 ____P.3d_____, involves the same primary legal questions as those in the above-styled appeal; and therefore, our holding in *Sutton* disposes of the issues herein.

¶3 IT IS THEREFORE ORDERED that the opinion of the Oklahoma Court of Civil Appeals, Division IV, filed November 25, 2019, is vacated, the trial court's Journal Entry filed November 7, 2018, wherein the trial court found there was no fraud in the inducement with regards to the dispute resolution clause and ordering the matter to Arbitration is reversed, and the cause is remanded for further proceedings.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 7th day of December, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

Gurich, C.J., Kauger, Edmondson, Colbert and Combs, JJ., concur;

Darby, V.C.J., Winchester (by separate writing), Kane and Rowe, JJ., dissent;

Rowe, J. dissenting

"I dissent for the same reasons I dissented in Sutton v. David Stanley Chevrolet, 2020 OK 87."

Winchester, J., with whom Darby, V.C.J., Kane, J., and Rowe, J. join, dissenting:

¶1 I dissent for the same reasons I dissented in *Sutton v. David Stanley Chevrolet*, 2020 OK 87. The Court in *Sutton* attempted to temper its holding by limiting it to the facts of that case, but today's pronouncement demonstrates how the Court has quickly set aside that limitation. The facts in this case differ from those in *Sutton*, but what parallels *Sutton* is the Court's repeated application of an affirmative duty for the finance manager to read every provision of the purchase agreement – including the Dispute Resolution Clause – to the buyer to avoid committing constructive fraud.

2020 OK 100

State of Oklahoma ex rel. Oklahoma Bar Association, Complainant, v. Eugene Robinson, Respondent.

SCBD No. 6982. December 7, 2020
As Corrected December 9, 2020

ORDER OF IMMEDIATE INTERIM SUSPENSION

¶1 Respondent Eugene Robinson was charged with nine counts of failure to account for and to pay over withholding and FICA (Social Security Taxes) as to Firm Employees in violation of 26 U.S.C. § 7202.[1] Robinson pled guilty to counts one through nine. He was sentenced to probation for a term of five years as to counts one through nine to run concurrently, and to home detention for eight months except for employment and approved activities. Robinson was ordered to pay restitution in the amount of $159,121.05.

¶2 The Oklahoma Bar Association (OBA), in compliance with Rules 7.1 and 7.2 of the Rules Governing Disciplinary Proceedings (RGDP), has forwarded to this Court certified copies of the 1) Information, 2) Petition to Enter Plea of Guilty and Order Entering Plea, and 3) Judgment in a Criminal Case, filed in *United States of America v. Eugene Robinson,* Case No. 19-CR-266 before the United States for the Northern District of Oklahoma.

¶3 Rule 7.3 of the RGDP provides that "upon receipt of the certified copies of Judgment and Sentence on a plea of guilty, order deferring judgment and sentence, indictment or information and the judgment and sentence, the Supreme Court may direct the lawyer to file a statement, to show cause, if any the lawyer has, why an order of immediate interim suspension from the practice of law should not be entered. Upon good cause shown, the Court may decline to enter an order of immediate interim suspension when it appears to be in the interest of justice to do so, due regard being had to maintaining the integrity of and confidence in the profession. If good cause is not shown, the Court may by order immediately suspend the lawyer from the practice of law until further order of the Court."

¶4 On October 1, 2020, this Court directed Robinson to show cause why he should not be immediately interim suspended from the practice of law. Robinson responded that he has been in good standing with the Oklahoma Bar Association for 37 years and never had a bar complaint. He states that he has tried to a verdict over 300 jury trials and enjoys a good reputation with the bench and bar. During a period of financial difficulty, Robinson states he thought he would be able to work out a payment plan with the IRS, but instead he received a Notice of Criminal Investigation. Robinson states that these are his first criminal charges, he took full responsibility, and he needs to maintain his bar license in order to pay the restitution of $159,121.05. He requests dismissal of the Rule 7 proceeding for want of evidence that he is unfit to practice law.

¶5 The Oklahoma Bar Association submits that nine felony convictions for crimes that involve the misappropriation of money being held in trust for taxes facially demonstrates unfitness to practice law, and brings discredit to the legal profession in violation of the Rule 1.3, RGDP. The OBA states that Respondent, as an employer, was required to withhold federal income and FICA taxes from employees' wages and to pay them to the IRS on their behalf. These funds are called trust fund taxes because the employer, Respondent's law office, is essentially holding in trust money taken from em-ployees' wages until it is remitted to the IRS. The OBA states that with

the guilty pleas, it is not disputed that Respondent was ultimately the person responsible to collect and remit the withheld taxes, and that Respondent misappropriated tax trust funds that did not belong to him, which were being held in trust for the United States to apply to the tax obligations of employees of his law office. The OBA submits that the Respondent's convictions involve dishonesty and a breach of trust and facially demonstrate unfitness to practice law, which warrants entry of an immediate interim suspension.

¶6 Rule 7.2 of the RGDP provides that a certified copy of a plea of guilty, an order deferring judgment and sentence, or information and judgment and sentence of conviction "shall constitute the charge and be conclusive evidence of the commission of the crime upon which the judgment and sentence is based and shall suffice as the basis for discipline in accordance with these rules."

¶7 In the Petition to Enter Plea of Guilty and Order Entering Plea, Robinson represented to the Court that he had the responsibility of ensuring that taxes withheld from the Firm's employees' paychecks were paid over quarterly to the government. Robinson states that for each quarterly tax period beginning in October 2013 through December 2015 (nine quarters), he withheld taxes but did not pay over those taxes to the IRS. He admits he knew he had an obligation to pay over the taxes but did not do so.

¶8 After review of the responses and certified copies of the papers and orders submitted, this Court finds that Robinson's conduct involves dishonesty and breach of trust, which facially demonstrates unfitness to practice law and warrants entry of an immediate interim suspension. This Court orders that Eugene Robinson is immediately suspended from the practice of law.

¶9 Pursuant to Rule 7.4 of the RGDP, Eugene Robinson has until **December 23, 2020**, to show cause in writing why a final order of discipline should not be imposed, to request a hearing, or to file a brief and any evidence tending to mitigate the severity of discipline. The OBA has until **January 7, 2021**, to respond.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE on December 7, 2020.

/s/ Noma D. Gurich

CHIEF JUSTICE

ALL JUSTICES CONCUR.

1. §7202. Willful failure to collect or pay over tax
Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

2020 OK 101

RE: Authorization of Electronic Dockets for Case Types CJTD and CJAD

SCAD-2020-109. December 7, 2020
As Corrected December 9, 2020

ORDER

¶1 In order to provide electronic access to the dockets of the Court on the Judiciary Trial and Appellate Divisions, the following electronic case types/prefixes are hereby authorized for use on the Oklahoma Supreme Court Network and the Oklahoma Case Information System:

Case Type/Prefix	Description
CJTD	Court on the Judiciary, Trial Division
CJAD	Court on the Judiciary, Appellate Division

¶2 The dockets for the Court on the Judiciary Trial and Appellate Divisions are currently publicly available, but are manually entered in docket books in the Office of the Court Clerk of the Appellate Courts. This authorization will allow future filings in the Court of the Judiciary to be docketed electronically, and will enable the dockets to be publicly available electronically. Dockets of past filings in the Court on the Judiciary will not be publicly available electronically.

¶3 The above case types/prefixes shall be integrated as soon as practicable for use by the Court Clerk of the Appellate Courts. These case types will be identified with the applicable prefix, then a hyphen, and then all four digits of the calendar year, which will be followed by a hyphen and the number of the case. Cases will be consecutively numbered within a calendar year. The four digits of the calendar year designation will be changed on each January 1 thereafter, and the consecutive case number will begin again with number 1. Case numbers will be assigned by the Clerk of the Appellate Courts to ensure the cases remain in sequence.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 7th day of December, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

ALL JUSTICES CONCUR.

2020 OK 102

RE: Authorization of Case Types IP and REF

SCAD-2020-110. December 7, 2020

ORDER

¶1 In order to create more precise case types/prefixes for cases involving Initiative Petitions and Referendum Petitions, the following electronic case types/prefixes are hereby authorized for use on the Oklahoma Supreme Court Network and the Oklahoma Case Information System:

Case Type/Prefix	Description
IP	Initiative Petition
REF	Referendum Petition

¶2 Currently, cases involving Initiative Petitions and Referendum Petitions are generally given an "O" prefix for the "Other" category docket. This authorization will allow future cases involving Initiative Petitions and Referendums to be given an "IP" or "REF" prefix respectively, which will specifically designate the cases as involving an Initiative Petition or Referendum Petition.

¶3 The above case types/prefixes shall be integrated as soon as practicable for use by the Court Clerk of the Appellate Courts. The case numbers will be assigned by the Clerk of the Appellate Courts in sequence with other appellate cases.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 7th day of December, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

ALL JUSTICES CONCUR.

2020 OK 103

RE AUTHORIZATION OF ELECTRONIC DOCKETS FOR ADMIN. DIRECTIVES SCAD AND CCAD

SCAD-2020-111. December 7, 2020
As Corrected December 8, 2020

ORDER

¶1 In order to provide electronic access to the dockets for Administrative Directives of the Supreme Court and the Court of Criminal Appeals, the following electronic case types/prefixes are hereby authorized for use on the Oklahoma Supreme Court Network and the Oklahoma Case Information System:

Case Type/Prefix	Description
SCAD	Supreme Court Administrative Directive
CCAD	Court of Criminal Appeals Administrative Directive

¶2 The dockets for Administrative Directives of the Supreme Court and Court of Criminal Appeals are currently publicly available, but are manually entered in docket books in the Office of the Court Clerk of the Appellate Courts. This authorization will allow future Administrative Directives to be entered electronically, and will enable the dockets of Administrative Directives to be publicly available electronically. Past Administrative Dockets of past Administrative Dreictives of these Courts will not be publicly available electronically.

¶3 The above case types/prefixes shall be integrated as soon as practicable for use by the Court Clerk of the Appellate Courts. Administrative Directives of the two Appellate Courts will be identified with the SCAD or CCAD prefix, then a hyphen, and then all four digits of the calendar year, which will be followed by a hyphen and the number of the case. Directives will be consecutively numbered within a calendar year. The four digits of the calendar year designation will be changed on each January 1 thereafter, and the consecutive directive number will begin again with number 1. Directive numbers will be assigned by the Clerk of the Appellate Courts to ensure the directives remain in sequence.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 7th day of December, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

ALL JUSTICES CONCUR.

2020 OK 104

THE CITY OF OKLAHOMA CITY, Petitioner, v. THE HONORABLE THAD BALKMAN, CHIEF JUDGE, CLEVELAND COUNTY, THE HONORABLE STEVEN STICE, SPECIAL DISTRICT JUDGE, CLEVELAND COUNTY, and THE HONORABLE JACK MCCURDY, CHIEF JUDGE, CANADIAN COUNTY, Respondents.

No. 118,950. December 7, 2020

ORDER

Original jurisdiction is assumed on the Amended Application to Assume Original Jurisdiction and Petition for Writ of Prohibition. Okla. Const. art. VII, (4. This Court's July 30, 2020, Order granting a stay of enforcement of AO-2020-1 and AO-2020-3, pending this Court's disposition of this Cause, remains in effect until further action by this Court or final disposition of this matter.

DONE BY THE ORDER OF THE SUPREME COURT THIS 7th DAY OF DECEMBER, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

Gurich, C.J. (by separate writing), Darby, V.C.J., Kauger (by separate writing), Colbert, and Combs, JJ., concur;

Winchester, Edmondson, Kane (by separate writing) and Rowe (by separate writing), JJ., dissent.

GURICH, C.J., specially concurring.

¶1 I concur in the Order which assumes Original Jurisdiction and the Petition for Writ of Prohibition. The Court of Criminal Appeals only has jurisdiction in criminal cases. In re M.B., 2006 OK 63, ¶ 8, 145 P.3d 1040, 1044. The subject of this original action is the issuance of administrative orders by the district courts. There is no pending criminal prosecution, and we are not called upon to review a criminal conviction, or even issues collateral to pending criminal case. *See* Parsons v. District Court of Pushmataha County, 2017 OK 97, ¶ 19, 408 P.3d 586, 595; Okla. Const., art. VII, § 4. In fact, on July 30, 2020, the majority of the judges of the Court of Criminal Appeals recognized the civil nature of this case, and issued an order transferring the matter to this Court for our determination of jurisdiction.[1] The orders before us are no more criminal matters than a civil suit arising out of detention at a jail facility or the adjudication of a negligence case predicated on a law enforcement motor vehicle accident which occurs during the transportation of an arrestee or inmate – both of which are matters only incidental to criminal arrest and/or confinement.

¶2 District judges have only two functions – judicial and administrative. Jurisdiction to review administrative orders issued by district courts lies solely in this Court, not the Court of Criminal Appeals:

> Review of an administrative decision made in the exercise of a district court's managerial function may be sought only through an original proceeding in the Supreme Court. Similarly, management decisions by a Chief Justice are reviewable and correctable only by the Supreme Court sitting in its capacity as the administrative board of directors for the entire judicial system.

Board of Law Library Trustees of Oklahoma County v. Petusky, 1991 OK 22, ¶ 14, 25 P.2d 1285 (citations omitted). As we have further explained:

> In order to have a unified, organized judiciary in Oklahoma, there must be one individual at the apex: the Chief Justice of the Supreme Court. Through the powers vested in the Supreme Court, by the Oklahoma Constitution and statutes, it has passed down the authority for the administration of district courts to the Administrative Judge of an Administrative Judicial District. This authority is essential for the orderly operation of justice.

Petusky v. Cannon, 1987 OK 74, ¶ 35, 742 P.2d 1117.

¶3 I also concur in the continued stay of the enforcement of AO-2020-1 (J. Balkman, Cleveland County District Judge) and AO-2020-3 (J. McCurdy, Canadian County District Judge).

KAUGER, J., with whom GURICH, C.J., DARBY, V.C.J. and COMBS, J., join, concurring:

¶1 Without question, this cause concerns an administrative matter. The City of Oklahoma City seeks a writ of prohibition from this Court

to bar the Cleveland County and Canadian County benches from enforcing their respective administrative orders mandating that all persons arrested by the Oklahoma City Police Department in Cleveland or Canadian County be immediately transported to those counties respectively, rather than Oklahoma County.[1] As part of their writ, the City of Oklahoma City attaches six administrative orders from the trial courts. To be clear, nothing in this matter concerns the appeal of a criminal conviction. Period. We have assumed jurisdiction to resolve the matter and the conflict between the county courts and the Court of Criminal Appeals has no jurisdiction to decide the matter even if it wanted to, or this Court wished it so.

¶2 The Oklahoma Constitution, art. 7, §4 provides:

> The appellate jurisdiction of the Supreme Court shall be coextensive with the State and shall extend to all cases at law and in equity; except that the Court of Criminal Appeals shall have exclusive appellate jurisdiction in criminal cases until otherwise provided by statute and in the event there is any conflict as to jurisdiction, the Supreme Court shall determine which court has jurisdiction and such determination shall be final. The original jurisdiction of the Supreme Court shall extend to a general superintending control over all inferior courts and all Agencies, Commissions and Boards created by law. The Supreme Court, Court of Criminal Appeals, in criminal matters and all other appellate courts shall have power to issue, hear and determine writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition and such other remedial writs as may be provided by law and may exercise such other and further jurisdiction as may be conferred by statute. Each of the Justices or Judges shall have power to issue writs of habeas corpus to any part of the State upon petition by or on behalf of any person held in actual custody and make such writs returnable before himself, or before the Supreme Court, other Appellate Courts, or before any District Court, or judge thereof in the State. The appellate and the original jurisdiction of the Supreme Court and all other appellate courts shall be invoked in the manner provided by law.

¶3 In Dancy v. Owens, 1927 OK 203, 258 P. 879, this Court explained the efficacy of this constitutional provision and the Court of Criminal Appeals' role in the Oklahoma judiciary. Dancy concerned whether the Oklahoma Supreme Court could review on certiorari a judgment entered by the Oklahoma Court of Criminal Appeals. The Court very clearly said that:

> 1) pursuant to the Oklahoma Constitution,[2] "the Supreme Court is the head of the judicial system and that other courts, established by law are inferior to the Supreme Court;"
>
> 2) "the authority, jurisdiction and power of the Court of Criminal Appeals is statutory" and "it is only what the Legislature gave it within permissive sanction of the Constitution;"
>
> 3) "the Legislature created the Court of Criminal Appeals to have exclusive appellate jurisdiction in criminal cases" and it's power is limited to appellate jurisdiction only;
>
> 4) "the Constitution does not permit the Legislature to give the Court of Criminal Appeals any other jurisdiction;"
>
> 5) "the terminology, 'Criminal Cases,' has a well-defined meaning and under the law of this state they are either prosecuted in the name of the state either by indictment or by information filed in a trial court having jurisdiction;"
>
> 6) "under the law of procedure of appeals may be prosecuted when the accused is convicted" and such appeals have "for their purpose the determination of alleged errors of the trial court in the cause;" and
>
> 7) "the language is so clear that, if any confusion arises, it must be by reason of courting confusion, either by a spirit of unwillingness to abide by the language of the law or from other motives which may lead into the realm of speculation unbecoming to any judicial decision."

¶4 Thus, history shows that the Court of Criminal Appeals is a court of special, and limited, jurisdiction; it has exclusive appellate jurisdiction only in criminal matters.[3] While this provision gives this Court superintending control over all inferior courts such as the Court of Criminal Appeals, it does not give this Court the power to confer jurisdiction on the Court of Criminal Appeals where none exists

by law.[4] Nor does it give the legislature such power.[5]

¶5 Where the Court of Criminal Appeals has no appellate jurisdiction, it has no power or authority over a cause.[6] In Carder v. Court of Criminal Appeals, 1978 OK 130, 595 P.2d 416, this Court said that:

> It speaks well of our bifurcated civil-criminal appellate system that there has not been a jurisdictional conflict between this Court and the Court of Criminal Appeals for more than fifty years. This scarcity of conflict is a testament to both the clarity of jurisdictional boundaries between the two Courts and the constant willingness of the members of each Court to observe and comply with their jurisdictional restrictions.

Carder involved the Court of Criminal Appeals' entertainment of an original action for mandamus brought by the Department of Institutions, Social and Rehabilitative Services (Department) in which the criminal appellate court made a determination beyond its power to render. The Department sought relief from this Court. In Carder, the trial court declared a juvenile a delinquent, adjudged the juvenile a ward of the court, and committed the juvenile to the custody of the Department. Subsequently, the trial court entered an order dismissing the juvenile action, and the Department sought relief in the Court of Criminal Appeals.

¶6 The Court of Criminal Appeals issued a published order purporting to assume original jurisdiction and grant mandamus against the trial court for exceeding its authority and issuing the dismissal order. We held that the Court of Criminal Appeals had no jurisdiction to assume original jurisdiction and grant mandamus because that court is a court of special and limited jurisdiction. It has exclusive appellate jurisdiction only in criminal matters. It has no superintending authority over inferior courts and it had no statutory authority to issue any orders in the cause.

¶7 Determining the issues concerning matters which are collateral or incidental to a criminal conviction is not merely a "tradition" of this Court, nor is it taking a "right-of-way" off of the path to criminal conviction. Rather, it is a constitutional obligation which this Court has methodically, and consistently, taken very seriously. The underpinnings of the jurisdictional boundaries was recently, very thoroughly discussed in *The Jurisdictional Boundary Between the Oklahoma Supreme Court and the Court of Criminal Appeals: Blurred Lines*.[7] In it, the author explains:

> The Oklahoma Constitution was adopted in 1907. It created a supreme court, district courts, and other inferior courts such as county courts and municipal courts. Initially, the appellate jurisdiction of the supreme court extended to all civil and criminal cases. But the original constitution granted the supreme court criminal appellate jurisdiction only "until a Criminal Court of Appeals with exclusive appellate jurisdiction in criminal cases shall be established by law." The constitution also provided that the supreme court's original jurisdiction extended "to a general superintending control over all inferior courts and all commissions and boards created by law." Finally, the supreme court was authorized to issue writs….
>
> …the legislature quickly created a criminal court of appeals in 1908, with "exclusive appellate jurisdiction ... in all criminal cases appealed from" other courts. The court also had the power to issue writs of habeas corpus and "writs as may be necessary to exercise its jurisdiction." In 1959, the court was renamed the Oklahoma Court of Criminal Appeals (COCA) and still bears that name… .
>
> . . .The statute originally provided that COCA had exclusive appellate jurisdiction over criminal cases, unless the construction of the Oklahoma Constitution, the Constitution of the United States, or an act of Congress was in question, in which the case the court was to certify the question to the Oklahoma Supreme Court and await its decision. The statute was amended in 1909 to eliminate that limitation, leaving COCA with exclusive appellate jurisdiction in criminal cases.
>
> In 1967, the Oklahoma Constitution was amended. The amended constitution now vests jurisdiction in COCA, recognizing its exclusive appellate jurisdiction in criminal cases, but with a proviso that the jurisdiction of the court is subject to the power of the legislature to alter. The amendment also gave COCA the power to issue writs in "criminal matters. Most importantly, the amended constitution explicitly provides that in the event of conflict between

the two courts regarding jurisdiction, "the Su-preme Court shall determine which court has jurisdiction and such determination shall be final." The amended version made no change to the supreme court's general superintending power or power to issue writs. (Citations omitted.)

¶8 To this day, this Court has made the decision regarding any jurisdictional conflicts and the Court of Criminal Appeals only has jurisdiction to review causes arising out of criminal cases, but nothing which concerns an administrative matter related to criminal proceedings. Recently, on October 12, 2020, we granted certiorari on companion cases to review the legality of a search and seizure regarding forfeited money seized as the result of an illegal drug sale and the subsequent possibility of awarding attorney fees.[8] Both matters collateral/incidental to a criminal conviction/proceeding. This cause is one of the many matters that comes before this Court which, although are the result of a criminal conviction/proceeding, are not, as this Court has interpreted under the Constitution, to be "criminal cases."

Other causes, although by no means an exhaustive list, have involved:

1. proceeding challenging District Court's rejection of treatment plan that included first-degree murder defendant adjudged not guilty of first-degree murder by reason of insanity, to attend group therapy program one day per week outside of Oklahoma Forensic Center;[9]

2. substantive constitutional claims of procedural matters related to the criminal conviction;[10]

3. constitutionally of secrecy provision of death sentence statute;[11]

4. payment of interpreters for indigent Mexican national charged with murder out of district court funds;[12]

5. jurisdiction to review an order disposing of a request to determine actual innocence;[13]

6. claims against penal officials, for failing to timely file prisoner's appeal of denial of post-conviction relief;[14]

7. jurisdiction to entertain an appeal from a dispositional order after adjudicatory determination of delinquency;[15]

8. district court proceedings for removal from office, no matter how instituted;[16]

9. payment of filing fees for lawsuits of civil rights violations against prison officials by prisoners;[17]

10. appointment of attorneys to represent prisoners access to legal matters;[18]

11. requirement of depletion of Department of Correction funds to pay court filing fees;[19]

12. consideration of prisoner's letter in file by Pardon and Parole Board for parole hearing;[20]

13. administration of inmate trust accounts;[21]

14. court filing/mailing deadlines by delivery to prison officials;[22]

15. release of funds in prisoner wage accounts;[23]

16. review of actions of officials alleged to have denied federally-protected liberty interests;[24]

17. liability for dispensing medicine to inmates;[25]

18. district court clerk filing without payment of filing fees;[26]

19. restoration of all prisoner's lost earned time credits and an unconditional reinstatement to his original security status;[27]

20. duty of the sheriff to call the physician to attend to sick or contagious prisoners; [28]

21. extension of incarceration past sentence by prison officials;[29]

22. grievances over medical care;[30]

23. use of trust account funds to pursue appeal of criminal conviction;[31]

24. payment of medical care for inmates in jail;[32]

25. assigning prisoner higher security risk points after escape, to render ineligible for assignment to a minimum security facility or work release program;[33]

26. questions concerning bail on a criminal bond procedures;[34]

27. habeas corpus to review authority of trial court to issue order of commitment;[35]

28. forfeiture of bail bond;[36]

29. withdrawal of inmate wages to pay court costs and victims compensation;[37]

30. signature allowed for release of county prisoner;[38]

31. personal appearance for court proceedings;[39]

32. providing bedding to prisoners;[40]

33. whether extradition proceedings had begun so as to qualify state agents to immunity for death of accused;[41]

34. surety of bail bond in case of forfeiture in criminal case;[42]

35. peace officer's ability to arrest without a warrant;[43]

36. providing interpreter upon arrest for a crime;[44]

37. failure to provide inmate medication;[45]

38. whether arrest made at direction of marshal can constitute false imprisonment;[46]

39. liability for excessive force;[47]

40. illegal restraint of person by sheriff;[48]

41. negligent notice to recall arrest warrant;[49]

42. double jeopardy effect on implied consent law after acquittal of criminal charges;[50]

43. constitutionality of Habitual Criminal Sterilization Act;[51]

44. forfeiture of appearance bond;[52]

45. forfeiture of appeal bond;[53]

46. appeal of habeas corpus discharging petitioner;[54]

47. transfer of juvenile from juvenile criminal court;[55]

48. compensation for representation of indigent defendants in capital murder cases;[56]

49. action by convicted inmate against state's medical expert in criminal trial;[57]

50. mandamus requiring warden of penitentiary to execute separate sentences imposed on prisoner concurrently rather than consecutively;[58]

51. justice of the peace's ability to hold preliminary hearing for a misdemeanor case;[59]

52. denial of concealed weapons license after charge, but acquittal of conspiracy to commit arson.[60]

CONCLUSION

¶9 The litany of previous cases all fall within the purview of administrative matters incidental to criminal cases. This case in no way arises out of a criminal conviction. The actions at which the writ is directed are taken before criminal charges are even formally filed. The Court of Criminal Appeals is court of special, and limited jurisdiction; it has exclusive appellate jurisdiction only in criminal matters. Even if this Court decided that the Court of Criminal Appeals should decide the matter, we cannot confer jurisdiction on it to do so where none exists. This is neither a tradition nor a suggestion. This is a constitutional mandate.

KANE, J., with whom Winchester, J., joins, dissenting:

¶1 This case is best resolved by the Court of Criminal Appeals. It bears noting that the Court of Criminals Appeals did *not* transfer this matter to us upon a finding that they lacked jurisdiction. Rather, they transferred the matter to us for clarification as to whether or not the dispute was best resolved before this Court, with a stated intent of proceeding forward should we find that the matter was properly before the Court of Criminal Appeals.

¶2 It also bears noting that had the Court of Criminal Appeals simply ruled upon the dispute without tendering same to us, this case likely would have proceeded in front of that tribunal without so much as a sideways glance from anyone. This is so because the Court of Criminal Appeals has, *at least*, concurrent jurisdiction with this Court in such matters.

> The Supreme Court, Court of Criminal Appeals, in criminal matters and all other appellate courts shall have power to issue, hear and determine writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition and such other remedial writs as may be provided by law and may exercise such other and further jurisdiction as may be conferred by statute.

Okla. Const. Art. 7, § 4. Petitioner rightly reads this constitutional provision as clothing the Court of Criminal Appeals with the constitutional authority to hear this matter, and hence filed its request for relief before that Court. *See Hurst v. Pitman*, 1950 OK 10, pg. 335, 213 P.2d 877, 881 ("Under this authority granted by the Constitution, the first Legislature after statehood created the Criminal Court of Appeals as it exists today... and [it] was given *exclusive* appellate jurisdiction in all criminal cases appealed from the district, superior, and county courts, and all other courts of record that may be established by law.") (internal citations omitted) (emphasis original).

¶3 Being aware that this dispute could be construed as a matter "traditionally within the jurisdiction of the Oklahoma Supreme Court," the Court of Criminal Appeals has tendered the case to us for clarity.[1] The fact that this Court may have a "tradition" of taking the right-of-way in

similar matters in the past, does nothing to rewrite the Constitution to divest the Court of Criminal Appeals with proper jurisdiction to hear such a matter. This Court rightly values and honors tradition, but we are duty bound to follow the Constitution. *See Hurst*, 1950 OK CR 10, pg. 336, 213 P.2d at 881 ("The term 'appellate,' in the constitutional phrase 'a Criminal Court of Appeals with exclusive appellate jurisdiction in criminal cases,' is not used in a restricted sense, but in the broadest sense, as embracing the power and jurisdiction to review and correct the proceedings of inferior courts in criminal cases, brought before it, in the manner provided by law.") (internal citations omitted).

¶4 The Court of Criminal Appeals observed that the contest of administrative orders pertaining to pretrial detention of citizens in criminal matters "appear(s) to be a civil matter."[2] Does it become less so if the action had been brought by a detained citizen, rather than by a municipal entity? Obviously, the crux of this dispute is the pretrial detention of citizens, and the body best suited to address this issue is the body to whom the request was posed: the Court of Criminal Appeals.[3]

¶5 While the Supreme Court has original jurisdiction pursuant to Okla. Const. art. 7, § 4, as to "general superintending control over all inferior courts and all Agencies, Commissions and Boards created by law," this provision should not be a trump card to overwrite another portion of the very same article that vests the Court of Criminal Appeals with concurrent jurisdiction. The phrase "general superintending control," when applied to a trial judge addressing pretrial detention of citizens is, at best, a slippery slope. *Id.* If one recasts this dispute regarding pretrial detention as a "civil matter," it is easy to conceive of future disputes where this Court is tempted to draw the line to suggest that another court's dispute is now somehow the business of the Supreme Court. This Court has previously agreed with the Court of Criminal Appeals that it has exclusive jurisdiction in all criminal cases, or in matters calling for the construction of penal provisions. *See Hurst,* 1950 OK CR 10, pg. 338, 213 P.2d at 882 (citing *Smythe v. Smythe*, 1911 OK 66, ¶ 14, 114 P. 258, 259 ("This being a criminal case, this court has no jurisdiction to review the same. It may be that the appellate jurisdiction of the Criminal Court of Appeals in this case may be invoked by the plaintiff in error.")).

¶6 It is certain from the historical background and the language used in the Constitution and statutes, that the framers of our Constitution and the Legislature intended, after the creation of the Criminal Court of Appeals, to vest it with *exclusive* jurisdiction in all criminal matters and to limit the Supreme Court to exclusive jurisdiction in all civil cases... Under the Constitution and the laws of our state, the two appellate courts are coordinate and exclusive in their respective jurisdictions. Neither can interfere with nor control the other. Neither is subordinate to nor dependent upon the other, but both are responsible to the people from whom each derived what power they respectively possess.

Hurst, 1950 OK CR 10, pg. 338, 213 P.2d at 882 (emphasis added).

¶7 For the reasons stated above, I respectfully, but most strenuously object to the acceptance of jurisdiction by this Court.

Rowe, J. with whom Winchester, J. joins, dissenting:

¶1 I would deny Petitioner's Amended Application to Assume Original Jurisdiction. While it is clear that the underlying matter does not arise from a criminal case and that the district courts were acting in an administrative capacity when they issued the Administrative Orders in question, resolution of this case necessarily implicates questions of criminal law and procedure. This Court maintains general superintending jurisdiction over all inferior courts pursuant to Okla. Const. art. 7, § 4. However, that general superintending jurisdiction should not be used as an inroad for this Court to weigh in on matters of criminal law and procedure which fall *exclusively* within the jurisdiction of the Court of Criminal Appeals, pursuant to Okla. Const. art. 7, § 4.

¶2 Accordingly, I respectfully dissent.

GURICH, C.J., specially concurring.

1. The majority of the judges of the Court of Criminal Appeals issued an Order Transferring Matter to the Oklahoma Supreme Court on July 29, 2020. In that Order, the Court of Criminal Appeals considered their Constitutional authority and stated: "These orders appear to be a civil matter. As Petitioner's petition appears to present a matter traditionally within the jurisdiction of the Oklahoma Supreme Court, it would be improvident for the Court of Criminal Appeals to assume jurisdiction or adjudicate Petitioner's petition without the Supreme Court having first found that Petitioner's cause is not within the Supreme Court's jurisdiction."

KAUGER, J., with whom GURICH, C.J., DARBY, V.C.J. and COMBS, J., join, concurring:

1. Title 22 O.S. 2011 §184 provides:
The officer who executes the warrant must take the defendant before the nearest or most accessible magistrate of the county in which the offense is triable with his return endorsed thereon, and the magistrate must then proceed in the same manner as upon a warrant issued by himself.

2. The Okla. Const. art 7, §1, as amended by a vote of the people of Oklahoma, by legislative referendum in 1967 provides:
§ 1. Courts in which judicial power vested.
The judicial power of this State shall be vested in the Senate, sitting as a Court of Impeachment, a Supreme Court, the Court of Criminal Appeals, the Court on the Judiciary, the State Industrial Court, the Court of Bank Review, the Court of Tax Review, and such intermediate appellate courts as may be provided by statute, District Courts, and such Boards, Agencies and Commissions created by the Constitution or established by statute as exercise adjudicative authority or render decisions in individual proceedings. Provided that the Court of Criminal Appeals, the State Industrial Court, the Court of Bank Review and the Court of Tax Review and such Boards, Agencies and Commissions as have been established by statute shall continue in effect, subject to the power of the Legislature to change or abolish said Courts, Boards, Agencies, or Commissions. Municipal Courts in cities or incorporated towns shall continue in effect and shall be subject to creation, abolition or alteration by the Legislature by general laws, but shall be limited in jurisdiction to criminal and traffic proceedings arising out of infractions of the provisions of ordinances of cities and towns or of duly adopted regulations authorized by such ordinances.

3. In re M.B., 2006 OK 63, ¶8, 145 P.3d 1040.

4. *See*, In re M.B., 2006 OK 63, ¶8, 145 P.3d 1040 [Appellate jurisdiction is the power and jurisdiction to review and correct those proceedings of inferior courts brought for determination in the manner provided by law. The question of jurisdiction is primary and fundamental in every case and cannot be conferred by the consent of the parties, waived by the parties, or overlooked by the Court.]. Allen v. State, 2011 OK CR 31, 265 P.3d 754 [Supreme Court order transferring capital defendant's direct appeal from underlying sanity proceedings to Court of Criminal Appeals did not itself provide Court of Criminal Appeals authority to review the appeal; transfer order resulted from recognition that Court of Criminal Appeals had exclusive jurisdiction over the case.]

5. Darcy v. Owens, 1927 OK 203, ¶17, 258 P. 879.

6. *See*, Carder v. Court of Criminal Appeals, 1978 OK 130, ¶12, 595 P.2d 416.

7. Eddington, Greg, *The Jurisdictional Boundary Between the Oklahoma Supreme Court and the Court of Criminal Appeals: Blurred Lines*, 69 Okla. L. Rev. 203, 205-206 (2017).

8. No's. 116, 875, Hingey v. State of Oklahoma and 117,737 State ex rel. Harris v. $2,11.00; $5,530.00; and $325,080.00. The vote to grant certiorari in the No 116,875 was Gurich, C.J., Darby, V.C.J., Kauger, Colbert, and Rowe, JJ., conur. Winchester, Edmondson, Combs, and Kane, JJ., dissent. The vote in 117,737 was Gurich, C.J., Darby, V.C.J., Kauger, Edmondson, Colbert, Combs, Kane and Rowe, JJ., concur. Winchester, J., dissent.

9. Parsons v. District Court of Pushmataha County, 2017 OK 97, 408 P.3d 586.

10. Lockett v. Evans, 2014 OK 28, 377 P.3d 1254.

11. Lockett v. Evans, 2014 OK 34, 330 P.3d 488.

12. Application of Murga, 1981 OK 36, 631 P.3d 735.

13. Courtney v. State, 2013 OK 64, 307 P.3d. 337.

14. Dubuc v. Sirmons, 2001 OK 57, 93 P.3d 780.

15. J.L.D. v. Jennings, 1979 OK CR 139, 603 P.2d 1165.

16. Hale v. Board of County Commissioners of Seminole County, 1979 OK 158, 603 P.2d 761.

17. Mehdipour v. State ex. rel. Dept. of Corrections, 2004 OK 19, 90 P.3d 546.

18. Gaynes v. Maynard, 1991 OK 27, 808 P.2d 672.

19. Smith v. Moore, 2002 OK 49, 50 P.3d 215; Foust v. Pearman, 1992 OK 135, 850 P.2d 1047.

20. Shabazz v. Keating, 1999 OK 26, 977 P.2d 1089.

21. Cumbey v. State, 1985 OK 36, 699 P.2d 1094.

22. Woody v. State ex rel. Dept. of Corrections, 1992 OK 45, 833 P.2d 257.

23. Daniels v. Kaiser, 1993 OK 51, 851 P.2d 529.

24. Prock v. District Court of Pittsburg County, 1981 OK 41, 630 P.2d 772.

25. Medina v. State, 1993 OK 121, 871 P.2d 1379.

26. Cotner v. Golden, 2006 OK 25, 136 P.3d 630.

27. Mitchell v. Meachum, 1988 OK 131, 770 P.2d 887.

28. Hunt v. Rowton, 1930 OK 254, 268 P. 342.

29. Payne v. Kerns, 2020 OK 31, 467 P.3d 659.

30. Martin v. Jordan, 2006 OK 26, 137 P.3d 681.

31. McMullin v. Dept. of Corrections, 1993 OK 132; 823 P.2d 1187.

32. State ex. rel. Dept. of Human Services v. Board of County Commissioners of McClain County, 1992 OK 29, 829 P.2d 961; City of Tulsa v. Hilcrest Medical Center, 1956 OK 21, 292 P.2d 430.

33. Morris v. Meachum, 1986 OK 18, 718 P.d 1354.

34. McIntosh et al v. State, 1924 OK 106, 224 P. 702.

35. Ex Parte Ray, 1935 OK 273, 42 P.2d 234.

36. State v. Buchanan, 1987 OK 105, 745 P.2d 730.

37. Webb v. Maynard, 1995 OK 125, 907 P.2d 1055.

38. Petusky v. Freeman, 1995 OK 9, 890 P.2d 948.

39. Hemphill v. Harbuck, 2014 OK 24, 326 P.3d 521.

40. State ex rel. Wise v. Whistler, 1977 OK 61, 562 P.2d 860.

41. Boston v. Causey, 1952 OK 134, 242 P.2d 712.

42. Exchange Trust Co. v. Mann, 1928 OK 357, 269 P. 275.

43. Steinicke v. Harr, 1924 OK 188, 240 P. 66.

44. Kiddy v. City of Oklahoma City, 1978 OK 28, 576 P.2d 298.

45. Brown v. Creek County ex rel. Creek County Bd of County Com'rs, 2007 OK 56, 164 P.3d 1073.

46. Moyer v. Meier, 1951 OK 347, 238 P.2d 338.

47. Perry v. City of Norman, 2014 OK 119, 341 P.3d 689.

48. Ex Parte v. Brewer, 1935 OK 236, 42 P.2d 143.

49. Wilhelm v. Gray, 1988 OK 142, 766 P.2d 1357.

50. Price v. Reed, 1986 OK 43, 725 P.2d 1254.

51. Skinner v. State ex. rel. Williamson, 1941 OK 60, 115 P.2d 123.

52. State v. Nesbitt, 1981 OK 113, 634 P.2d 1306.

53. Resolute Ins. Co. v. State, 1971 OK 7, 479 P.2d 956.

54. State v. Powell, 2010 OK 40, 237 P.3d 779.

55. Anderson v. Walker, 1958 OK 297, 333 P.2d 570.

56. State v. Lynch, 1990 OK 82, 796 P.2d 1150.

57. Cooper v. Parker-Hughey, 1995 OK 35, 894 P.2d 1096.

58. Hinkle v. Kenny, 1936 OK 592, 62 P.2d 621.

59. Melton v. State, 1915 OK 328, 149 P. 154.

60. State ex rel. Oklahoma State Bureau of Investigation v. Warren, 1998 OK 133, 975 P.2d 900.

KANE, J., with whom Winchester, J., joins, dissenting:

1. *See* Order Transferring Matter to the Oklahoma Supreme Court, filed 7/29/2020, PR-2020-478.

2. *See* Order Transferring Matter to the Oklahoma Supreme Court, filed 7/29/2020, PR-2020-478.

3. *See* Order Transferring Matter to the Oklahoma Supreme Court, filed 7/29/2020, PR-2020-478.

2020 OK 105

ERIC M. THURSTON, Plaintiff/Petitioner, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, YEAROUT INSURANCE AGENCY, INC., and JANIS YEAROUT, Individually, Defendants/ Respondents.

No. 118,636. December 8. 2020

ON CERTIORARI TO THE DISTRICT COURT OF OKLAHOMA COUNTY, HONORABLE THOMAS E. PRINCE, DISTRICT JUDGE, TO REVIEW A CERTIFIED INTERLOCUTORY ORDER

¶0 Plaintiff requested damages for State Farm's failure to stack Plaintiff's uninsured motorist benefits under several policies.

State Farm sought summary adjudication. The district court rendered partial summary adjudication in State Farm's favor and certified the order for immediate interlocutory review. Certiorari was granted.

DISTRICT COURT'S ORDER UNDER REVIEW IS AFFIRMED; REMANDED FOR FURTHER PROCEEDINGS.

Derek S. Franseen, Walsh & Franseen, Edmond, OK, and Monty Cain and Anthony M. Alfonzo, Cain Law Office, Oklahoma City, OK, for Plaintiff/Petitioner, Eric M. Thurston.

Joseph T. Acquaviva, Jr., Wilson, Cain & Acquaviva, Oklahoma City, OK, and Galen L. Brittingham, Atkinson, Haskins, Nellis, Brittingham, Gladd & Fiasco, Tulsa, OK, for Defendant/Respondent, State Farm Mutual Automobile Insurance Company.

Rex Travis, Travis Law Office, and James A. Scimeca, Burch, George & Germany, P.C., Oklahoma City, OK, for *Amicus Curiae*, Oklahoma Association for Justice.

Brad Smith and Michelle B. Harris, Steidley & Neal, P.L.L.C., Tulsa, OK, for *Amici Curiae,* Oklahoma Association of Defense Counsel, the American Property Casualty Insurance Association, and the National Association of Mutual Insurance Companies.

OPINION

DARBY, V.C.J.,

¶1 In January 2020, the Oklahoma County District Court granted summary adjudication in favor of State Farm Mutual Automobile Insurance Co. (State Farm), Defendant. The question before this Court is whether State Farm expressly provided for stacking of uninsured motorist policies, pursuant to 36 O.S. Supp. 2014, § 3636(B), by charging and accepting separate premiums for uninsured motorist coverage on separate policies. We answer in the negative.

I. STANDARD OF REVIEW

¶2 "[S]ummary adjudication, like summary judgment, settles only questions of law." *Am. Biomedical Grp. v. Techtrol, Inc.,* 2016 OK 55, ¶ 2, 374 P.3d 820, 822. Statutory interpretation is also a question of law. *Raymond v. Taylor,* 2017 OK 80, ¶ 9, 412 P.3d 1141, 1143-44. We review questions of law *de novo. Techtrol*, 2016 OK 55, ¶ 2, 374 P.3d at 822. Summary adjudication will be affirmed only if the appellate court determines that there is no dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.*; *see also* 12 O.S.2011, § 2056(C).

II. BACKGROUND & PROCEDURAL HISTORY

¶3 In 2012, Eric M. Thurston, Plaintiff, first obtained automobile liability insurance through State Farm. At that time, Thurston inquired whether uninsured motorist (UM) coverage on multiple policies would stack. He was told yes.

¶4 State Farm's standard procedure is to only print new declaration pages when a policy issuance transaction, such as change of coverage, occurs. R. at 115, 169. In July 2013 and June 2014, the most recent policy issuance transactions for Thurston's 2013 Chevrolet K1500 and 2012 Toyota Camry, respectively, occurred. The corresponding declaration pages that were issued stated the policies were subject to any endorsements issued with subsequent renewal notices. R. at 115, 118, 167, 169.

¶5 In 2014, the Oklahoma Legislature amended title 36, section 3636(B) to "prohibit[] the stacking of certain insurance policies." 2014 Okla. Sess. Laws 1139. The amended statute provides that "[p]olicies issued, renewed or reinstated after November 1, 2014, shall not be subject to stacking or aggregation of limits unless expressly provided for by an insurance carrier." 36 O.S. Supp. 2014, § 3636(B). Over the next year and a half, Thurston added and removed several vehicles from his policies with State Farm and renewed other vehicle policies.

¶6 In July 2015, State Farm included "Important Notice" paperwork with the mailed Auto Renewal information for Thurston's 2013 Chevrolet and 2012 Toyota stating:

> UNINSURED MOTOR VEHICLE COVERAGE
>
> As a result of Oklahoma Senate Bill 991, the "If Other Uninsured Motor Vehicle Coverage Applies" provision has been amended to state that stacking of Uninsured Motor Vehicle Coverage from policies issued by the State Farm Companies to the named insured or resident relatives is not allowed.

R. at 211-12, 215, 254-55. The notice stated that changes that did not broaden coverage were effective on the first renewal on or after August 3, 2015. R. at 211. It also explained that

"Endorsement 6128AP . . . makes these changes to [the] policy." R. at 212. In September 2015, State Farm also mailed the same "Important Notice" with the Auto Renewal information for Thurston's 2015 Cadillac SRX. R. at 291-92.[1]

¶7 In January 2016, State Farm mailed Thurston a copy of the declaration page for his 2015 Chevrolet K1500, and attached a copy thereof. R. at 232-35. The declaration page stated the policy was subject to Amendatory Endorsement 6128AP. R. at 237-39. Amendatory Endorsement 6128AP stated in relevant part:

> If Uninsured Motor Vehicle Coverage provided by this policy and one or more other vehicle policies issued to ***you*** or any ***resident relative*** by the State Farm Companies apply [sic] to the same ***bodily injury,*** then:
>
> a. the Uninsured Motor Vehicle Coverage limits of such policies will not be added together to determine the most that may be paid; and
>
> b. the maximum amount that may be paid from all such policies combined is the single highest applicable limit provided by any one of the policies. ***We*** may choose one or more policies from which to make payment.

R. at 122, 243 (emphasis original). The January declaration page for the 2015 Chevrolet K1500 did not denote UM coverage on the policy, but a declaration page prepared March 1, 2016, indicated that the policy had been augmented with UM coverage and again noted the policy included Amendatory Endorsement 6128AP. *See* R. at 237, *and* R. at 161-65.

¶8 On June 9, 2016, Thurston was injured in an automobile accident. At that time, Thurston had three separate, six-month term, insurance policies with State Farm, with separate UM coverage on each, for which Thurston paid three separate premiums. The accident vehicle had $25,000 in UM coverage and the other two vehicles each had $50,000 in UM coverage.[2] After determining that Thurston's medical expenses from the accident exceeded the at-fault driver's policy limits, State Farm initially paid Thurston $25,000 in UM benefits under the policy for the vehicle involved in the accident. State Farm eventually paid Thurston another $25,000 under a second policy, for a total of $50,000 in paid UM benefits – *i.e.*, the "single highest applicable limit provided by any one of the policies." While Thurston's injuries exceeded that amount, State Farm refused further payment.

¶9 Thurston brought claims against State Farm, Janis Yearout (Agent), and Yearout Insurance Agency (Agency) for fraud, breach of contract, bad faith, and failure to procure appropriate coverage. In April 2019, Thurston filed his third amended petition arguing, in part, that State Farm expressly provided for stacking, pursuant to section 3636, when it continued to charge and accept full premiums on multiple policies without advising that the policies no longer stacked. In support, Thurston submitted his deposition testimony that he did not recall receiving notice of changes in policy language after the 2014 statutory amendment. Thurston alleged that his claims were also supported by State Farm's internal claim documents, which described the policy for the accident vehicle as "stacking" with another. R. at 381-83.

¶10 Agent acknowledged that Thurston was told the policies would stack in 2012, but claimed that she or a member of her staff had spoken to Thurston about State Farm eliminating stacking UM coverage when Thurston made coverage changes in 2015 and 2016. State Farm asserted that Thurston received written notice regarding SB 991 and the new policy endorsement. State Farm submitted affidavits from a PIM ("Printing Inserting and Mailing") Supervisor, based on his review of records, in which he asserted that all of the alleged notices and enclosures were delivered to the United States Postal Service for mailing to Thurston, in accordance with procedures, and not returned to State Farm. State Farm also argued that the policies were unambiguous and specifically provided that UM coverage does not stack. State Farm filed a motion for summary adjudication requesting the court declare that, pursuant to 36 O.S. Supp. 2014, § 3636(B), the automobile policies issued by State Farm to Thurston do not provide stackable UM coverage as a matter of law.

¶11 On October 11, 2019, the district court held a hearing on the motion; *sua sponte* noted a recent federal case finding UM coverage stacked under Oklahoma law, *Shotts v. Geico General Ins. Co.*, No. CIV-16-1266-SLP (W.D. Okla. 2018); and denied summary adjudication to State Farm, based on *Shotts*. On November 13, 2019, State Farm requested the court reconsider its ruling because the accident in *Shotts* occurred before section 3636 was amended, therefore the case was inapposite.

¶12 On January 16, 2020, the district court granted the motion to reconsider, vacated the original order denying summary adjudication, and granted the motion for summary adjudication in State Farm's favor. The court ruled that the act of charging additional premiums for multiple vehicles does not fall within the exception provided in section 3636. The court certified the order for interlocutory review. We previously granted certiorari.

III. ANALYSIS

¶13 Title 36, section 3636 of the Oklahoma statutes requires that insurers offer UM coverage for every motor-vehicle liability insurance policy extended.[3] UM coverage of an injured person stems from that individual falling within the definition of "insured" under a policy. *State Farm Mut. Auto. Ins. Co. v. Wendt,* 1985 OK 75, ¶ 11, 708 P.2d 581, 586 (quoting *Babcock v. Adkins,* 1984 OK 84, ¶ 14, 695 P.2d 1340, 1343). Prior to the recent amendment, the UM statute made no mention of stacking or aggregating UM policy limits. *See* 36 O.S.2011, § 3636.

¶14 UM coverage attaches to an insured "no matter where they are or in what circumstances they may be in when they are injured through the negligence of an uninsured motorist." *Babcock,* 1984 OK 84, ¶ 13, 695 P.2d at 1343. Because of that, we previously required insurers to stack, or aggregate, coverage when they charged multiple UM premiums for multiple vehicles, either on the same or separate policies. *Keel v. MFA Ins. Co.*, 1976 OK 86, ¶ 13, 553 P.2d 153, 156; *Richardson v. Allstate*, 1980 OK 157, ¶¶ 13-14, 619 P.2d 594, 598; *Wendt*, 1985 OK 75, ¶ 10, 708 P.2d at 585; *Wilson v. Allstate Ins. Co.,* 1996 OK 22, ¶ 12, 912 P.2d 345, 348. When we first determined UM coverage stacked, we specifically noted:

> The legislature must have been cognizant that a person often becomes an insured, either named or otherwise included in more than one automobile liability policy. Therefore, it must have contemplated when it mandated the uninsured motorist coverage in each policy that the injured person might have recourse to more than one policy. Had that result not been intended, its negation would be expressed in the statute.

Keel, 1976 OK 86, ¶ 10, 553 P.2d at 155-56. The Legislature has since expressed that negation.

¶15 An insured's right to recovery is governed by the UM statute in effect on the date the policy was issued or last renewed. *May v. Nat'l Union Fire Ins. Co.*, 1996 OK 52, ¶ 7, 918 P.2d 43, 45; *Cofer v. Morton,* 1989 OK 159, ¶ 3, 784 P.2d 67, 70. As the amended UM statute was in effect when all of Thurston's policies were issued or last renewed, we apply it today. Whether State Farm expressly provided for UM coverage stacking by charging and accepting separate UM premiums for Thurston's separate policies, pursuant to 36 O.S. Supp. 2014, § 3636(B), is a question of statutory interpretation.

¶16 We presume that the legislature "expressed its intent and that it intended what it expressed." *Heath v. Guardian Interlock Network, Inc.*, 2016 OK 18, ¶ 14, 369 P.3d 374, 379. As such, we begin with the text of the statute in order to ascertain the ordinary meaning of section 3636 (B), so we can then determine if State Farm's actions fall within it. *See Hall v. Galmor,* 2018 OK 59, ¶ 45, 427 P.3d 1052, 1070. "Legislative purpose and intent may [also] be ascertained from the language in the title to a legislative enactment." *Naylor v. Petuskey,* 1992 OK 88, ¶ 4, 834 P.2d 439, 441. Words will be given their ordinary meaning unless a contrary legislative intent plainly appears. 25 O.S.2011, § 1; V*ideo Gaming Techs., Inc. v. Tulsa Cty. Bd. of Tax Roll Corrs*., 2019 OK 84, ¶ 11, 455 P.3d 918, 921.

¶17 In 2014, the Oklahoma Legislature amended section 3636 through SB 991.The bill was titled: "An Act relating to insurance; amending 36 O.S. 2011, Section 3636, which relates to uninsured motorist insurance coverage requirements; prohibiting the stacking of certain insurance policies; and providing an effective date." 2014 Okla. Sess. Laws 1139-42. SB 991 added one sentence to section 3636(B): "Policies issued, renewed or reinstated after November 1, 2014, shall not be subject to stacking or aggregation of limits unless expressly provided for by an insurance carrier." *Id.*

¶18 Generally, the term *shall* signifies a mandatory directive or command, rather than a permissive one. *Keating v. Edmondson*, 2001 OK 110, ¶ 13, 37 P.3d 882, 888. Therefore, Section 3636 provides that, by default, policies issued after November 1, 2014, do not stack or aggregate UM coverage limits. Section 3636 does not require that the insurer provide notice to the insured that they do not stack UM coverage or use specific policy language to that end. 36 O.S. Supp. 2014, § 3636(B); *see also Spears*, 2005 OK 35, ¶ 19, 114 P.3d at 453.[4]

¶19 Instead, the statute requires the insurer must expressly provide for UM coverage to stack if it wishes to do so. "[T]he adverb 'expressly,' in its primary meaning, denotes precision of statement, as opposed to ambiguity, implication, or inference, and is equivalent to 'in an express manner' or 'in direct terms.'" *Magone v. Heller,* 150 U.S. 70, 74, 14 S. Ct. 18, 19, 37 L. Ed. 1001 (1893). The adjective "express" means, "[c]learly and unmistakably communicated; stated with directness and clarity." *Express, Black's Law Dictionary* 726 (11th ed. 2019). In context, this means the insurer must clearly and unmistakably communicate its intention to stack UM coverage *if* the insurer chooses to do so.

¶20 "[I]nsurance policies are issued pursuant to statutes, and the provisions of those statutes are given force and effect as if written into policy." *Siloam Springs Hotel, LLC v. Century Sur. Co.,* 2017 OK 14, ¶ 22, 392 P.3d 262, 268. "An insurance company may limit the risk for which it is responsible." *Wiley v. Travelers Ins. Co.*, 1974 OK 147, ¶ 16, 534 P.2d 1293, 1296. "Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy and as amplified, extended, or modified by any rider, endorsement, or application attached to and made a part of the policy." 36 O.S.2011, § 3621.

¶21 State Farm expressly provided in Amendatory Endorsement 6128AP that it *would not allow stacking.* This language, while not required by statute, was clear and unambiguous. It is also distinctly similar to the "other insurance" clauses we reviewed in UM cases prior to the statutory amendment, where we found the language clear and unambiguous, but did not enforce it for policy reasons. *See Simpson v. Farmers Ins. Co*., 1999 OK 51, ¶¶ 9, 14, 981 P.2d 1262, 1265-66.

¶22 Thurston argues that we should apply the reasonable expectations doctrine. *See Max True Plastering Co. v. U.S. Fid. & Guar. Co.*, 1996 OK 28, ¶ 2, 912 P.2d 861, 863. But that doctrine is not applicable here because the insurance contract is not ambiguous. Further, Thurston appears to request that we apply his reasonable expectations from 2012 to his 2015 and 2016 contracts, and therefore waive his duty to read the contract he was currently subject to. *See Williams v. TAMKO Bldg. Prod., Inc*., 2019 OK 61, ¶ 9, 451 P.3d 146, 151; *see also Silk v. Phillips Petroleum Co*., 1988 OK 93, ¶ 34, 760 P.2d 174, 179. This interpretation would be absurd and therefore must be avoided. *See McIntosh v. Watkins*, 2019 OK 6, ¶ 4, 441 P.3d 1094, 1096.

¶23 Thurston argues that State Farm charging and accepting separate premiums was an express provision for stacking. Thurston asserts the legislature did not intend for insurers to be able to charge premiums for services they would not provide and argues this outcome is manifestly unjust as he did not receive the UM coverage he paid for. In *Keel,* we noted that not stacking UM coverage was repugnant to the law and against public policy when (1) the UM statute requires provision of UM coverage with each policy, (2) the statute provides a minimum amount of coverage, and allows the insured to purchase additional coverage, and (3) separate premiums were collected for each coverage. *Keel*, 1976 OK 86, ¶ 7, 553 P.2d at 155. That holding was based off our interpretation of the public policy within the statute at that time, which contemplated individuals having recourse to numerous insurance policies while remaining silent on the issue of stacking. *See Keel*, 1976 OK 86, ¶ 10, 553 P.2d at 155-56. But the law and public policy expressed within the UM statute has now changed. *See* 36 O.S. Supp. 2014, § 3636. While the statute and case at hand present the same three facts as *Keel*, now we have the additional statutory guidance that stacking is not allowed unless expressly provided for by the insurer.

¶24 The amendment of Section 3636(B), and the new public policy within, demand a different result. Although not allowing stacking prevents Thurston from receiving primary coverage benefits under multiple policies, he still received secondary coverage on those vehicles – providing UM protection to passengers and permissive users that qualify as insured only by virtue of their physical presence in the vehicle. *See Babcock,* 1984 OK 84, ¶¶ 10, 13, 695 P.2d at 1343. While Thurston's argument falls in line with this Court's past precedent regarding UM coverage stacking, the amended section 3636(B) must be viewed in the context of section 3636(A) – that UM coverage must still be offered with each policy of insurance. *See* 36 O.S. Supp. 2014, § 3636(A); *see also Beauchamp v. Sw. Nat. Ins. Co*., 1987 OK 111, ¶ 11, 746 P.2d 673, 676.

¶25 Although State Farm charged Thurston separate premiums for UM coverage on separate policies, S*tate Farm was required by statute to offer such UM coverage on all extended policies.* Acceptance of separate premiums alone is not

an express provision for stacking. "It is not this Court's role to review the wisdom or prudence of a legislative expression deciding a public policy." *Duke v. Duke*, 2020 OK 6, ¶ 21, 457 P.3d 1073, 1080. And we do not have the authority to rewrite the enactment to comport with our own view of prudent public policy. *Head v. McCracken,* 2004 OK 84, ¶ 13, 102 P.3d 670, 680.

¶26 Thurston's claims rely, in part, on an affirmative statement from State Farm regarding stacking, made years prior to the amendment of section 3636. But insurers have no affirmative duty to explain the terms of UM coverage, or the advantages or disadvantages of it, to secure an effective rejection. *Silver v. Slusher,* 1988 OK 53, ¶¶ 9-10, 770 P.2d 878, 883-84; *see also Cofer*, 1989 OK 159, ¶ 10, 784 P.2d at 72. We will not hold State Farm to an express statement of stacking made years before section 3636 was amended and the current insurance policies were issued or renewed. State Farm did *nothing* after 2014 to *expressly* provide for stacking.

¶27 As we previously noted, the legislature is aware that insured individuals often have recourse to more than one policy and the legislature could have required UM coverage on only one policy, to prevent stacking. *See Keel,* 1976 OK 86, ¶¶ 10-11, 553 P.2d at 155-56. It did not. Because insurers are still required to offer UM coverage with each policy, the legislature must have contemplated the consequences of the new statutory language on those individuals who otherwise would have recourse to more than one policy.

¶28 Stacking UM policies here, where the policy expressly provides to the contrary would render the amended statutory language totally meaningless. *See Lake v. Wright*, 1982 OK 98, ¶ 14, 657 P.2d 643, 645. We find nothing which mandates stacking UM policies in the face of the express statutory provision and policy language which both provide to the contrary. *See Lake,* 1982 OK 98, ¶ 15, 657 P.2d 643, 645; *Withrow,* 1995 OK 120, ¶ 13, 905 P.2d at 804. The 2014 amendment effectively overruled *Keel*, and any progeny, to the extent they require stacking UM coverage due to payment of multiple premiums and ignoring contrary policy provisions.

¶29 Thurston had three separate insurance policies. State Farm was required to offer UM coverage on each policy. Thurston chose to pay three separate UM premiums in order to have UM coverage on each policy. Today, we follow the intent of the legislature, as expressed in the statutory text, and find that State Farm did not expressly provide for stacking of UM coverage, under the statute, by accepting the separate premiums for coverage which the amended statute still required them to offer.

IV. CONCLUSION

¶30 We find that State Farm charging separate UM premiums for vehicles on separate policies does not fall within section 3636's exception of expressly providing for stacking of UM coverage. Because State Farm did not take action to expressly provide for stacking of UM coverage, they were entitled to judgment as a matter of law. The district court's order granting summary judgment is affirmed. The stay in the district court is lifted and this matter is remanded for further proceedings.

DISTRICT COURT'S ORDER UNDER REVIEW IS AFFIRMED; REMANDED FOR FURTHER PROCEEDINGS.

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

Colbert, J., dissents.

DARBY, V.C.J.,

1. It is not clear from the record whether Thurston's insurance coverage for the SRX lapsed or he simply did not have UM coverage on the policy in June 2016. The included policy documents for this vehicle show policy effective dates of 11/01/15 through 5/01/2016, with no UM coverage. The record states that the policy was terminated on 6/24/16 and transferred to a different account number; those included documents also show no UM coverage. We do not have policy documents for the period of 5/02/2016 through the date of the accident in the record before us on appeal. Whether or not Thurston had UM coverage on that vehicle is not relevant as the analysis in this opinion is the same for three or four separate policies.

2.

Vehicle	Effective Dates	Coverage	Premium
2015 Chevrolet K1500	12/29/15-6/29/16	UM $25,000/$50,000	$49.30
2013 Chevrolet K1500	3/2/16-7/11/16	UM $50,000/$100,000	$75.43
2012 Toyota Camry	3/2/16-9/2/16	UM $50,000/$100,000	$75.43

3. Title 36, section 3636 provides in part:

A. No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be issued, delivered, renewed, or extended in this state with respect to a motor vehicle registered or principally garaged in this state unless the policy includes the coverage described in subsection B of this section.

B. The policy referred to in subsection A of this section shall provide coverage therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death resulting therefrom. . . . . Policies issued, renewed or reinstated after November 1, 2014,

shall not be subject to stacking or aggregation of limits unless expressly provided for by an insurance carrier. . . . .

36 O.S. Supp. 2014, § 3636(A),(B).

4. This is distinctly different from where the legislature required that insurers provide notice to insured of increased minimum UM coverage, on the first renewal after April 1, 2005, if the insured had selected limits lower than the new minimum, but not if the insured had rejected UM coverage, or previously had equal or greater UM coverage. *See* 36 O.S.Supp. 2014, § 3636(K).

2020 OK 106

IN RE THE MARRIAGE OF: TY L. RADER, Petitioner/Appellant, v. BRENDA Y. RADER, Respondent/Appellee.

No. 118,344. December 15, 2020

ON APPEAL FROM THE DISTRICT COURT OF BEAVER COUNTY,

STATE OF OKLAHOMA

HONORABLE RYAN D. REDDICK, DISTRICT JUDGE

¶0 Petitioner/Appellant Ty L. Rader ("Father") appeals from the trial court's order finding Kansas has exclusive, continuing child custody jurisdiction and that Oklahoma does not have jurisdiction to make an initial child custody determination under Oklahoma's Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), 43 O.S.2011 §§ 551-101 to 551-402. We hold that because the Kansas child custody proceeding was dismissed by the parties, it was of no effect in the present matter, and the Oklahoma judge erred in failing to determine whether or not Oklahoma had become the minor child's new home state under the UCCJEA at the commencement of this proceeding. We reverse the part of the trial court's order finding the Oklahoma court does not have jurisdiction over child custody and remand to the trial court to consider whether or not Oklahoma became the minor child's new home state, and, if so, to consider Respondent/Appellee Brenda Y. Rader's ("Mother") *forum non conveniens* argument, pursuant to 43 O.S. § 551-207. If Petitioner fails to establish Oklahoma as the new home state, the trial judge shall transfer the matter to Kansas, pursuant to the UCCJEA.

ORDER OF THE DISTRICT COURT IS REVERSED AND REMANDED WITH INSTRUCTIONS.

Jim Loepp, Jim Loepp Law Office, Oklahoma City, Oklahoma, for Appellant.

David W. West, Liberal, Kansas, for Respondent.

KANE, J.:

¶1 Here we have a child custody dispute between divorced parents where divorce actions have been filed in two different states at different times. The primary question on appeal is whether the state of Kansas retains exclusive, child custody jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA")[1] after a Kansas court issued temporary orders concerning child custody but then the parents, for reasons unrelated to jurisdiction, jointly dismissed the Kansas divorce and child custody proceeding.

¶2 While the Kansas divorce court was the first court to make an initial child custody determination under the UCCJEA, the parties jointly dismissed that action without prejudice before Petitioner/Appellant Ty L. Rader ("Father") filed the present divorce action in Oklahoma. As a result, there were not simultaneous child custody proceedings pending in a sister state.[2] The only pending child custody proceeding is in Oklahoma. The record is silent as to the trial court making a finding that the minor child had or had not resided with a parent for at least six (6) months in Oklahoma prior to the filing of Oklahoma Petition, relying instead upon the existence of a dismissed Kansas case to reject child custody jurisdiction. Thus, we reverse and remand for such a determination of whether or not Oklahoma is the minor child's new "home state"[3] under the UCCJEA. If the trial court finds that Oklahoma is the home state, then the custody case will proceed in Oklahoma, and the trial court will need to rule upon the *forum non conveniens* issue pursuant to 43 O.S. § 551-207.[4] If the Petitioner cannot establish residency under the UCCJEA sufficient to establish Oklahoma as the new home state, then the case should be transferred to Kansas pursuant to the temporary jurisdiction provided for in 43 O.S. § 551-204(B).[5]

I. FACTS AND PROCEDURAL HISTORY

¶3 This case is the third divorce attempted by these parties. They have one minor child. Father first filed for divorce in Seward County, Kansas ("Kansas Divorce"), on September 13, 2017 and received a default judgment on December 1, 2017. Upon learning of the default divorce judgment obtained by Father, Respondent/Appellee Brenda Y. Rader ("Mother") filed a Motion to Set Aside the Default Decree of Divorce in Kansas. Mother's motion was

granted by the Kansas divorce court on January 26, 2018. The Journal Entry from the hearing provides, in relevant part: "[T]he court orders that the *Journal Entry and Decree of Divorce* in this matter, file stamped December 1, 2017, be set aside in its entirety. All orders contained therein are hereby set aside and the parties' marriage is reinstated." Mother then moved to file her answer to the divorce action out of time, without objection from Father. As part of the Journal Entry, the Kansas divorce court noted there were no temporary orders on file and "set [the] matter for Temporary Orders hearing on February 16, 2018."

¶4 Mother and Father continued to litigate the divorce in Kansas for approximately two years. During this time period, the court issued temporary child custody orders, including a parenting plan. On June 19, 2018, the Kansas divorce court entered a Journal Entry wherein the parties announced to the court that they "had reached an agreement on the terms and conditions for a permanent parenting plan." The Kansas divorce court noted its subject matter jurisdiction in the Journal Entry and adopted the permanent parenting plan for the minor child. While the Kansas Divorce was actively pending, Father moved to Beaver County, Oklahoma, in late May or early June 2018.[6] The Kansas Divorce trial was set for October 16, 2018, but on October 15, 2018, the parties advised the Kansas divorce court that they had reconciled and the Kansas action was dismissed without prejudice at the request of both parties.

¶5 Three days later, on October 18, 2018, Father filed a new divorce in Beaver County, Oklahoma ("Oklahoma Divorce I"). Father dismissed Oklahoma Divorce I on January 24, 2019, and refiled on the same day in Beaver County, Oklahoma ("Oklahoma Divorce II"). After Father filed Oklahoma Divorce II, Mother filed in the Kansas divorce court a Motion to Set Aside Dismissal and Reinstate Proceedings. The Kansas divorce court subsequently denied Mother's motion on January 25, 2019, "due to the fact the parties were represented by attorneys at the time they filed their joint dismissal." In denying Mother's Motion to Set Aside the Dismissal, the Kansas divorce court opined in the Journal Entry it would "accept this case if the Oklahoma judge presiding over the current divorce action in Beaver County, Oklahoma requests or desires to transfer the case to Kansas."

¶6 Mother then filed a Motion to Dismiss the proceedings in Oklahoma Divorce II for lack of jurisdiction on March 8, 2019. The motion was heard on April 8, 2019. The trial court granted Mother's motion to dismiss in part, finding that it lacked jurisdiction over child custody and child support issues, but concluded it did have jurisdiction over the divorce proceedings and distribution of the martial estate. The Oklahoma trial court noted in its Order filed on September 26, 2019 that: (1) it was exercising the court's subject matter jurisdiction, but identified Seward County, Kansas, as the home state of the minor child under the UCCJEA; (2) Seward County, Kansas, was the first state to make an initial determination under the UCCJEA and to exercise initial child custody jurisdiction; and (3) "[a]s to the claim for child custody, visitation, and child support, this Court is not able to exercise initial child custody jurisdiction, and under Oklahoma law, Kansas has exclusive, continuing child custody jurisdiction." Father appealed.[7] This Court, on its own motion, retained the appeal.

II. STANDARD OF REVIEW

¶7 Whether a trial court has subject matter jurisdiction under the UCCJEA is a question of law this Court reviews *de novo. See State ex rel. Cartwright v. Oklahoma Ordinance Works Auth.*, 1980 OK 94, ¶ 4, 614 P.2d 476, 479 (determination of jurisdiction is a question of law and on appeal, questions of law are reviewed *de novo*); *National Diversified Bus. Servs., Inc. v. Corporate Fin. Opportunities, Inc.*, 1997 OK 35, n. 18, 946 P.2d 662, 666 (an appellate court has plenary, independent and nondeferential authority to reexamine a trial court's legal rulings). The trial court's decision to exercise or decline jurisdiction under the UCCJEA is within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *See G.S. v. Ewing*, 1990 OK 1, ¶¶ 16-20, 786 P.2d 65, 72; *McCullough v. McCullough*, 2000 OK CIV APP 125, ¶ 10, 14 P.3d 576, 580.

III. DISCUSSION

A. Conceptual Underpinning of the UCCJEA

¶8 The purpose of the UCCJEA is to avoid jurisdictional competition and conflict with courts in matters of child custody and, to that end, the provisions of the Act were established to discourage the use of the interstate system for continuing controversies over child custody and to promote cooperation within

the judicial system of state courts to render custody determinations in the state that can best decide the matter, while avoiding relitigation of custody determinations already decided by sister states. *See* 43 O.S. § 551-101, official cmts. 1-6. These uniform laws are necessary because of the mobility of Americans and the frequency of child custody disputes between parents, which arise when there is a divorce or when unmarried biological parents want to have custody adjudicated in a court. *Id.*

¶9 Prior to the enactment of the UCCJEA in 1980, the Legislature enacted the Uniform Child Custody Jurisdiction Act ("UCCJA"), 10 O.S. Supp.1980 §§ 1601-1627.[8] The main problems it attempted to address were "child snatching" and "multi-state jurisdictional squabbles." *Holt v. District Court for Twentieth Judicial District, Ardmore County, Carter County,* 1981 OK 39, ¶ 14, 626 P.2d 1336, 1340. The UCCJA addressed these problems in several ways, but did so primarily by limiting the jurisdiction of courts to act in child custody matters. *See id.* The UCCJA had several purposes, which were set out specifically, so that each section of the UCCJA would be read with those purposes in mind. *Id.* The UCCJEA tracks these same purposes.[9] *See* 43 O.S. § 551-401 ("In applying and construing this Uniform Act [UCCJEA], consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.").

¶10 An overarching aim of the UCCJA was to "shift from providing for the child's best interests through ease of modification [of a child custody order] to an emphasis on continuity of the child's environment." *Holt*, 1981 OK 39, ¶ 14, 626 P.2d at 1340.[10] In this regard, the UCCJA "substantially curtailed" the jurisdiction of an Oklahoma court to modify a custody decree rendered by a court of another state. *Id.* ¶ 18 (internal citations omitted). However, the UCCJA, as originally enacted and later amended, contained *no* provision specifying the *duration* of a trial court's jurisdiction in a particular child custody matter. *See S.W. v. Duncan*, 2001 OK 39, ¶ 18, 24 P.3d 846, 852.

B. The Uniform Child Custody Jurisdiction and Enforcement Act

¶11 In 1998 the UCCJA was repealed and the Oklahoma Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) was enacted. *See* 43 O.S.Supp.1998 §§ 551-101 to 551-402.[11] Importantly, the UCCJEA specifically addresses the trial court's *duration* of jurisdiction and provides for exclusive, continuing jurisdiction of a court issuing an initial child custody determination until certain events occur as set forth in that section. *See* 43 O.S. §§ 551-201 to 551-202; *Duncan,* 2001 OK 39, ¶¶ 21-22.

¶12 The UCCJEA applies to a "child custody proceeding." *See* 43 O.S. § 551-102(4). In *Duncan*, we held divorce actions are child custody matters within in the scope of the UCCJEA and jurisdiction of a divorce court continues for child custody matters. *See Duncan,* 2001 OK 39, ¶¶ 19-21. When parents and children live (and have lived) in one state, the courts of that state may take jurisdiction over a child custody matter. However, because it is common for a parent to live in a different state from the one in which the other parent and the child live, more than one state may have the authority to adjudicate a dispute between them, and competing decisions between two courts often simply confuse, rather than conclude, the dispute.

¶13 The UCCJEA attempts to address these issues by defining which state is the home state of the child and providing jurisdictional priority for the home state, (i.e., the court who is first-in-time and has jurisdiction to issue an initial custody determination under the statutory provisions of the Act). *See* 43 O.S. §§ 551-101 to 551-402. Once jurisdiction has been established under the Act, the home state maintains exclusive, continuing jurisdiction, except in limited circumstances. See 43 O.S. § 551-202. Thus, the Act strives to prevent simultaneous child custody proceedings in sister states. *See* 43 O.S. § 551-206.

C. Initial Child Custody Determination and Home State

¶14 The UCCJEA prioritizes home state jurisdiction and provides for exclusive, continuing jurisdiction in the state issuing the initial child custody determination. *See* 43 O.S. §§ 551-201 to 551-202. The term "home state" is defined under the Act as follows:

> "Home state" means the state in which a child lived with a parent or a person acting as a parent for at least six (6) consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six (6) months of age, the term means the state in which the child lived from birth with the parent or person acting as a parent. A period of temporary absence of the parent

or person acting as a parent is part of the period.

43 O.S. § 551-102(7).

¶15 To establish "home state" jurisdiction, the court must first determine if a "child custody determination" has been made. *See Duncan*, 2001 OK 39, ¶ 25 (a court exercising jurisdiction under the UCCJEA must determine if a child custody proceeding has been commenced in another state in conformity with the Act). Under the UCCJEA, a "child custody determination" is defined as follows:

> "Child custody determination" means a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, or modification order.

43 O.S. § 551-102(3).

¶16 The term "initial determination" is also clearly defined under the Act as "the *first* child custody determination concerning a particular child." 43 O.S. § 551-102(8) (emphasis added). A critical part of the trial court's analysis of jurisdiction under the UCCJEA is for the trial court to inquire if any court (in-state and/or out-of-state) has made an "initial determination" of child custody concerning the child. *See* 43 O.S. §§ 551-102(8), 551-201(A), 551-206(A)-(B); *Duncan*, 2001 OK 39, ¶ 25; *Redwine v. Wood*, 2001 OK CIV APP 115, ¶¶ 8-10, 33 P.3d 53, 55 (for "home state" jurisdiction under the UCCJEA, the trial court must look to the mandatory provisions of the UCCJEA for a determination of initial child custody).

¶17 In examining the custody dispute currently before us, we acknowledge its extensive procedural history, including the previously filed and partially-litigated divorce action in Kansas that spanned over two years and the temporary child custody orders resulting therefrom, as well as the two later divorce filings here in Oklahoma.[12] Section 551-201 of the UCCJEA governs initial child custody jurisdiction and it restricts Oklahoma's ability to make an initial determination of child custody. It provides, in relevant part:

> A. Except as otherwise provided in section 16 of this act, a court of this state has jurisdiction to make an initial child custody determination only if:
>
> 1. This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six (6) months before the commencement of the proceeding and the child is absent from this state, but a parent or person acting as a parent continues to live in this state . . . .

43 O.S. § 551-201(A)(1).

¶18 Mother suggests that since Kansas made an "initial determination" previously, Oklahoma has no ability to render such a determination now. Father argues on appeal that, pursuant to 43 O.S. § 551-201(A)(1), Oklahoma has jurisdiction to make an "initial determination" of child custody because the minor child had been present in Oklahoma with him for over six months with no case pending in any other jurisdiction, so that Oklahoma is now the minor child's home state. *See* 43 O.S. §§ 551-102(7), 551-102(8), 551-201(A)(1). For the reasons set forth herein, we agree with Father that the prior Kansas litigation has no effect on the present case, although it has not yet been adjudicated whether or not Oklahoma has become the minor child's home state.

D. Effect of Dismissal in the Kansas Divorce Action

¶19 Generally, a court cannot exercise jurisdiction over a dismissed case,[13] although the interjection of the UCCJEA complicates this proposition. While we do acknowledge a Default Decree of Dissolution was entered in the Kansas divorce court, which provided for joint legal custody of the child to both parents and physical custody to the Mother, it was later set aside at Mother's request after Mother learned of the default decree.

¶20 The Kansas divorce court had no divorce or child custody proceeding since the date of the filing of the parents' joint dismissal, other than Mother's unsuccessful attempt to vacate the dismissal. The Kansas Divorce had concluded and the Kansas divorce court's prior temporary child custody orders were *nullified* as of the moment the joint dismissal was filed – which was *before* Father filed Oklahoma Divorce II.

¶21 While the UCCJEA gives jurisdictional priority and exclusive, continuing jurisdiction to the courts of a child's home state, the term of duration a child's home state is not indefinite.[14] *See* 43 O.S. § 551-203 (providing jurisdiction

and statutory authority for a court of this state to modify a child custody determination in certain circumstances; thus, acknowledging the need for potential changes to a child custody determination).

¶22 In the case currently before us, the Oklahoma trial court stopped short in its analysis of home state jurisdiction under the UCCJEA and erroneously concluded that Kansas was the home state of the minor child because a prior divorce and child custody proceeding had been *previously* filed in Kansas, and the Kansas court had entered temporary child custody orders. It then erroneously concluded that Kansas had continuing, exclusive jurisdiction. This is the same argument made by Mother on appeal, which we find unpersuasive.

¶23 Specifically, the Oklahoma trial court erred by failing to address its own jurisdiction in light of the fact that the Kansas divorce action and child custody proceeding had been *jointly dismissed prior* to either of Father's divorce actions being filed in Oklahoma. The UCCJEA clearly and unambiguously defines the home state of a minor child and directs the trial court to look at a very specific period/window of time – the six consecutive months immediately before the commencement of a child custody proceeding, to determine the child's "home state" for an "initial determination" of child custody jurisdiction. *See* 43 O.S. §§ 551-102(7), 551-102(8), 551-201(A)(1). Thus, if a case in another jurisdiction is jointly dismissed before final decree, a child may acquire a new "home state" if a child and one parent (or person acting as a parent) satisfies the six month requirement for home state status. *Id.*

¶24 While this specific issue, the effect of the parties' joint dismissal of a child custody proceeding previously filed in a sister state, is a question of first impression for this Court, other states have addressed it. In *C.H. v. O'Malley,* 140 N.E.3d 589, 592 (Ohio 2019), the Ohio Supreme Court held that a father's dismissal without prejudice of his child custody action left the parties as if no action had been brought at all. The Ohio Supreme Court, under very similar facts to the case currently before us,[15] found that the father's voluntary dismissal of his first application for divorce effectively made that filing a *nullity* for purposes of satisfying the six month requirement for home state status necessary for jurisdictional analysis under the UCCJEA. *Id.* at 592-93.

¶25 Alternatively, in *Campbell v. Tardio*, 323 P.3d 317, 318 (Or. Ct. App. 2014), the Oregon Court of Appeals came to a different conclusion under somewhat similar facts. In *Tardio,* the parties had agreed to a joint dismissal/stipulation of judgment in Oregon as to child custody in 2006. *Id.* The judgment awarded the father sole custody, along with visitation to the mother under a parenting plan.[16] *Id.*

¶26 After the mother moved several times to different states with the minor child, the father in *Tardio* petitioned the Oregon trial court to reestablish child custody. *Id.* The trial court granted the father's motion for custody. *Id.* On appeal, the Oregon Court of Appeals held that "while the order which dismissed the 2006 judgment terminated the custody award, it did not nullify the prior judgment *ab initio*." *Id.* The Oregon Court of Appeals held that the prior judgment from 2006 could not be ignored because the parties had never filed a motion to set aside the original judgment based on a lack of jurisdiction, fraud, or other grounds (all of which are bases upon which to set aside a judgment). *Id.* As a result, the Oregon Court of Appeals held Oregon had exclusive, continuous jurisdiction under the UCCJEA.[17] *Id.*

¶27 We find that the current case is more analogous to the *O'Malley* decision, and we agree with the approach taken by the Ohio Supreme Court. In the present case, if Father can establish the minor child's residency with him in Oklahoma for the requisite time, he is entitled to proceed. It is alleged that the minor child had lived with Father in Oklahoma for seven consecutive months.[18] *See* 43 O.S. §§ 551-102(7), 551-201(A). The joint dismissal of the Kansas Divorce nullified the Kansas divorce court's initial determination of child custody under the UCCJEA. The joint dismissal of the Kansas divorce action *prior* to the divorce filings in Oklahoma, is the key pivotal and procedural distinction that separates this case from most UCCJEA disputes where simultaneous proceedings are pending in sister states.

¶28 Pursuant to 43 O.S. § 551-206(A):

> [A] court of this state may not exercise its jurisdiction under this article if, *at the time of the commencement of the proceeding*, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this act, *unless the proceeding has been terminated* or is stayed ….

43 O.S. § 551-206(A) (emphasis added). Here, jurisdictional competition among sister states and dual pending child custody proceedings in sister states did not occur simultaneously. *Id.* Instead, the Kansas divorce action had already been terminated *prior* to Father's divorce filings in Oklahoma; thus, the Oklahoma trial court may have had jurisdiction to make an initial child custody determination under the UCCJEA and it could do so without violating 43 O.S. § 551-206(A). *See* 43 O.S. §§ 551-201(A), 551-206(A). Said another way, the Kansas child custody determination no longer existed, and the Oklahoma trial court was required to determine if it had jurisdiction to make an initial determination of child custody under 43 O.S. § 551-201(A), if jurisdiction was established. *See* 43 O.S. §§ 551-102(7), 551-102(8), 551-201(A), 551-206(A).

¶29 This is also consistent with the Kansas divorce court's Order Denying Mother's Motion to Reinstate the Proceedings, wherein the Kansas court opined it would be willing to accept this case back from Oklahoma via a transfer upon the Oklahoma trial court's request. The very language used in its Order Denying Mother's Motion to Reinstate the Proceedings, implicitly acknowledges that Kansas no longer had child custody jurisdiction (or any jurisdiction) because the case had already been dismissed.

¶30 As a result, if UCCJEA residency is established by Father, then Oklahoma is the minor child's home state under the UCCJEA. Oklahoma would then be required to make an "initial determination" of child custody.[19] *See* 43 O.S. §§ 551-102(7), 551-102(8), 551-201(A)(1).

¶31 The trial court's failure to fully conduct a home state jurisdictional analysis and/or its erroneous conclusion that it could *not* make an initial determination of child custody due to the previously filed and jointly dismissed Kansas divorce case was in error. As a result, we remand to the trial court for a determination whether or not Oklahoma is the new home state, and if so, for an initial child custody pursuant to 43 O.S. § 551-201(A).

E. If Oklahoma is the Home State, then the Claim of *Forum Non Conveniens* Must be Addressed

¶32 If Oklahoma had become the minor child's new "home state" at the time Oklahoma Divorce II was filed, then the Oklahoma court would be required to rule upon Mother's claim of *forum non conveniens*. In that event, the court would have discretion, if it so chooses, to decline or yield its jurisdiction to fulfill the policies underlying the UCCJEA. *See* 43 O.S. §§ 551-101(A), official cmt. 1, para. 1-2, 551-207(A). The UCCJEA provides the home state with an *option* to decline or yield its jurisdiction based on a *forum non conveniens* basis. *See* 43 O.S. § 551-207(A); *see also Holt*, 1981 OK 39, ¶¶ 17-18, 626 P.2d at 1340 (two questions must be asked: (1) has there been compliance with the jurisdictional provisions [in this case the UCCJA] and (2) whether jurisdiction should be exercised); *In re R.L.S.*, 1994 OK CIV APP 102, ¶¶ 40-41, 879 P.2d 1258, 1268 (an Oklahoma trial court can decline and yield its jurisdiction in certain circumstances).

¶33 Because the Oklahoma trial court erroneously concluded that it could *not* make an initial determination of child custody under the UCCJEA, the Oklahoma trial court never reached a determination on Mother's claim of *forum non conveniens*. The appellate record reflects a somewhat lengthy and active Kansas divorce action that had been ongoing for approximately two years and that trial was imminent before it was jointly dismissed at the request of both parents. On remand, if Oklahoma is determined to be the new "home state," we direct the Oklahoma trial court to hear evidence and to make findings of fact and conclusions of law concerning Mother's claim of *forum non conveniens* in accordance with the eight factors set forth in 43 O.S. § 551-207(B)(1)-(8).[20]

¶34 In such event, if the Oklahoma trial court determines on remand, that Oklahoma is an inconvenient forum and that the Kansas divorce court "is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be *promptly* commenced in another designated state [Kansas] and may impose any other condition the court considers just and proper." 43 O.S. § 551-207(C) (emphasis added).[21]

III. CONCLUSION

¶35 The trial court erroneously concluded it could not make an initial determination of child custody jurisdiction under the UCCJEA without first considering whether or not Oklahoma had become the new home state. *See* 43 O.S. § 551-201(A). While the Kansas divorce court was the first court to issue an initial determination of child custody for this particu-

lar minor child under the UCCJEA, the Oklahoma trial court erroneously and prematurely concluded its home state jurisdictional analysis and failed to consider the effect of the joint dismissal of the Kansas divorce action *prior* to Father's divorce actions being filed in Oklahoma. As such, we reverse the Oklahoma trial court and hold that the trial court must rule upon whether Oklahoma became the new "home state" of the minor child pursuant to the UCCJEA when the Father filed Oklahoma Divorce II. If Oklahoma is the new home state, the trial court shall make an initial determination of child custody pursuant to 43 O.S. § 551-201(A). In the event that Oklahoma has not become the new home state, the trial judge shall transfer the case to Kansas under 43 O.S. § 551-204(B).

¶36 In the event that Oklahoma is found to be the new home state, the trial court shall also conduct an evidentiary hearing and to make specific findings of fact and conclusions of law for a determination on Mother's claim of *forum non conveniens*, specifically, for a determination as to whether the Oklahoma trial court should yield or decline its home state jurisdiction to meet and/or better satisfy the intent and purposes behind the passage of uniform legislation, like Oklahoma's UCCJEA. *See* 43 O.S. §§ 551-101, official cmts. 1-6, 551-201, 551-207. The trial court's order is affirmed in all other aspects.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Gurich, C.J., Darby, V.C.J., Winchester, Edmondson, Kane and Rowe, JJ., concur;

Colbert and Combs, JJ., concur in result;

Kauger, J., dissents.

Kauger, J., dissenting:

"I would issue a show cause order to determine where the child is residing."

KANE, J.:

1. *See* Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), 43 O.S.2011 §§ 551-101 to 551-402.

2. *See* 43 O.S. § 551-206(A), which prohibits simultaneous child custody actions pending in sister states.

3. *See* 43 O.S. § 551-102(7).

4. *See* 43 O.S. § 551-207(A), which sets forth conditions under which a court of this state may decline to exercise jurisdiction if it determines that it is an inconvenient forum. Section 551-207(B)(1)-(7) also sets forth numerous factors a court of this state should consider in determining whether or not to decline jurisdiction based on an inconvenient forum.

5. 43 O.S. § 551-204(B) provides, in relevant part:

> B. If there is no previous child custody determination that is entitled to be enforced under this act and a child custody proceeding has not been commenced in a court of a state having jurisdiction under Sections 13 through 15 of this act, a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under Sections 13 through 15 of this act. If a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under Sections 13 through 15 of this act, a child custody determination made under this section becomes a final determination, if it so provides and this state becomes the home state of the child.

6. Turpin, Oklahoma is located roughly fourteen miles south of Liberal, Kansas and just across the Kansas-Oklahoma border. When Father filed the Kansas Divorce action in 2017 in Seward County, Kansas, the parties and their minor child lived in Liberal, Kansas.

7. Neither party has appealed the property division or divorce jurisdiction of the Oklahoma court. Father appealed the custody provisions by filing a Petition in Error with this Court on October 1, 2019. The Oklahoma trial court filed an Amended Order on November 13, 2019, and Father filed an Amended Petition in Error on December 6, 2016. Thereafter, the Oklahoma trial court issued another Amended Order on March 12, 2020. Upon this Court's receipt of the Oklahoma trial court's Amended Order dated March 12, 2020, this Court concluded on March 25, 2020, it has jurisdiction over this matter as an appeal from a final judgment designated as such by the trial court pursuant to 12 O.S.2011 § 994(A).

8. *See* 10 O.S.Supp.1980 §§ 1601-1627, subsequently renumbered 43 O.S.Supp.1990 §§ 501-527, and repealed by Laws 1998 c. 407, § 43, eff. Nov. 1, 1998.

9. Section 1 of the UCCJA contained a statement of the purposes of the Act. *See* 10 O.S.Supp.1980 § 1601, subsequently codified at 43 O.S. Supp.1990 §§ 501-527, and repealed by Laws 1998 c. 407, § 43, eff. Nov. 1, 1998. Although extensively cited by the courts, it was eliminated in the UCCJEA because Uniform Acts no longer contain such a section. Nonetheless, the UCCJEA should be interpreted according to its purposes. *See* 43 O.S. § 551-101, official cmts., para. 1, official cmts. 1-6.

10. *See* 10 O.S.Supp.1980 § 1602(4), subsequently renumbered 43 O.S.Supp.1990 § 502(4), and repealed by Laws 1998 c. 407, § 43, eff. Nov. 1, 1998 (one of the purposes of the UCCJA was to discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child).

11. The State of Kansas adopted and codified its UCCJEA within its own statutory scheme. *See* Kan. Stat. Ann. §§ 23-37,101 to 23-37,405 (eff. July 1, 2000).

12. While not dispositive of the issues in the case currently before us, we acknowledge and conclude Kansas's version of the UCCJEA is in substantial conformity with Oklahoma's UCCJEA.

13. "The dismissal of an action ousts the court of its jurisdiction of the action dismissed, and no further proceedings can be had or judgment rendered by the court. The court is without power to make any other order, except such as may be necessary to close the litigation properly." 27 C.J.S. Dismissal and Nonsuit § 14 (internal citations omitted).

14. "The intent of the UCCJA was likewise to maintain continuing jurisdiction in the state issuing the original decree. However, equally clear is the fact that a court was never deemed to have perpetual jurisdiction and that at some point it may lose jurisdiction." *G.S. v. Ewing*, 1990 OK 1, ¶ 2, 786 P.2d 65, 72 (Lavender, J., dissenting) (internal citations omitted).

15. Although the child custody dispute in *O'Malley* concerns the adoption of a minor child, the father, like Father in our case, initially filed a child custody proceeding in the state of Ohio after residing there for less than two months, which was less than the six month jurisdictional requirement for home state jurisdiction under Ohio's UCCJEA. *See C.H. v. O'Malley*, 140 N.E.3d 589, 592-93 (Ohio 2019). To remedy this jurisdictional defect, the father filed a notice of voluntary dismissal without prejudice and then filed a second action for child custody in Ohio after the minor child had been in Ohio for fifteen months–well past the six month jurisdictional requirement for home state status. *Id.*

16. The child custody judgment also recited that the father and the minor child lived in Oregon and the mother lived in the state of Washington. *See Campbell v. Tardio*, 323 P.3d 317, 318 (Or. Ct. App. 2014). In hopes of reconciliation, the father eventually acquiesced to the mother's request to terminate the Oregon custody order. *Id.* The parties signed a stipulated motion providing that the earlier judgment of custody and visitation be dismissed. However, the parties did not reconcile and the mother moved with the minor child from the state of Washington to North Dakota. Thereafter, the father petitioned the state of Oregon to reestablish child custody. *Id.*

17. The Court of Appeals in *Tardio* also noted that at the time of the commencement of the proceeding before the trial court, the child had not lived in California for six months and had not lived in North Dakota at all. *See Tardio*, 323 P.3d at 318. Moreover, no proceeding had

ever been filed in the state of Washington, and no Washington court had made any findings adverse to Oregon jurisdiction. *Id.* The father still lived in Oregon and both Father and the minor child still had a significant connection with Oregon. *Id.*

18. The Court is mindful of the appearance that Father may have been forum-shopping among the state courts, which has included three divorce and child custody lawsuits being filed in two separate states (albeit only fourteen miles apart) within a relatively short period of time. However, even when the UCCJEA's statutory provisions are applied correctly to the facts of this case, the end result allows child custody jurisdiction to "shift" between two states, although not simultaneously, which the Act was designed to prevent. *See* 43 O.S. § 551-101, official cmts. 1-6.

19. It matters not that the Kansas divorce court's initial child custody determination was temporary in nature. *See* 43 O.S. § 551-102(3).

20. When conducting a *forum non conveniens* analysis, the court should consider the ability of the court to arrive at a solution to all legal issues surrounding the family. If one State has jurisdiction to decide both the custody and support issues, it would be desirable to determine that State to be the most convenient forum. *See* 43 O.S. § 551-207, official cmt., para. 4.

21. Under the UCCJEA, the trial court may not simply dismiss the action based on an inconvenient forum. To do so would leave the case in limbo. Rather, the court shall stay the case and direct the parties to file in the State that has been found to be the more convenient forum. *See* 43 O.S. § 551-207, official cmt., para. 6.

2020 OK 107

No. SCAD-2020-113. December 14, 2020

PAYMENT OF COURTROOM INTERPRETERS

Pursuant to the administrative authority vested in the Court by the Oklahoma Constitution, Article 7, section 6, Administrative Directive No. SCAD-2007-32 relating to the payment of foreign language interpreters and interpreters for the deaf and hard-of-hearing is hereby superseded. The provisions of this directive shall become effective January 1, 2021.

1. Order of Preference. When securing an interpreter provided at the expense of the court, judges and court clerks shall follow the order of preference set forth in 20 O.S. §1710 (effective Nov. 1, 2019), which states in part:

   > In district court proceedings, the court shall endeavor to obtain the services of a courtroom interpreter with the highest available level of credential prior to accepting services of an interpreter with lesser credential and skill. Certified courtroom interpreters have the highest recognized level of credential in this state, and registered courtroom interpreters have the next highest level.

2. **Hourly Rates – Foreign Language Interpreters.** Spoken-language interpreters provided at the expense of the court shall be paid at the following hourly rates for in court services related to the specific case assignment:

   a. Certified Courtroom Interpreters shall be paid not to exceed Eighty Dollars ($80.00) per hour.

   b. Registered Courtroom Interpreters shall be paid not to exceed Sixty Five Dollars ($65.00) per hour.

   c. Provisional Status Interpreters shall be paid not to exceed Fifty Dollars ($50.00) per hour.

   d. All other spoken language interpreters may be paid not to exceed Forty Dollars ($40.00) per hour. Nothing herein is intended to require the court fund to pay a bilingual person who performs incidental interpretation in a particular matter, such as a friend or family member of a party. No mileage shall be paid for interpreters in this category.

3. **Hourly Rates – Sign Language Interpreters.** Sign Language Interpreters provided at the expense of the court shall be paid at the following hourly rates:

   a. Certified Sign Language Interpreters shall be paid not to exceed Eighty Dollars ($80.00) per hour. A "Certified Sign Language Interpreter" is a sign language interpreter who has satisfied the certification requirements set forth in the Rules of the Board of Examiners of Certified Courtroom Interpreters ("the Board"), and whose registration with the Board is current.

   b. Faculty and instructors at the Oklahoma School for the Deaf in Sulphur, OK, and the Jane Brooks/Oklahoma School for the Deaf in Chickasha, OK, who appear on the Oklahoma State Department of Education registry as an educational interpreter may serve as a court interpreter if the judge determines that the individual possesses proficiency sufficient for the purposes of that hearing, and may be paid not to exceed Sixty Five Dollars ($65.00) per hour.

   c. All other qualified legal sign language interpreters (63 O.S. Supp. 2011 §2408) shall be paid not to exceed Sixty Dollars ($60.00) per hour.

   d. All other sign language interpreters may be paid not to exceed Forty Dollars ($40.00) per hour. Nothing herein

is intended to require the court fund to pay a person who performs incidental interpretation in a particular matter, such as a friend or family member of a party. No mileage shall be paid for interpreters in this category.

4. **Billable Time.**

   a. Certified and Registered Courtroom Interpreters, and Certified Sign Language Interpreters, shall be paid a minimum of two hours per day for court interpreting services in a district court. After the first two hours of billable time, services should be invoiced and paid at the appropriate hourly rate in 15 minute increments, rounded to the nearest quarter hour.

   b. Interpreters who are not Certified or Registered are not entitled to the two-hour minimum unless the judge specifically authorizes otherwise for good cause (such as assignments requiring significant travel or rare languages).

   c. Billable time includes all time during which the interpreter is required to be present in the courthouse and available to interpret, as well as time spent actually interpreting.

   d. Double billing on multiple cases is prohibited. The two-hour minimum may be invoiced and paid only once per day in the same district courthouse, regardless of the number of cases covered by the interpreter. Billable time beyond the two-hour minimum shall not total more than the actual time spent providing professional services in any district courthouse, covering one or more cases.

   e. Except for trial proceedings, billable time shall not exceed 8 hours per court day.

   f. Interpreters appearing remotely via telephone or video may be paid a one-hour minimum, unless the judge specifically authorizes otherwise for good cause (such as assignments requiring rare languages). After the first hour of billable time, services should be invoiced and paid at the appropriate hourly rate in 15 minute increments, rounded to the nearest quarter hour.

5. **Travel Time.** Mileage shall be paid pursuant to the State Travel Reimbursement Act. Interpreters shall not be reimbursed at an hourly rate for travel time.

6. **Lodging and Per Diem.** For multi-day assignments, an interpreter may be paid for lodging and per diem pursuant to the State Travel Reimbursement Act if the total expense to the court would be equal to or less than daily mileage to and from the assignment location.

7. **Cancellation Fee.**

   a. A cancellation fee in the amount of $100.00 may be invoiced and paid if cancellation of a Certified or Registered Courtroom Interpreter's assignment occurs with less than 24 hours' notice to the interpreter. The fee does not apply to cancellations due to inclement weather or health emergencies.

   b. The cancellation fee may not be invoiced and paid more than once per day in the same district courthouse.

   c. Interpreters who are not Certified or Registered are not entitled to the cancellation fee. However, a courtesy notice of cancellation of at least four hours is recommended.

   d. If cancellation occurs after an interpreter starts traveling to, or appears for, an assignment, the interpreter may request reimbursement for any applicable mileage.

8. **Judges' Responsibilities.**

   a. Judges shall make every effort to arrange their dockets so as to minimize the amount of billable time an interpreter must wait before or between proceedings, and to maximize the use of the interpreter during the first two hours of billable time on as many cases as possible. Judges in the same courthouse should endeavor to coordinate docket scheduling as much as possible to maximize the use of interpreter time.

   b. Absent extraordinary circumstances, judges and attorneys serving in a case should not function as foreign or sign-language interpreters in that case. In any such case where a judge or attorney must function as an interpreter,

the assigned judge shall make a full record, including any objection by the parties and an explanation of the extraordinary circumstances, for later appellate review.

9. **Interpreters' Responsibilities.** By accepting assignments in the district courts, interpreters agree to comply with all billing requirements, and shall submit complete and accurate invoices on such forms as may be required. Before submitting an invoice to the court clerk for payment, interpreters shall be responsible for obtaining any judicial approval, and attaching any supporting documentation, including the district court and the case number for each individual for services provided.

10. **Exceptions**. The Chief Justice may authorize a departure from the hourly rates or other provisions of this SCAD when necessary to meet the language access needs of the courts. The trial judge or court clerk shall obtain authorization in advance from the Chief Justice before accepting interpreter services at rates other than those set forth herein or when services are required for more than 5 consecutive days.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 14TH day of DECEMBER, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

ALL JUSTICES CONCUR

2020 OK 108

RE: Videoconferencing and Teleconferencing in Meetings of Boards and Committees of the Judiciary

SCAD-2020-114. December 14, 2020

ORDER

¶1 This Order is issued to clarify the meeting requirements applicable to judicial branch boards, committees, task forces, and other working groups, and to authorize those groups to utilize teleconferencing and videoconferencing to conduct their meetings and proceedings. While the Open Meetings Act is applicable to public bodies in the State of Oklahoma, the state judiciary is specifically exempted from the definition of "public body." 25 O.S. §304, paragraph 1. Notwithstanding any other provision of law, the requirements of the Open Meetings Act shall not apply to the proceedings of the boards, committees, or other groups established by or through the state judiciary. The use of videoconferencing and teleconferencing, at the discretion of each group's chairperson, is hereby authorized, for judicial branch boards, committees, task forces, and other working groups, including but not limited to the following:

1. The State Board of Examiners of Certified Shorthand Reporters. Rule 7, Title 20, Chapter 20, Appendix 2, is hereby amended as set forth on Exhibit 1.

2. The State Board of Examiners of Certified Courtroom Interpreters. Rule 6, Title 20, Chapter 23, Appendix 3, is hereby amended as set forth on Exhibit 2.

3. The Dispute Resolution Advisory Board (DRAB).

4. The Juvenile Justice Oversight and Advisory Committee (JJOAC).

5. The Conference of Presiding Judges.

6. The Oklahoma Judicial Conference (OJC).

7. The Oklahoma Access to Justice Commission.

8. The Pandemic Judicial Advisory Committee.

9. The Oversight Committee for the Uniform Representation of Children and Parents in Cases Involving Abuse and Neglect.

10. Any subcommittee of the above listed groups.

11. Any other committee, board, task force, or working group created by or through the Supreme Court, Oklahoma Judicial Conference, or the state judiciary.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 14TH day of DECEMBER, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

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

Rowe, J., not voting.

EXHIBIT 1

Rules Governing Disciplinary Proceedings of the State Board of Examiners of Certified Shorthand Reporters

Chapter 20, App. 2

Rule 7. Disciplinary Hearings.

a) The Board, under signature of the Chairperson~~man~~ on behalf of the Board, shall have power to issue subpoenas to compel the attendance of witnesses on behalf of the State or the court reporter involved.

b) The Chairperson~~man~~ shall preside over formal disciplinary hearings and, if necessary, rule on questions of procedure. Disciplinary hearings shall be conducted in an orderly manner, generally following the order of proceedings in civil matters. However, the formal rules of evidence and civil procedure shall not apply to disciplinary hearings before the Board. Any evidence offered on behalf of the complainant or the court reporter respondent shall be received and considered unless clearly irrelevant to the proceedings. The court reporter shall have the right to appear personally or through counsel, cross examine witnesses and present evidence on his/her own behalf. A complete stenographic record of formal disciplinary hearings before the Board shall be kept. The complainant shall have the burden of persuasion on the material elements of the complaint. Hearings may be adjourned or continued to a date certain as the Board in its discretion shall decide.

c) All disciplinary proceedings before the Board shall be open to the public ~~and conducted in full compliance with the Oklahoma Open Meeting Act [25 O.S. § 301, et. seq.]~~, except that the Board, when acting in its capacity as a quasi-judicial body, may close the meeting to the public ~~adjourn to an executive session~~ for purposes of deliberations only. All votes of the Board regarding disciplinary matters shall be publicly cast and recorded. At the discretion of the Chairperson, the Board may permit the use of teleconferencing and videoconferencing technology in any stage of its disciplinary proceedings. In any disciplinary proceeding conducted by videoconference, the Board shall follow the same general provisions applicable to videoconferencing in the District Courts, as set forth in Rule 34, Paragraph A, Rules of the District Courts, Title 12, Chapter 2, Appendix.

d) Decisions of the Board shall be in writing with findings of fact and conclusions of law as applicable, including a recommendation as to discipline, if such is found to be indicated. The written decision of the Board shall reflect the votes of the members for or against the Board's recommendation. The written decision of the Board shall constitute its recommendation to the Supreme Court for or against discipline. If the recommendation is for discipline, the Board may recommend:

1) Suspension for a period of time up to one (1) year; or

2) Revocation of the enrollment of a certified court reporter, or revocation of the status of a person appointed as a temporary court reporter pursuant to Section 106.3B(d) of Title 20 of the Oklahoma Statutes.

The written decision of the Board shall be immediately transmitted to the court reporter respondent, by hand-delivery or by mailing it or sending it by third-party commercial carrier for delivery within three (3) calendar days. Proof of service shall be documented, and may be made by a certificate of mailing endorsed on the written decision.

EXHIBIT 2

Rules Governing Disciplinary Proceedings of the State Board of Examiners of Certified Courtroom Interpreters

Chapter 23, App. III

Rule 6 Disciplinary Hearings

a) The Board, under signature of the Chairperson~~man~~ on behalf of the Board, shall have power to issue subpoenas to compel the attendance of witnesses on behalf of the State or the interpreter involved.

b) The Chairperson~~man~~ shall preside over formal disciplinary hearings and, if necessary, rule on questions of procedure. Disciplinary hearings shall be conducted in an orderly manner, generally following the order of proceedings in civil matters. However, the formal rules of evidence and civil procedure shall not apply to disciplinary hearings before the Board. Any evidence offered on behalf of the complainant or the interpreter respondent shall be received and considered unless clearly irrelevant to the proceedings. The interpreter shall have the right to appear personally or through counsel, cross examine witnesses and present evidence on his/her own behalf. The Board or the respondent may request that a complete stenographic record of formal disciplinary hearings before the Board be kept. The complainant shall have the burden of persuasion on the material elements of the complaint. Hearings may be adjourned or con-

tinued to a date certain as the Board in its discretion shall decide.

c) All disciplinary proceedings before the Board shall be open to the public, except that the Board, when acting in its capacity as a quasi-judicial body, may close the meeting to the public for purposes of deliberations only. All votes of the Board regarding disciplinary matters shall be publicly cast and recorded. At the discretion of the Chairperson, the Board may permit the use of teleconferencing and videoconferencing technology in any stage of its disciplinary proceedings. In any disciplinary proceeding conducted by videoconference, the Board shall follow the same general provisions applicable to videoconferencing in the District Courts, as set forth in Rule 34, Paragraph A, Rules of the District Courts, Title 12, Chapter 2, Appendix.

d) The Board shall issue a written report with findings of fact and conclusions of law as applicable, and its recommendation to the Supreme Court for or against discipline. The written report of the Board shall reflect the votes of the members for or against the Board's recommendation. Disciplinary action against a Registered or Certified Courtroom Interpreter shall consist of either:

1) Suspension for a period of time up to one (1) year; or

2) Revocation of the enrollment of a Registered or Certified Courtroom Interpreter.

e) The Board shall issue its written report and recommendation within fifteen (15) days from the conclusion of the hearing. The written report and recommendation of the Board shall be immediately transmitted to the interpreter, by hand-delivery or by mailing it or sending it by third-party commercial carrier for delivery within three (3) calendar days. Proof of service shall be documented, and may be made by a certificate of mailing endorsed on the written report.

2020 OK 109

In the Matter of the Reinstatement of Jacqueline Forsgren Cronkhite to Membership in the Oklahoma Bar Association and to the Roll of Attorneys.

SCBD No. 6905. December 14, 2020

ORDER

¶1 The petitioner, Jacqueline Foresgren Cronkhite (Cronkhite/attorney) was stricken from the roll of attorneys from the Oklahoma Bar Association on January 1, 2017, for non payment of dues and non-compliance with mandatory continuing education. Petitioner lives in and is licensed to practice law in Arkansas. On March 19, 2020, she petitioned this Court for reinstatement as a member of the Oklahoma Bar Association.

¶2 On June 11, 2018, a hearing was held before the Trial Panel of the Professional Responsibility Tribunal and the tribunal recommended that the attorney be reinstated. Upon consideration of the matter, we find:

1) The attorney has met all the procedural requirements necessary for reinstatement in the Oklahoma Bar Association as set out in Rule 11, Rules Governing Disciplinary Proceedings, 5 O.S. 2011, ch.1, app. 1-A.

2) The attorney has established by clear and convincing evidence that she has not engaged in the unauthorized practice of law in the State of Oklahoma.

3) The attorney has established by clear and convincing evidence that she possesses the competency and learning in the law required for reinstatement to the Oklahoma Bar Association.

4) The attorney has established by clear and convincing evidence that she possesses the good moral character which would entitle her to be reinstated to the Oklahoma Bar Association.

5) The attorney's bar dues have been paid and brought up to date and she has paid $1,148.46 for the costs of the transcripts of the PRT proceeding.

¶3 IT IS THEREFORE ORDERED that the petition of Jacqueline Forsgren Cronkhite for reinstatement be granted effective immediately. The remaining costs of $347.27 for these proceedings shall be paid within 90 days of reinstatement.

¶4 DONE BY ORDER OF THE SUPREME COURT THE 14th DAY OF DECEMBER, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

ALL JUSTICES CONCUR.

2020 OK 110

TOKIKO JOHNSON, Plaintiff, and TRIPLE DIAMOND CONSTRUCTION LLC, Plaintiff/Appellant, v. CSAA GENERAL INSURANCE COMPANY, CSAA INSURANCE EXCHANGE, CSAA FIRE AND CASUALTY INSURANCE COMPANY d/b/a AAA FIRE & INSURANCE COMPANY, and AUTOMOBILE CLUB OF OKLAHOMA d/b/a AAA OKLAHOMA, Defendants/Appellees.

No. 118,689. December 15, 2020

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY

¶0 The owner of real property and a construction company filed an action in District Court against the insurer of the property and alleged related insurer entities. Defendants (insurer) filed a motion to dismiss or in the alternative motion for summary judgment, argued an insurance policy may not be assigned, and sought dismissal of the construction company as a party. The Honorable Cindy H. Truong, District Judge, granted the defendants' motion, and the construction company appealed. Defendants filed a motion for the Oklahoma Supreme Court to retain the appeal and the motion was granted. We hold a post-loss insured's assignment of a property insurance claim was an assignment of a chose in action, and not an assignment of the policy. Insurer's motion to dismiss the appeal is denied.

DISTRICT COURT ORDER REVERSED AND CAUSE REMANDED TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THE COURT'S OPINION; APPELLEES' MOTION TO DISMISS DENIED

Aaron Stiles, Austin Meyer, Downtown Legal Group, Norman, Oklahoma, for Plaintiff/Appellant.

Gerard F. Pignato, Matthew C. Kane, Ryan, Whaley, Coldrion, Jantzen, Peters & Webber PLLC, Oklahoma City, Oklahoma, for Defendants/Appellees.

EDMONDSON, J.

¶1 This case involves an insured assigning a post-loss property insurance claim to a construction company for the purpose of the company repairing her property after a storm. Insurer argued the insured property owner was required to obtain written consent from the insurer prior to making the assignment. We agree with a majority of courts stating an insured's post-loss assignment of a property insurance claim is an assignment of a chose in action and not an assignment of the insured's policy. We hold insured's assignment was not prohibited by either the insurance policy or 36 O.S. § 3624. We conclude the District Court's judgment was erroneous when it dismissed the construction company as a party because written consent for the assignment was not provided by insurer to the insured. We reverse the judgment of the District Court and remand for further proceedings. The insurer's motion to dismiss the appeal is denied.

¶ 2 Tokiko Johnson's real property was damaged in a storm and she filed a claim with her insurance company. Johnson also executed an assignment of her insurance claim for the purpose of repairing the property with the execution in favor of Triple Diamond Construction LLC (the construction company). An appraiser retained by the construction company determined storm damage to the property in the amount of $36,346.06. The insurer determined the amount of damage due to the storm was $21,725.36.

¶3 Johnson and the construction company brought an action against Johnson's insurer and alleged related entities which are "part of a reciprocal inter-insurance exchange which pools its business among insureds and 'exchange policies' within the AAA/CSAA Insurance Group of companies sharing premiums, expenses and losses" (insurer).[1] Plaintiffs' petition in its labeled "first cause of action – breach of contract" alleges damages in the amount of $14,620.70, not including interest, attorneys' fees, and costs. Plaintiffs' petition also contains allegations labeled "second cause of action – bad faith (Johnson Only)." This part of the petition alleges the insurance company did not timely and adequately investigate the insurance claim or timely name an appraiser to determine the storm damage. These allegations are combined with others alleging the insurer failed to act in good faith with respect to the insurance contract obligations.

¶4 Insurer filed a motion to dismiss or an alternative motion for summary judgment for the purpose of dismissing the construction company as a party. Insurer raised one argument: Johnson's policy and 36 O.S. § 3624 prohibit an assignment of the policy. The construction company's response argues the assignment was a

post-loss assignment of an insurance claim and not an assignment of an insurance policy. Defendants replied (1) an insurance claim is part of an insurance policy and a policy may not be split into smaller pieces, and (2) a "bad faith claim" may not be assigned.

¶5 The District Court sustained insurer's motion. Johnson dismissed her claims without prejudice to re-filing and the construction company appealed. In response to a show cause order by this Court, the parties agree that nothing remains pending in the District Court. However, insurer argues the construction company may not appeal without Johnson as a party in the appeal and insurer requests dismissal of the appeal. Insurer's argument is based upon (1) characterizing an insurance claim on an insurance policy as a single legal claim which may not be split between Johnson and the construction company, and (2) identifying Johnson as a necessary and proper party for this appeal involving a legal claim against her policy.

¶ 6 The Court's show cause order requested the construction company to address *Mann v. State Farm Mutual Automobile Insurance Company*, 1983 OK 84, 669 P.2d 768. The construction company responded and argued *Mann* applies in an appeal from a judgment which resolves fewer than all of the issues in a case, and all issues have been resolved due to the combined effect of the trial court's order and Johnson's dismissal without prejudice. The construction company argued *Mann* does not apply for this reason.

¶7 Insurer responded to the show cause order and argued the construction company is appealing "only part of a [legal] claim" or part of a cause of action and one principle stated in *Mann* applies. Insurer's approval of *Mann* was limited to citing it for the proposition that a cause of action includes all theories of recovery or types of damages stemming from one occurrence or transaction.[2] Insurer argued an action for breach of an insurance contract is the same cause of action as one based upon an insurer's failure to perform the contract in good faith. Insurer's response requested dismissal of the appeal based upon the same argument it made in the trial court, *i.e.*, Johnson's contractual rights created by the insurance agreement may not be assigned to the construction company. We address the request to dismiss the appeal after addressing the sole issue decided in the trial court and raised on appeal.

I. Standard of Review

¶8 The parties argued in the trial court a single question: May an insured assign a property insurance policy benefit to a third party without the consent of the insurer when (1) the policy requires insurer's consent for assignment of the policy, (2) a statute allows a policy to state it is or is not assignable, and (3) the insured's assignment relates to a previous covered loss to the insured's property? This issue was presented for adjudication by the insurer's motion to dismiss or alternative motion for summary judgment.

¶9 The appellate standard of review for an assignment of error is based upon the nature of the proceeding in District Court (*e.g.*, law, equity, and types of administrative proceedings), nature of the trial court's decision (*e.g.*, deciding an issue of law, fact, mixed law and fact), and the nature of the procedure used by the trial court (*e.g.*, dismissal of a petition, summary judgment, judgment on a jury verdict), with the procedure linked to a particular judicial power and judicial discretion exercised by the trial court.[3] Generally, a legal question involving the District Court's statutory interpretation of law is subject to *de novo* appellate review.[4] Similarly, when the meaning assigned by the trial court to an insurance contract and its terms is based upon a legal conclusion, then the assignment of error on appeal presents a legal question and is reviewed using a *de novo* standard.[5]

¶10 The trial court decided insurer's motion to dismiss or in the alternative summary judgment. Insurer's motion relied on 12 O.S. § 2017(D)[6] in its reply to plaintiffs' response to a dismissal request, and insurer combined this authority with an argument stating a cause of action should not be split.[7] Insurer raised "failure to state a claim" in its previously filed answers, and in its motion to dismiss relied on one opinion for a difference between a motion raising 12 O.S. § 2012(B)(6) and a motion for summary judgment.[8] The construction company also relied on authority discussing review of an order deciding a 12 O.S. § 2012 (B)(6) dismissal for failure to state a claim.[9] The parties do not identify in their filings either an additional § 2012 ground for dismissal or an issue of fact adjudicated by the District Court.

¶11 The trial court adjudicated the meaning of the language in both 36 O.S. § 3624 and insured's policy as issues of law. *De novo* appel-

late review is used for issues of law arising from both § 2012(B)(6) motion to dismiss and summary judgment adjudications.[10] Review of both these types of adjudications involves an appellate court's exercise of a plenary, independent, and non-deferential reexamination of the trial court's rulings on issues of law.[11] We use *de novo* appellate review for appellant's assignments of error challenging the correctness of the District Court's judgment.

II. Insured's Assignment

¶12 Generally, when an insurance policy is deemed to be a personal contract between insured and insurer, a policy provision requiring insurer's consent for an assignment will be enforced. However, this Court has noted exceptions to this general rule. For example, in *American Alliance Ins. Co. of N. Y. v. McCallie,* 1957 OK 312, 319 P.2d 295, we noted an exception occurs when the subject of the assignment is not the policy and its coverage, but a right to receive funds for a policy-covered loss and the assignment occurs after the loss. We stated the following.

> It seems to be the rule, followed by most courts, that where such a policy is in force and effect at the time the insured property burns, by the happening of the latter event, the relationship between the insurer and the insured becomes simply that of debtor and creditor; and that the chose in action, which the latter then has against the former, may be validly transferred to a third person, by assignment, without compliance with the policy's requirement that the insurer's consent thereto (by endorsement or otherwise) be obtained.

American Alliance Ins. Co. of N.Y. v. McCallie, 319 P.2d at 298 (relying on court opinions from Wisconsin and Iowa, cases cited in Annotations at 122 A.L.R. 144, 56 A.L.R. 139, and the then current 45 C.J.S. *Insurance,* 29 Am.Jur. *Insurance*, and 5 Appleman, *Insurance Law and Practice,* § 3458).

The phrase "chose in action" was used in common law and has modern applications which include an assignable legal right.[12] The phrase may be used when describing a type of property in 60 O.S.2011 § 312: "A thing in action is a right to recover money or other personal property, by judicial proceedings."[13] Generally, 60 O.S. 2011 § 313 makes a "thing in action" assignable.[14] This concept of a post-loss policy-covered assignment of a chose in action was not new when we addressed it in *American Alliance.* For example, in 1880 the Supreme Court of Wisconsin made the following observation.

> . . . although the policy provides that an assignment thereof, without the consent of the company, will avoid the contract, yet the law is well settled that this only applies to an assignment before a loss under it. After a loss, the claim, like any other chose in action, may be assigned without affecting the insurer's liability. *May on Ins*. 468; *Wood on Ins.* 189. Says Mr. Wood on this point: "The contract, while the risk is active, is personal, and the parties contract in reference to the *delectus personae* of each other; therefore, the obligation cannot be changed without the insurer's consent. But, when liability actually attaches under the policy, the entire relation is changed, and the relation of insurer and insured is changed to that of debtor and creditor, and the *delectus personae* of the contract is no longer material."

Dogge v. Northwestern Nat. Ins. Co., 49 Wis. 501, 5 N.W. 889, 889-890 (1880).

The Wisconsin court was not alone when asserting this rule in 1880. The Supreme Court of Michigan also recognized this concept as an important public policy in 1880.

> The provision of the policy forfeiting it for an assignment without the company's consent is invalid, so far as it applies to the transfer of an accrued cause of action. It is the absolute right of every person – secured in this state by statute – to assign such claims, and such a right cannot be thus prevented. It cannot concern the debtor, and it is against public policy.

Roger Williams Ins. Co. v. Carrington, 43 Mich. 252, 5 N.W. 303, 304 (1880).

By 1917 the Florida Supreme Court described the rule allowing an insured's assignment of post-loss contractual rights without an insurer's consent as a matter which was "well-settled" in law.[15] The Florida court relied on an opinion from Georgia which in turn cited *Joyce on Insurance, Roger Williams Ins. Co*., and opinions from Wisconsin, New York, and Pennsylvania.[16] Legal hornbooks of that day also recognized the principle.[17]

¶ 13 In *American Alliance* we noted this post-loss exception to a policy-required insurer's

consent did not apply because: (1) The insured had transferred ownership of the insured property to the new owner prior to the loss and the insured/assignor "had no insurable interest in the property" at the time of loss; and (2) "It is elementary that a fire insurance policy was a personal contract with the party insured," and the insurance policy did not pass to the purchaser of the property without the policy-required insurer's consent to the assignment.[18] In other words, the insured could not assign insurance coverage to a new owner of the property, and an attempt to assign coverage was an attempt to assign the policy.

¶14 In 1963 and few years after *American Alliance* we again noted the distinction between assignment of a chose in action and one to create insurance coverage.[19] We commented on what the property owners had been required to show in the trial court relating to an assignment of a "matured claim" which had "ripened" into a "chose in action."

> The cases plaintiffs cite in support of their argument that Mrs. Wythe's assignment was effective, even though the subject of the insurance had already been destroyed, concern situations in which those insured under the policies involved, had insurable interests, or valid claims that had already matured at the time of their assignments, in which situations the subject of the assignments were choses in action against the insurors. If, on the date of Mrs. Wythe's purported assignment, there had been anything in being, upon which the assignment, or the policies, could have operated, or to which either could have applied – that is, either the property, or a chose in action growing out of the loss thereof – then there might be a basis for the position that said assignment transferred some right to plaintiffs. As we have seen, however, when the assignment was belatedly executed on December 21, 1960, the ostensible assignor, Mrs. Wythe, could neither claim any loss from the fire, nor assert that, by reason of the fire, any such claim had matured, or ripened, into a chose in action in her – nor was the property – the subject of the insurance coverage – any longer in existence.

Shadid v. American Druggist Fire Ins. Co., 1963 OK 146, 386 P.2d 311, 314-315.

We noted a difference between (1) an insured possessing an insurable interest and valid insurance claim matured at the time of assignment when the subject of the assignment was a policy-created chose in action after a policy-covered loss, and (2) a person possessing no insurable interest and no policy-created chose in action and who attempts to create personal insurance coverage without a policy-required consent of insurer.[20]

¶15 Our explanation in *Shadid* relied upon reasoning we cited in *American Alliance* relating to a matured claim assignable as a "chose in action." *Shadid* occurred in the context of a fire insurance policy, property loss due to fire, and whether an assignment was proper. Oklahoma's standard fire insurance policy both before and after the then recent 1957 Insurance Code has continued to provide: "Assignment of this policy shall not be valid except with the written consent of this Company."[21] This was the language in the policy quoted by the Court in *Shadid*.[22] *Shadid* occurred in the context of a statutory form for a fire insurance policy stating an assignment required insurer's consent.

¶16 Many courts since 1957-1963 have agreed with the rule stated in *American Alliance* and *Shadid*, and a majority have continued to state a post-loss assignment by the insured of a chose in action is one exception to an insurer's policy-required consent for assignment. For example, one legal encyclopedia states: "Moreover, the majority rule is that a provision that requires the insurer's consent to an assignment of an insurance policy is void as applied to an assignment made after a loss covered by the policy has occurred."[23] This division of majority and minority views was recently discussed by the United States Court of Appeals for the Fifth Circuit when applying the law of Texas, and the court observed the following.

> According to *Couch on Insurance*, "the great majority of courts adhere to the rule that general stipulations in policies prohibiting assignments thereof except with the consent of the insurer apply only to assignments before loss, and do not prevent an assignment after loss." These courts reason that "[t]he purpose of a no assignment clause is to protect the insurer from increased liability, and after events giving rise to the insurer's liability have occurred, the insurer's risk cannot be increased by a change in the insured's identity."

Keller Foundations, Inc. v. Wausau Underwriters Ins. Co., 626 F.3d 871, 874 (5th Cir. 2010) (quot-

ing 3 *Couch on Insurance* § 35:7 (Westlaw 2010) and collecting various cases), (notes omitted).

Courts adopting the majority position have relied on a long-recognized public policy against restraints on assigning a chose in action, and they have stated this policy supersedes or outweighs a public policy favoring contractual freedom to create such a restraint in a contract of insurance. For example, the Supreme Court of New Jersey recently stated the following.

> The majority rule is an exception to the general principle that parties to a contract may freely limit assignment of their contractual rights. The principle underlying the rule is a deeply rooted public policy against allowing restraints on alienation of choses in action. *See Bolz v. State Farm Mut. Auto. Ins. Co*., 274 Kan. 420, 52 P.3d 898, 904, 908 (2002) (adopting majority rule and rejecting insurer's position "that the public policy in favor of freedom of contract is superior to the public policy in favor of free assignment of choses of action"); *Wehr Constructors, Inc. v. Assurance Co. of Am.,* 384 S.W.3d 680, 688 (Ky. 2012) (finding majority rule "fully consistent with [Kentucky's] prior holdings adverse to contractual provisions tending to restrain the alienability of choses in action"). New Jersey similarly recognizes choses in action as personal property and disfavors any attempt to restrict alienation of that property. *Morris v. Glaser*, 106 N.J. Eq. 585, 610, 151 A. 766 (Ch. 1930) ("[A] chose in action has almost time out of mind been assignable."), *aff'd,* 110 N.J. Eq. 661, 160 A. 578 (E. & A. 1932); *see also* N.J.S.A. 1:1 – 2 (including choses in action in statutory definition of "personal property").

Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co., 227 N.J. 322, 151 A.3d 576, 586 – 587 (2017).

These courts echo our observations in both *American Alliance* and *Shadid* by explaining a difference between assignment of a policy and a chose in action.

> The principle on which the courts hold that an assignment of a right under a policy prohibiting assignment may be made is that such an assignment is not the assignment of the policy itself (because the parties have contracted otherwise), but it is the assignment of a claim, or debt, or chose in action. The rule is stated in 2 *May on Insurance*, § 386, as follows: "An assignment after loss is not the assignment of the policy, but the assignment of a claim or debt – a chose in action. *** An assignment after loss does not violate the clause in the policy forbidding a transfer even if the clause reads before or after loss. The reason of the restriction is, that the company might be willing to write a risk for one person of known habits and character and not for another person of less integrity and prudence, but after loss this reason no longer exists."

Givaudan Fragrances Corp., 151 A.3d at 588, quoting *Ocean Accident & Guar. Corp. Ltd. v. Sw. Bell Tel. Co.*, 122 A.L.R. 133, 100 F.2d 441, 446 (8th Cir.), *cert. denied,* 306 U.S. 658, 59 S.Ct. 775, 83 L.Ed. 1056 (1939).

Distinguishing between an assignment of an insurance policy and an assignment of a post-loss chose in action which does not increase an insurer's risk has continued to be recognized by a majority of courts in the United States as implementing an important public policy.[24]

¶17 We have explained contractual rights are presumed to be assignable, but parties may expressly provide otherwise.[25] We observed that contractual language concerning assignment has been examined by courts to determine (1) if the language is clear and unambiguous, (2) the parties' intent, (3) if the language eliminates both the power and the right to assign, (4) the nature of any harm to the party obligated to perform by the mere assignment, (5) the nature of the benefit created by the assignment, (6) the public policy considerations applicable to the particular contract and (7) assignability of contractual rights.[26]

¶18 The insurer in our case focuses on public policy considerations by relying on 36 O.S. 2011 § 3624 as an expression of public policy,[27] and argues this statutory public policy should be enforced by recognizing a limit on Johnson's ability to create an assignment of a chose in action. Section 3624 states as follows.

> Except as provided in subsection D of Section 6055 of this title, *a policy may be assignable or not assignable*, as provided by its terms. Subject to its terms relating to assignability, any life or accident and health policy, whether heretofore or hereafter issued, under the terms of which the beneficiary may be changed upon the sole request of the insured, may be assigned either by pledge or transfer of title, by an assignment executed by the insured alone

> and delivered to the insurer, whether or not the pledgee or assignee is the insurer. Any such assignment shall entitle the insurer to deal with the assignee as the owner or pledgee of the policy in accordance with the terms of the assignment, until the insurer has received at its home office written notice of termination of the assignment or pledge, or written notice by or on behalf of some other person claiming some interest in the policy in conflict with the assignment.

36 O.S.2011 § 3624 (emphasis added).

Johnson's policy contains similar language: "Assignment of this policy will not be valid unless we give our written consent."[28] The statutory language relied on by insurer expressly states "a policy may be assignable or not assignable, as provided by its terms." The policy itself states assignment of "this policy" requires written consent. The issue is whether the statutory language expressing a public policy relating to an assignment of an insurance "policy" includes a post-loss assignment of a chose in action when the insurance policy restricts an assignment of "this policy."

¶19 A primary goal when reviewing a statute is to ascertain legislative intent, if possible, from a reading of the statutory language and its plain and ordinary meaning.[29] This is so because the plain words of a statute are deemed to express legislative authorial intent in the absence of any ambiguity or conflict in language.[30] We have explained the plain meaning of statutory language is conclusive, except in a rare case when literal construction produces a result which is demonstrably at odds with legislative intent.[31] When a provision of an insurance policy and a statute relate to the same insurance principle we read the policy in light of the statute.[32] In the present case where the statute refers to the parties' agreement in the policy, we examine the policy to give effect to the ordinary meaning of the words in the policy.[33]

¶20 We first look at the plain words used in the statute. Our parties agree Johnson's policy is subject to section 3624's language that "a policy may be assignable or not assignable, as provided by its terms."[34] They disagree whether "policy" includes a chose in action. The plain language of the statute states the object which is made assignable or not is a "policy." The term "policy" in the context of an insurance policy usually refers to a type of contract, certificate, or document stating the existence or coverage of insurance for certain purposes.[35] Generally, courts construe terms in an insurance policy consistent with insurance statutes on the same subject.[36] We consider the term "policy" in the contexts provided by both the statute and an insurance contract or agreement.

¶21 We have explained the nature of an insurance policy as a type of contract, a contract of adhesion.[37] Historically, the term "policy" referred to a completed contract of insurance usually evidenced by a formal written instrument named a "policy."[38] Also historically, this contract usually contained certain elements (either determining or subject to being made determinable), including the subject of the insurance, the rate of premium, extent of insurance as to time and risks assumed, amount of insurance underwritten, additional terms essential for the circumstance, and with no conditions considered to be precedent for the creation of the contract remaining to be fulfilled.[39] Generally, insurance is "a conditional contract, whereby one party undertakes to indemnify another against loss, damage, or liability arising from some specified but contingent event."[40]

¶22 Section 3624 was created as part of the then new Insurance Code in 1957 and section 3624 was codified in Title 36, Article 36, containing general provisions for many insurance contracts.[41] Similar language involving fire insurance contracts had existed in our insurance statutes both before and after the 1957 Code. This continued use of statutory language concerning assignment of a "policy" occurred forty years after the Florida Supreme Court had observed a then well-settled legal principle distinguishing assignment of a policy and a post-loss chose in action.[42] This Florida Supreme Court opinion was not unfamiliar to members of the Oklahoma Bar in 1957, and it had been relied upon by this Court in 1929 and twice in 1935 when explaining a garnishment principle.[43] Further, the Florida Supreme Court relied upon an opinion from Georgia which in turn relied on an 1881 court opinion from Iowa, the same Iowa opinion we cited in *American Alliance* when explaining the chose-in-action exception for an assignment related to an insurance policy.[44] A few months after section 3624 became effective in 1957 this Court's opinion in *American Alliance*, *supra*, noted the general rule allowing assignment of a chose in action by an insured after a policy-covered loss had occurred.

¶23 Insurer's position is essentially this: When the legislators created 3624 in 1957 they selected the term "policy" to have a meaning in scope so as to include a chose in action. In summary, insurer contends the Legislature created a statutory meaning for "policy" that was contrary to a "well-settled" legal principle used by courts in other states construing insurance contracts for the then previous 75 years. The area of insurance contracts is one in which the Legislature has the power to decide public policy,[45] but insurer's argument does not show that the Oklahoma Legislature decided on a different definition for an insurance "policy" in 1957 for section 3624.

¶24 As noted herein in our discussion of *Shadid*, the statutory form for a fire insurance policy contained language relating to an assignment similar to section 3624. The uniform statutory form for fire insurance used in several States expressed a legislative intent in this and other States to not change the meaning and effect of common insurance terms which had become well-settled; but "to combine these terms in a standard policy for the sake of uniformity,"[46] and for courts to construe an insurance policy by the usual rules of construction applied to an insurance contract although the policy was based upon a statutory form.[47]

¶25 No Oklahoma insurance statute or Oklahoma authority is cited by insurer for making the term "policy" to be broad enough in scope to include Johnson's assignment of a post-loss chose in action.[48] Insurer points to no language in Johnson's policy defining the term "policy" as including an assignment of a chose in action.[49] Insurer argued an insured may not split a "policy" into smaller pieces and then classify a piece as a "claim" for the purpose of an assignment, because a "policy" may not be assigned.[50] Insurer equates the meaning of "policy" with a "chose in action" when the latter is based on a policy-created obligation. Insurer's argument injects ambiguity into the meaning of the term "policy" by arguing for a definition of "policy" not found in (1) an insurance statute, or (2) the historical and ordinary meaning of the term which distinguishes a "policy" and a "chose in action," or (3) a policy-defined meaning for "policy" in this appeal. The language "assignment of this policy" in Johnson's policy is not ambiguous; but insurer's argument would create an ambiguity and it would not ultimately support insurer's argument against an assignment since ambiguity would be resolved against the insurer.[51]

¶26 We construe the meaning and effect of a common insurance term in § 3624, a "policy," using its well-settled meaning at both the time § 3624 was created in 1957 and used today in Johnson's policy of property insurance. We agree with the majority of courts allowing an assignment by an insured possessing an insurable interest when the subject of the assignment is a post-loss chose in action based upon property insurance. We conclude the District Court's judgment dismissing the construction company as a party must be reversed.

III. Insurer's Split-Claim Theory

¶27 Insurer argues the appeal should be dismissed because Johnson impermissibly split her "contract" claim" from her "tort claim." Insurer further argues a "tort claim" or tort chose in action may not be assigned, and because of this principle the construction company is not a proper party and Johnson is the proper and necessary party for an appeal.

¶28 Insurer's response to the Court's order on the issue of *Mann* has attached photocopies. They include (1) a letter from the Oklahoma Insurance Department to a person, not a party, and who acted as a public adjuster, (2) a request from this person to the State Insurance Commissioner for a hearing, (3) two pages selected from a deposition involving this person, and (4) a District Court petition naming this person and the Oklahoma Insurance Commissioner as parties. Nothing before us suggests these documents were either before the trial court when it decided insurer's motion to dismiss or demonstrate the Court's incapacity to administer complete relief in this appeal.

¶29 This court may not consider as part of an appellate record any instrument or material which has not been (1) incorporated into the assembled record by a certificate of the clerk of the trial court, or (2) allowed by a rule of appellate procedure for reviewing certain dismissals and summary judgment.[52] A deficient record may not be supplemented by material physically attached to a party's appellate brief.[53] Exceptions to these principles may include an admission of fact made in a brief, and facts occurring during the pendency of an appeal that adversely affect a court's capacity to administer effective relief, such as when a controversy has become moot during an appeal and facts presented with affidavit by counsel of

record.[54] The extra-record documents presented by insurer herein are not supported with an affidavit by counsel of record.[55] These documents are not considered by the Court when reviewing insurer's response.

¶30 In *Mann v. State Farm Mutual Automobile Insurance Company*,[56] we observed "the general rule that an appeal will not lie from the trial court's determination of breach of an insurance contract when the rest of the cause of action has not yet been tried."[57] We then observed "the general rule is not applicable" where the trial court adjudicated liability and damages on the insurance contract claim against the insurer, insurer appealed, *and "the issue of tortious breach" remained pending in the trial court*.[58] We allowed the appeal to adjudicate the issues as a final order apart from the tortious breach claim remaining in the trial court. Neither insurer nor the construction company has made any argument stating this part of *Mann* should be overruled or modified in the appeal before us.

¶31 Insurer argues as part of its dismissal request: (1) 12 O.S. § 2017 states assignment of claims not arising out of contract is prohibited; (2) A "bad faith" claim against an insurer is a tort; and (3) Johnson's bad faith claim may not be assigned or split because of § 2017 and a bad faith claim as a tort. The Oklahoma Court of Appeals has recently observed it "has held that claims arising out of a breach of contract are freely assignable."[59] In one of these opinions, *Chimney Rock Ltd. Partnership v. Hongkong Bank of Canada*,[60] the court distinguished "a pure tort" which may not be assigned and a tort arising out of contract which may be assigned.[61] *Chimney Rock* relied on Judge Murrah's opinion in *Momand v. Twentieth Century Fox Film Corp*., 37 F.Supp. 649 (W.D.Okl.1941),[62] which explained the non-assignability of a tort occurs when the tort is a wrong against a person, as opposed to wrong which affected "the business or property of the assignor and it was, therefore, not *ex delicto* and came within the exception of the general rule forbidding the assignment of a thing in action, arising out of a tort."[63]

¶32 Insurer invites the Court to examine the tort of an implied-in-law duty of good faith and fair dealing arising from an alleged breach of the contractually-based relationship owed by an insurer to its insured in the context of opinions by the Court of Civil Appeals cited by insurer. Insurer also relies upon a legal encyclopedia which includes jurisprudence from other jurisdictions, and insurer necessarily invites our review of the assignability of claims in these jurisdictions, principles in the common law, the relation between assignability and survivability of a claim, and a comparison with Oklahoma jurisprudence.[64] Insurer essentially asks the Court to review our jurisprudence and determine whether the alleged tort herein should be classified as "pure tort" or a "tort arising out of contract" for purpose of an insured's assignment of a property insurance chose in action against her insurer, and (2) adjudicate the meaning and effect of Johnson's assignment on the contract and tort theories of recovery pled in the District Court. Insurer also relies upon a Court of Civil Appeals' opinion for its argument that the "contract claim" and the "bad-faith claim" are one cause of action.[65]

¶33 The District Court did not adjudicate these issues, and in an appeal we do not make first instance determinations of disputed non-jurisdictional law issues.[66] The present appeal is limited to *the meaning of an insured's post-loss property insurance assignment of a claim against the policy* as it relates to 36 O.S. § 3624 and a phrase in the insured's property insurance policy. This issue was adjudicated by the trial court. We also may not adjudicate insurer's request for the Court to construe the meaning of the assignment in a broader context because an issue on appeal will not be decided when unsupported by an appellate record necessary for such review,[67] and the assignment itself is not a part of the record on appeal. Further, insurer asks us to adjudicate whether Johnson intended to assign a tort claim to the construction company because the meaning of an assignment is usually based upon the intent of the parties.[68] This issue was not adjudicated in the trial court. We decline to address these issues raised by insurer when they are unsupported by an appellate record, not preserved by the parties for appellate review, and not adjudicated by the trial court.[69] Insurer's motion to dismiss the appeal is denied.

IV. Conclusion

¶34 An insured possessing an insurable interest may assign a post-loss chose in action based upon a claim against a property insurance policy without violating an insurance policy clause requiring written consent of the insurer for assignment of the policy. Insurer's motion to dismiss the appeal is denied. The District Court's judgment is reversed and the matter is remanded to the trial court for further proceedings consistent with this opinion.

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

¶36 CONCUR IN PART AND DISSENT IN PART: KANE, J., I concur in the holding that a post-loss insurance contract right is assignable as a chose in action, but I dissent from the declination to rule upon the assignability of a bad faith chose in action, which I would hold as a matter of law is not assignable.

EDMONDSON, J.

1. Record on Accelerated Appeal, Tab 1, Petition, May 16, 2019, pg. 2 ¶ 7.

2. *Mann,* 1983 OK 84, 669 P.2d at 772, citing *Retherford v. Halliburton Company,* 1977 OK 178, 572 P.2d 966.

3. *I.T.K. v. Mounds Public Schools*, 2019 OK 59, n. 12, & ¶¶ 11-12, 451 P.3d 125, 131; *Christian v. Gray,* 2003 OK 10, ¶ ¶ 40-47, 65 P.3d 591, 608-610 (review of issues of law and fact); *Laubenstein v. Bode Tower, L.L.C.*, 2016 OK 118, ¶ 9, 392 P.3d 706, 709 (equity order is sustained unless found to be against the clear weight of the evidence or is contrary to law or established principles of equity). *Compare, City of Tulsa v. State. of Oklahoma, ex rel. Public Employees Relations Bd.*, 1998 OK 92, ¶ 12, 967 P.2d 1214, 1219 (Administrative Procedure Act appeal uses same statutory review in District Court, Court of Civil Appeals, and Supreme Court) with *Weson v. Independent School District No. 35 of Cherokee County*, 2007 OK 61, ¶ 16, 170 P.3d 539, 543 (District Court's appellate review of administrative order using a trial *de novo* and when the decision is reviewed by Court of Civil Appeals and Supreme Court they will not weigh evidence to determine preponderance, but determine if competent evidence supports the District Court's decision, or is clearly erroneous as a matter of law).

4. *McIntosh v. Watkins,* 2019 OK 6, ¶4, 441 P.3d 1094, 1096, citing *Fulsom v. Fulsom,* 2003 OK 96, ¶ 2, 81 P.3d 652.

5. *May v. Mid-Century Insurance Company*, 2006 OK 100, ¶ 22, n. 37, 151 P.3d 132, 140, citing *American Economy Ins. Co. v. Bogdah*n, 2004 OK 9, ¶ 11, 89 P.3d 1051; *Bituminous Cas. Corp. v. Cowen Const., Inc.*, 2002 OK 34, ¶ 9, 55 P.3d 1030, 1032; *Torres v. Sentry Ins.*, 1976 OK 195, ¶ 7, 558 P.2d 400; *Wiley v. Travelers Ins. Co.*, 1974 OK 147, ¶ 16, 534 P.2d 1293; *American Iron & Mach. Works Co., Inc. v. Insurance Co. of North America*, 1962 OK 197, ¶ 5, 375 P.2d 873.

A meaning assigned by the trial court to an insurance contract and its terms may be based upon adjudication of an issue of fact in some circumstances. *See*, *e.g.*, *Hensley v. State Farm Fire and Casualty Co.,* 2017 OK 57, ¶¶ 37, 38, 398 P.3d 11, 23-24. (parties' intent relating to third party beneficiary status occurring in the context of a latent ambiguity claim required trier of fact to adjudicate the issue of fact presented by competing claims).

6. 12 O.S.2011 § 2017(D):

> D. ASSIGNMENT AND SUBROGATION OF CLAIMS. The assignment of claims not arising out of contract is prohibited. However, nothing in this section shall be construed to affect the law in this state as relates to the transfer of claims through subrogation.

7. *See* 12 O.S.Ann. § 2017 (Thomson Reuters 2020) (Committee Note to Section 2017 Concerning Legislative Changes – Adoption of Code) (paragraph "D" codified to be consistent with *Lowder v. Okla. Farm Bureau Mut. Ins. Co.*, 1967 OK 245, 436 P.2d 654, where insured and his subrogated insurer sought to recover damages arising from the same cause of action, Court held they could not split their claims into separate actions and directed the District Court to dismiss the petition on remand).

8. Record on Accelerated Appeal, Tab 6, defendants' motion to dismiss, pg. 2, citing *Tucker v. Cochran Firm-Criminal Defense Birmingham L.L.C.*, 2014 OK 112, 341 P.3d 673.

9. Record on Accelerated Appeal, Tab 7, plaintiffs' response to defendants' motion to dismiss, pg. 2, citing *A-Plus Janitorial & Carpet Cleaning v. Employers' Workers' Comp. Ass'n*, 1997 OK 37, 936 P.2d 916, and *Great Plains Fed. Sav. And Loan Ass'n v. Dabney*, 1993 OK 4, 846 P.2d 1088.

10. *Farley v. City of Claremore*, 2020 OK 30, ¶¶ 14-18, 465 P.3d 1213, 1223-1225; *Independent School Dist. No. 52 of Okla. Cnty. v. Hofmeister*, 2020 OK 56, ¶ 17, 473 P.3d 475.

11. *Martin v. Gray*, 2016 OK 114, ¶ 5, 385 P.3d 64, 66 (rule stated for a motion to dismiss); *Payne v. Kerns*, 2020 OK 31, ¶ 10, 467 P.3d 659, 663 (Whether summary judgment is properly entered is a question of law reviewed *de novo*; and in a *de novo* review the Court has plenary, independent and non-deferential authority to determine whether the trial court erred in its application of the law and whether there is any genuine issue of material fact.).

12. *ACCOSIF v. American States Ins. Co.*, 2000 OK 21, n. 4, 1 P.3d 987, 990. *See Black's Law Dictionary,* 305 (4th ed. 1951) (*chose in action*) (including within one definition of the phrase is "assignable rights of action *ex contractu* and perhaps *ex delicto*"); William Blackstone, *2 Commentaries*, * 389, *396-397 (one type of property is a "thing" or "chose" held "in action" when it may be recovered "by suit or action at law"). Blackstone, *Commentaries*, 854, n. *h* (William D. Lewis, ed., 1922) (explaining same idea of thing or chose in action at Vol. 2, *397 in the civil law: "*Rem in bonis nostris habere intelligimur, quotiens ad recuperandum eam actionem habeamus*." ["We are supposed to have a property in our goods, whenever we can have action to recover them."]).

13. *ACCOSIF v. American States Ins. Co.*, 2000 OK 21, n. 4, 1 P.3d at 990, citing 60 O.S. 1991 § 312 and explaining a chose in action.

14. 60 O.S. 2011 § 313: "A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. Upon the death of the owner, it passes to his personal representatives, except where, in the case provided by law, it passes to his devisees or successors in office."

15. *West Florida Grocery Co. v. Teutonia Fire Insurance Co.*, 74 Fla. 220, 77 So. 209, 210-211, L.R.A. 1918B, 968 (1917) ("it is a well-settled rule that the provision in a policy relative to the consent of the insurer to the transfer of an interest therein does not apply to an assignment after loss").

16. *West Florida* relied on *Georgia Fire Ass'n v. Borchardt*, 123 Ga. 181, 51 S. E. 429, 430, 3 Ann. Cas. 472 (1905) ("It has been held, rightly we think, that a condition in a policy of fire insurance prohibiting an assignment or transfer of the same after loss, without the consent of the insurer, is null and void, as inconsistent with the covenant of indemnity and contrary to public policy."). *Georgia Fire Ass'n* relied on Joyce, *Insurance*, §§ 904, 2322; *Roger Williams Ins. Co. v. Carrington*, 43 Mich. 252, 5 N. W. 303 (1880); *Alkan v. New Hampshire Ins. Co.*, 53 Wis. 136, 10 N. W. 91 (1881); *Goit v. Ins. Co.*, 25 Barb. 189 (N.Y. 1855); *Courtney v. Ins. Co.*, 28 Barb. 116 (N.Y. 1858); *West Branch Ins. Co. v. Helfenstein*, 40 Pa. 289, 80 Am. Dec. 573 (1861). *Georgia Fire Ass'n*, 51 S.E. at 430.

17. *See, e.g.*, William Reynolds Vance, *Handbook on the Law of Insurance*, pgs. 50-51 (West Pub. 1904) ("From the fact that the contract of fire insurance is peculiarly personal, the result follows that rights under it, so long as it remains executory, cannot be assigned by one party without the consent of the other. . . After the loss has been suffered, a right to demand money of the insurer has accrued, the insured may assign such claim as freely as any other money demand.") relying on *Nease v. Insurance Co.*, 32 W. Va. 283, 9 S.E. 283. Vance also states assignment after loss is "a mere money claim" and an attempted restraint upon such an assignment would not be valid. Vance, *Insurance,* at pg. 468, relying on *Alkan v. New Hampshire Insurance Co.*, 53 Wis. 136, 10 N.W. 91 (1881).

18. *American Alliance Ins. Co. of N. Y. v. McCallie*, 319 P.2d at 298-299.

19. *Shadid v. American Druggist Fire Ins. Co.*, 1963 OK 146, 386 P.2d 311.

20. *Shadid v. American Druggist Fire Ins. Co.*, 386 P.2d at 314-315 (drug store insured by insurance policy was damaged by fire two months after sale of the store, former owner executed an assignment of insurance policy to new owners eighteen months after sale, evidence at trial was conflicting whether a policy-required insurer's consent had occurred, and Court affirmed judgment on a jury verdict for the insurer noting the distinction between an assignment of a chose in action and one to create insurance coverage).

21. Prior to 1957 the Standard Fire Insurance Policy form at 36 O.S.1951 § 244.1 contained a clause on the first page of the policy which stated: "Assignment of this policy shall not be valid except with the written consent of this Company." 36 O.S.1951 at pg. 1529. Section 244.1 as part of Ch. 4, 36 O.S.1951, and was repealed in 1957 when the new Insurance Code was adopted. 1957 Okla. Sess. Laws, 215-409, pg. 409 (Insurance Code Adoption, eff. July 1, 1957, by 26th Legislature, Regular Session, House Bill No. 501, eff. date § 119; repeals at pgs. 408-409).

The then new 1957 Insurance Code continued to state "Assignment of this policy shall not be valid except with the written consent of this Company" in the form for fire insurance in the new Article 48 "Property Insurance," and codified at 36 O.S. § 4803. This language continues to be codified in the policy form at 36 O.S.2011 § 4803.

22. *Shadid v. American Druggist Fire Ins. Co.*, 386 P.2d at 312.

23. 45 C.J.S. *Insurance* § 762 (Westlaw 2020) citing *Givaudan Fragrances Corporation v. Aetna Casualty & Surety Company*, 227 N.J. 322, 151 A.3d 576 (2017), and 45 C*.J.S. Insurance, supra*, at § 749.

24. *See*, *e.g.*, *Katrina Canal Breaches Litigation*, 63 So.3d 955, 961 & n. 9 (La.2011) (prevailing American rule distinguishes between pre-loss and post-loss assignments), citing *Conrad Brothers v. John Deere Ins. Co.*, 640 N.W.2d 231, 237 (Iowa 2001) and *Antal's Restaurant, Inc. v. Lumbermen's Mutual Casualty Co.*, 680 A.2d 1386, 1388 (D.C.1996) and observations on the majority rule in several states); *Kent General Hosp., Inc. v. Blue Cross & Blue Shield of Delaware, Inc.*, 442 A.2d 1368, 1370 (Del.1982) ("Courts distinguish between assignment of a policy by an insured, which might change the risk, and assignment of the mere right to receive payment, which is a fixed obligation of the insurer, enforcing contract provisions barring the former [*i.e.*, assignment of a policy], but not those barring the latter [*i.e.*, assignment of the right to receive payment]") (explanations added).

25. *In re Kaufman*, 2001 OK 88, ¶ 8, n. 18, 37 P.3d 845, 851. citing *Earth Products Co. v. Oklahoma City*, 1968 OK 39, 441 P.2d 399, 404, which relied on *Poling v. Condon-Lane Boom & Lumber Co.*, 55 W.Va. 529, 47 S.E. 279 (1904) and its discussion of a non-assignable contract where *delectus personae* is material to the contract.

26. *In re Kaufman*, 2001 OK 88, ¶¶ 8-14, 37 P.3d at 851-853.

27. Expressions of public policy are found in the federal and state constitutions, federal and state statutes, court decisions, and the common law. *Berry and Berry Acquisitions, LLC v. BFN Properties LLC*, 2018 OK 27, ¶ 14, n. 18, 416 P.3d 1061, 1069, quoting *Darrow v. Integris Health, Inc.*, 2008 OK 1, ¶ 13, 176 P.3d 1204, 1212. *See State Mut. Life Assur. Co. of Amer. v. Hampton*, 1985 OK 19, 696 P.2d 1027, 1031-1032 (Courts applying slayer statutes have held that the automatic disqualification of a convicted beneficiary is merely an extension of a public policy common-law rule that no person should benefit from his or her own wrongful conduct, and 84 O.S. 1981 § 231 did not prevent application of this common law expression of public policy).

28. Record on Accelerated Appeal, Tab 6, Defendants' Motion to Dismiss Triple Diamond Construction LLC, Oct. 4, 2019. Exhibit 1.

29. *In re Initiative Petition No. 397, State Question No. 767*, 2014 OK 23, ¶ 9, n. 1, 326 P.3d 496, 501, citing, *W.R. Allison Enters., Inc. v. CompSource Okla.*, 2013 OK 24, ¶ 15, 301 P.3d 407, 411, and *Head v. McCracken*, 2004 OK 84, ¶ 13, 102 P.3d 670, 680.

30. *In re Initiative Petition No. 397, State Question No. 767*, 2014 OK 23, ¶ 9, n.2, 326 P.3d 496, 501, citing *State ex rel. Bd. of Regents of Univ. of Oklahoma v. Lucas*, 2013 OK 14, ¶ 15, 297 P.3d 378, 387; *Cline v. Oklahoma Coalition for Reproductive Justice*, 2013 OK 93, ¶ 14, 313 P.3d 253, 258-259, and *Rogers v. Quiktrip Corp.*, 2010 OK 3, ¶ 11, 230 P.3d 853, 859.

31. *Samman v. Multiple Inj. Tr. Fund*, 2001 OK 71, ¶ 13, 33 P.3d 302, 307.

32. *Siloam Springs Hotel v. Century Sur. Co.*, 2017 OK 14, ¶ 22, 392 P.3d 262, 268.

33. *Max True Plastering Company v. United States Fidelity & Guaranty Co.*, 1996 OK 28, 912 P.2d 861, 865 (words in an insurance policy "are given effect according to their ordinary or popular meaning).

34. The appellate record does not contain the insurance policy. One exhibit in the record before us does contain a "declaration" from insurer's "Custodian of Records" referencing a "policy booklet and declaration of coverage." This page is attached to one page numbered "52" with paragraphs relating to the topics of nonrenewal, assignment, subrogation, and death, as well as an additional two pages labeled Homeowners Policy Declarations.

35. *Haworth v. Jantzen*, 2006 OK 35, ¶ 13, 172 P.3d 193, 196 ("an insurance policy is a contract"); *American Economy Ins. Co. v. Bogdahn*, 2004 OK 9, ¶ 8, 89 P.3d 1051; 1054 ("Oklahoma law governing insurance coverage disputes is well-established. The foremost principle is that an insurance policy is a contract."); 36 O.S.Supp.2013 § 1250.2 (defining "insurance policy or insurance contract" for the Unfair Claims Settlement Practices Act).

36. *Graham v. Travelers Insurance Co.*, 2002 OK 95, ¶ 17, 61 P.3d 225, 229. *Cf. Public Service Co. of Oklahoma v. State ex rel. Oklahoma Corp. Com'n*, 2005 OK 47, ¶ 54, 115 P.3d 861, 884 (a part of every contract in this state is the law applicable to that contract).

37. *See*, *e.g.*, *Mulford v. Neal*, 2011 OK 20, n. 29, 264 P.3d 1173, 1184 (trial court properly construed policy as a contract of adhesion); *Brown v. Patel*, 2007 OK 16, ¶ 11, n. 8, 157 P.3d 117, 122 (insurance policy is a contract of adhesion).

38. William Reynolds Vance, *Handbook on the Law of Insurance*, pg. 159 (West Pub. 1904) ("The completed contract of insurance is usually evidenced by a formal written instrument known as a 'policy.'").

39. William Reynolds Vance, *Handbook on the Law of Insurance*, pg.138 (West Pub. 1904) (discussing some of the elements courts analyze to determine whether a complete contract of insurance exists). *See also McMullan v. Enterprise Financial Group, Inc.*, 2011 OK 7, ¶ 15, 247 P.3d 1173, 1179 (elements courts examine to determine the existence of insurance include the presence of an insurable interest, a risk of loss, an assumption of the risk by the insurer, a general scheme to distribute the loss among the larger group of persons bearing similar risks; and the payment of a premium for the assumption of risk), citing with approval, *Jim Click Ford, Inc. v. City of Tucson*, 154 Ariz. 48, 739 P.2d 1365 (1987); *Poteete v. MFA Mut. Ins. Co.*, 1974 OK 110, 527 P.2d 18, 20 (discussing similar elements of insurance contract).

40. William Reynolds Vance, *Handbook on the Law of Insurance*, pg.1 (West Pub. 1904), relying in part on *State ex rel. Sheets v. Pittsburg, C., C. & St. L. R. Co.*, 68 Ohio St. 9, 96 Am. St. Rep. 635, 67 N.E. 93, 96 (1903) (insurance is "a contract whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject by specified perils"). *See also* 36 O.S. 2011 § 102 ("'Insurance' is a contract whereby one undertakes to indemnify another or to pay a specified amount upon determinable contingencies.").

41. 1957 Okla. Sess. Laws, 215-409, at pg. 369, § 3624 (Insurance Code Adoption, eff. July 1, 1957, by 26th Legislature, Regular Session, House Bill No. 501, § 119).

Some insurance contracts are specifically exempted from application of Article 36, but the exemptions are not an issue in this proceeding. 36 O.S.2011 § 3601 (listing insurance not subject to the provisions of Title 36 Article 36).

42. *West Florida Grocery Co. v. Teutonia Fire Insurance Co., supra*, note 15.

43. In *Russell v. Prospect Lodge*, 1935 OK 1226, 46 P.2d 478, we noted that the Court had followed a holding in *West Florida* relating to a garnishment principle in both *Jacobs v. Colcord*, 1929 OK 181, 275 P. 649; and *Ray v. Paramore*, 1935 OK 124, 41 P.2d 73. *Russell*, 46 P.2d at 480.

44. *American Alliance* relied on *Alkan v. New Hampshire Ins. Co.*, 53 Wis. 136, 10 N. W. 91 (1881). *American Alliance*, 319 P.2d at 298. *See* the discussion of *West Florida, Georgia Fire Ass'n v. Borchardt*, and reliance on *Alkan* at note 16, *supra*. *Alkan* was also used by *Vance, Insurance*, explaining assignment of a money demand or chose in action is not prohibited by language prohibiting assignment of a policy. *See* note 17, *supra*.

45. *Walton v. Colonial Penn Ins. Co.*, 1993 OK 115, 860 P.2d 222, 225.

46. *Murphey v. Liverpool & L. & G. Ins. Co.*, 1922 OK 275, 214 P. 695, 697.

47. *Murphey v. Liverpool*, 214 P. at 697, relying upon 1 & 3 Cooley, *Insurance*, pgs. 630, & 2610, and reliance on *Knarston v. Manhattan Life Ins. Co.*, 140 Cal. 57, 73 Pac. 740 (1903).

48. Characterizing post-loss assignment as not increasing an insurer's risk is consistent with courts examining an insurer's risk relating to personal insurance and concluding an assignment to a mortgagee of insurance proceeds did not increase the insurer's risk. *See*, *e.g.*, *Whiting v. Burkhardt*, 178 Mass. 535, 60 N.E. 1, 52 L.R.A. 788, 86 Am.St.Rep. 503 (1901) (transfer of right to policy proceeds to the assignee of a mortgage was not a transfer of the policy but a transfer of the right to receive payment). *Cf. Kintzel v. Wheatland Mutual Insurance Association*, 203 N.W.2d 799, 808, 65 A.L.R. 3d 1110 (Iowa 1973) ("the general rule that an assignment of the note and mortgage carries with it such rights as existed in the assignor with respect to the ancillary insurance policy, without the consent of the insurer") (collecting cases).

49. The insurance policy is not in the record on appeal, and whether a policy may prevent an assignment of a chose in action presents a hypothetical issue. We need not address this hypothetical issue. *Gaasch, Estate of Gaasch v. St. Paul Fire and Marine Insurance Company*, 2018 OK 12, n. 23, 412 P.3d 1151 (Court does not address hypothetical issues in an appeal).

50. Record on Accelerated Appeal, Tab 8, reply in support of defendants' motion to dismiss, Nov. 20, 2019, pg. 1.

51. *Miller v. National Life & Acc. Ins. Co.*, 1978 OK 92, 588 P.2d 1978, 1081 ("We have repeatedly held that when ambiguity exists in the meaning of an insurance contract the doubt is to be resolved against the company."), quoting *Combined Mut. Cas. Co. v. Metheny*, 1950 OK 269, 223 P.2d 533, 535.

52. *Chamberlin v. Chamberlin*, 1986 OK 30, 720 P.2d 721, 723-724; Okla. Sup. Ct. Rule 1.36 (accelerated procedure for summary judgments and certain dismissals).

53. *Chamberlin v. Chamberlin*, 720 P.2d at 723-724.

54. *House of Realty, Inc. v. City of Midwest City*, 2004 OK 97, ¶ 6, 109 P.3d 314, 317.

55. Okla. Sup. Ct. R. 1.6(a) ("Where the facts relied upon are not of record in the Supreme Court, the motion or response shall be supported by affidavit.").

56. 1983 OK 84, 669 P.2d 768.

57. *Mann*, 1983 OK 84, 669 P.2d at 772.

58. *Mann*, 1983 OK 84, 669 P.2d at 770-772

59. *First Pryority Bank v. Moon*, 2014 OK CIV APP 21, ¶ 53, 326 P.3d 528, 539 (Division I) citing *Chimney Rock Ltd. Partnership v. Hongkong Bank of Canada*, 1993 OK CIV APP 94, 857 P.2d 84, 88 (Division III).

60. 1993 OK CIV APP 94, 857 P.2d 84.

61. 1993 OK CIV APP 94, 857 P.2d 84, 87-88. *See also Rose Group, L.L.C. v. Miller*, 2003 OK CIV APP 18, ¶ 4, 64 P.3d 573, 575 (Division I) (pure tort not assignable); *United Adjustment Services, Inc. v. Professional Insurors Agency, LLC*, 2013 OK CIV App 67, ¶ 20, 307 P.3d 400, 404 (Division II) (same).

62. *Chimney Rock*, 857 P.2d at 88.

63. *Momand*, 37 F.Supp. at 652, relying on *Sullivan v. Associated Billposters and Distributors*, 6 F.2d 1000, 1004, 42 A.L.R. 503 (2nd Cir. 1925).

64. *See, e.g., Cooper v. Runnels*, 48 Wash.2d 108, 291 P.2d 657, 658-660 (1955) (discussing Stat. 4 Edw. III, chapter 7 [1330], assigning a tort action based on damage to property, and stating "The test of assignability is: Does the cause of action survive to the personal representative of the assignor? If it does, the cause of action is assignable."); *Clements v. ITT Hartford*, 1999 OK CIV APP 6, 973 P.2d 902 (bad faith claim survived the death of the insured as a cause of action because it was "injury to the person" as well as injury to the "personal estate" that survived the insured's death); *Shafer v. Grimes*, 23 Iowa 550, 553-554 (1868) (discussing common law *rule actio personalis moritor cum persona* as including actions *ex delicto* for injuries to the person [which die with the person] and distinguished from injuries to property, the change in the common law rule due to 4 Edward III, *supra*, and Stat. 3 and 4 Wm. IV, chap. 42, § 2 [1833] with the latter providing survival for an action against trespasser to property); *Essex Ins. Co. v. Five Star Dye House, Inc.*, (2006) 38 Cal.4th 1252, 45 Cal.Rptr.3d 362, 137 P.3d 192, 198 ("Actions for bad faith against an insurer have generally been held to be assignable.").

65. *See, e.g., Cales v. Le Mars Mut. Ins. Co.*, 2003 OK CIV APP 41, 69 P.3d 1206 (trial court committed reversible error when it bifurcated contract and tort claims for trial).

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

67. *Torres v. Seaboard Foods, LLC*, 2016 OK 20, n. 11, 373 P.3d 1057, 1081 (stating principle in the context of a public-law controversy).

68. *In re Kaufman*, 2001 OK 88, ¶ 8, 37 P.3d 845, 851 (an assignment is the expressed intent of one party to pass rights owned to another); *Mid-Continent Petroleum Corp. v. Blackwell Oil & Gas Co.*, 1932 OK 281, 15 P.2d 1028, 1031 (a contract must be so interpreted as to give effect to the mutual intention of the parties at the time of contracting).

69. *Independent School Dist. No. 52 of Okla. Cnty. v. Hofmeister*, 2020 OK 56, ¶ 52, 473 P.3d 475, 497 ("We require parties to preserve error with proper argument and authority, or the error is waived for the appeal."). The issue was not raised by insurer's motion to dismiss filed in the trial court.

NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT OF KEITH G. MUNRO, SCBD #6990 TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION

Notice is hereby given pursuant to Rule 11.3(b), Rules Governing Disciplinary Proceedings, 5 O.S., Ch. 1, App. 1-A, that a hearing will be held to determine if Keith G. Munro should be reinstated to active membership in the Oklahoma Bar Association.

Any person desiring to be heard in opposition to or in support of the petition may appear before the Professional Responsibility Tribunal at the Oklahoma Bar Center at 1901 North Lincoln Boulevard, Oklahoma City, Oklahoma, at **9:30 a.m. on MONDAY, JANUARY 25, 2021**. Any person wishing to appear should contact Tracy Pierce Nester, Assistant General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152, telephone (405) 416-7007.

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2020 OK CR 23

DAVID CHRISTOPHER COCHLIN, Appellant, v. THE STATE OF OKLAHOMA, Appellee.

Case No. F-2019-488. December 3, 2020

SUMMARY OPINION

LUMPKIN, JUDGE:

¶1 Appellant, David Christopher Cochlin, was tried by jury in the District Court of Canadian County, Case No. CF-2018-53, and convicted of two counts of Second Degree (Depraved Mind) Murder, in violation of 21 O.S.2011, § 701.8. The jury recommended punishment of life imprisonment on both counts.[1] The trial court sentenced Appellant accordingly and ordered the sentences to run concurrently with one another. From this judgment and sentence, Appellant appeals.

¶2 Appellant raises the following propositions of error in this appeal:

I. The trial court abused its discretion by submitting the second degree depraved mind murder instruction to the jury.

II. The trial court abused its discretion in admitting evidence of Appellant's blood alcohol content, taken only pursuant to a general and routine blood test and not pursuant to reliable methods for adducing an accurate blood-alcohol level, in violation of Defendant's [sic] constitutional right to due process.

¶3 After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that under the law and the evidence, Appellant is not entitled to relief.

I.

¶4 While the proposition heading of Appellant's first proposition challenges the jury instruction given by the trial court on second degree murder, his argument challenges the sufficiency of the evidence supporting his conviction of second degree murder. The heart of Appellant's complaint is that insufficient evidence was presented that his conduct in killing Sean Tucker and Luke Ross, both nineteen years old, by crashing into their truck, evinced a depraved mind. This Court follows the standard for the determination of the sufficiency of the evidence which the United States Supreme Court set forth in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04. Under this test, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson,* 443 U.S. at 319; *Easlick*, 2004 OK CR 21, ¶ 5, 90 P.3d at 558; *Spuehler,* 1985 OK CR 132, ¶ 7, 709 P.2d at 203-04. "A reviewing court must accept all reasons, inferences, and credibility choices that tend to support the verdict." *Taylor v. State,* 2011 OK CR 8, ¶ 13, 248 P.3d 362, 368.

¶5 The State had to prove beyond a reasonable doubt that Appellant killed both young men by engaging in conduct "which was imminently dangerous" to them and his conduct "evinced a depraved mind in extreme disregard of human life" but without "the intention of taking the life of any particular individual." Instruction No. 4-91, OUJI-CR (2d). The phrases "depraved mind" and "imminently dangerous conduct" are defined in Instruction No. 4-91, OUJI-CR (2d) as follows:

> You are further instructed that a person evinces a "depraved mind" when he engages in imminently dangerous conduct with contemptuous and reckless disregard of, and in total indifference to, the life and safety of another.
>
> You are further instructed that "imminently dangerous conduct" means conduct that creates what a reasonable person would realize as an immediate and extremely high degree of risk of death to another person.

Some fact scenarios illustrating depraved mind are the situation where the defendant shoots his gun or throws a large rock randomly into a crowd. *Bench v. State,* 2018 OK CR 31, ¶ 76, 431 P.3d 929, 954-55.

¶6 The record shows Appellant admitted to drinking three drinks at the Sushi Bar on the

night in question, but his check showed eight drinks were served at his table, three of which were doubles. He admitted he was very familiar with the intersection of Mustang Road and 150th Street because he had lived about a quarter mile from that intersection for five years. Appellant admitted he was driving his Mercedes from the Valero station on Northwest Expressway west of the Kilpatrick Turnpike to the intersection at Northwest 150th and Mustang Road. He admitted his heel was on the accelerator and the car accelerated. Numerous witnesses at the scene of the collision noted Appellant's slurred speech and odor of alcohol and testified they believed him to be drunk. Evidence from the event data recorder in Appellant's car showed the car was traveling at 149 MPH five seconds before the crash and at 96 MPH. when it crashed into the victims' small truck. The impact caused the gas tank to explode and the victims were burned beyond recognition. The data recorder evidence also indicated Appellant did not stop at the four way stop sign at the intersection. While this evidence showed Appellant did apply the brakes about three seconds prior to impact, his application was insignificant. Two blood tests performed on Appellant's blood showed Appellant was well over the legal blood alcohol limit of .08 at the time of the collision.

¶7 The jury heard Appellant's testimony that he was not drunk, that he set his cruise control between 40 and 45 MPH when he turned onto Mustang Rd., that he got his foot stuck under the brake, that the car accelerated and that he did not see the little truck until it was too late. Clearly the jury found Appellant's testimony incredible. "The credibility of witnesses and the weight and consideration to be given to their testimony are within the exclusive province of the trier of facts and the trier of facts may believe the evidence of a single witness on a question and disbelieve several others testifying to the contrary." *Davis v. State,* 2011 OK CR 29, ¶ 83, 268 P.3d 86, 112-13.

¶8 A person driving 149 MPH at night on a two lane road while drunk and blowing through a stop sign at an intersection plainly poses an "immediate and extremely high degree of risk of death to another person" on that road. Thus, we find the evidence adduced at trial sufficiently supports the jury's verdict. Proposition I is denied.

II.

¶9 Appellant contends in his second proposition that the results of the blood test performed on his blood drawn at OU Medical Center pursuant to the "rainbow draw" (a term used by medical personnel to denote the various tubes bearing multi-colored stoppers used to contain blood drawn from trauma patients) were improperly admitted. These results showed his blood alcohol content was .33. A test performed on a blood sample taken about five hours after the collision pursuant to a warrant showed his blood alcohol content was .20. Appellant filed a pretrial motion to suppress the "rainbow draw" test results which the trial court denied. He argues that this blood was not drawn in conformance with Board of Tests' rules. Appellant did not renew his objection to the admission of the blood test results on the "rainbow draw" evidence at trial. Therefore, we review this claim for plain error. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923; *Jones v. State,* 2006 OK CR 5, ¶ 24, 128 P.3d 521, 536. As set forth in *Simpson v. State,* 1994 OK CR 40, ¶¶ 11, 30, 36, 876 P.2d 690, 694-95, 698, 700-02, we determine whether Appellant has shown an actual error, which is plain or obvious, and which affects his or her substantial rights. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.,* 1994 OK CR 40, ¶ 30, 876 P.2d at 700-01.

¶10 The Oklahoma Statutes, 47 O.S.2011, §§ 751-52 and 47 O.S.Supp.2015, § 753, set forth the procedures for law enforcement personnel to use when they seek to obtain blood and breath samples from individuals for use in prosecuting alcohol/drug related motor vehicle offenses and state that these procedures must comply with the relevant provisions of the Board of Tests found in the Oklahoma Administrative Code. The Oklahoma Administrative Code, § 40:20-1-3, provides the collection of human blood "under the provisions of Title 47 and Title 3 Section 303 and Title 63 Section 4210A, Oklahoma Statutes shall be performed as set forth in this Section." Thus, these statutes apply to blood collection at the behest of law enforcement. However, 47 O.S.2011, § 757, provides that other competent evidence, besides blood drawn and tested in conformance with the preceding statutory provisions, may be admitted on the question of whether a person was under the influence of alcohol. *Cf.*

State v. Hodges, 2020 OK CR 2, ¶ 8, 457 P.3d 1093, 1096-97 (holding blood testing evidence taken by law enforcement in compliance with another state's procedures is not inadmissible because Oklahoma procedures were not followed and pursuant to Section 757 may be admissible if the evidence would have been admissible in the other state). Section 757 contemplates the situation where compliance with Board of Tests' rules does not occur, but other evidence exists regarding whether a defendant was under the influence of alcohol or other intoxicants.

¶11 In the instant case, OU Medical Center collected the blood samples at issue as part of its routine practice in treating incoming trauma patients, not pursuant to a statutory law enforcement request. Thus, compliance with the statutory and Board of Tests requirements for collecting blood samples did not occur and was not required.

¶12 Nothing in the record indicates the test performed by the OSBI on the blood samples was unreliable. Melissa Melton, a registered nurse, drew the blood samples at 12:08 a.m. from Appellant's I.V. upon his arrival at the hospital. She affirmed that Appellant had received no drugs at that time and that the vials used in the "rainbow draw" contained anti-coagulant liquid. Danielle Ross-Carr, who conducted the testing at the OSBI, explained her test procedures and results (.33) and though she did not test for anti-coagulant in the samples, she looked at the quality of the samples and did not note anything which suggested the samples were not in liquid form and red in color. She further affirmed that the OSBI laboratory is certified by ANAB, formerly known as ASCLD/LAB.

¶13 We agree with the district court's conclusion that nothing about the statutory scheme set forth above affected the admissibility of the evidence related to the "rainbow draw" blood test results. Section 757 allows the trial court to consider other evidence of intoxication and determine the admissibility of that evidence. Any divergence from the statutory procedures simply goes to the weight and credibility of the evidence.[2] The OU blood sample was not procured at the request of law enforcement nor was it procured pursuant to a warrant. When the sample was tested for the presence of alcohol, it was tested in a fully accredited OSBI laboratory. In this regard, compliance with the statutory and Board of Tests' requirements was met. We find no error and therefore no plain error, in the admission of the hospital blood sample test results.

¶14 We hold that failure to comply with Board of Tests' procedures for the collection and testing of blood samples does not equate to the inadmissibility of test results from those samples. Under the authority of Section 757, the trial court may consider other competent evidence regarding the collection and testing of those samples and determine whether the evidence is admissible. To the extent our prior cases are inconsistent with this holding, they are overruled. Proposition II is denied.

DECISION

¶15 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.

AN APPEAL FROM THE DISTRICT COURT
OF CANADIAN COUNTY
THE HONORABLE PAUL HESSE,
DISTRICT JUDGE

APPEARANCES AT TRIAL

R. Scott Adams, Robert Gray, 401 Hudson, #100, Oklahoma City, OK 73102, Counsel for Defendant

Eric Epplin, Asst. District Attorney, 303 N. Choctaw, El Reno, OK 73036, Counsel for the State

APPEARANCES ON APPEAL

Laura K. Deskin, 400 N. Walker, #230, Oklahoma City, OK 73102 and Carl Hughes, 1218 E. 9th St., #8, Edmond, OK 73034, Counsel for Appellant

Mike Hunter, Attorney General of Oklahoma, Theodore M. Peeper, Asst. Attorney General, 313 N.E. 21st St., Oklahoma City, OK 73105, Counsel for the State

OPINION BY: LUMPKIN, J.
LEWIS, P.J.: Concurs in Results
KUEHN, V.P.J.: Concur
HUDSON, J.: Concur
ROWLAND, J.: Concur

LEWIS, PRESIDING JUDGE, CONCURS IN RESULTS:

¶1 I concur that the Judgment and Sentence in this case should be affirmed. I also concur in

the resolution of proposition one. I can only concur in the result reached in the analysis of proposition two.

¶2 The Opinion ignores plain error analysis in order to expand the law relative to blood evidence in DUI cases, where no expansion is necessary. I, therefore, concur in results only.

¶3 In proposition two, Appellant attacks evidence which was introduced at trial without a contemporaneous objection. Without the contemporaneous objection, any error is waived unless a substantial right of a party is affected. *See Hancock v. State*, 2007 OK CR 9, ¶ 72, 155 P.3d 796, 813, *overruled on other grounds by Williamson v. State*, 2018 OK CR 15, ¶ 51 n.1, 422 P.3d 752, 762 n.1 (holding that a contemporaneous objection must be made at the time the alleged error is being committed); *Dodd v. State*, 2004 OK CR 31, ¶ 64, 100 P.3d 1017, 1038. *See* 12 O.S.2011, § 2104. This Court may take notice of plain errors affecting substantial rights, meaning that the error affected the outcome of the proceeding. *Barnard v. State*, 2012 OK CR 15, ¶ 13, 290 P.3d 759, 764; *see also* 12 O.S.2011, § 2104. I would find that no plain error occurred as it did not affect the outcome of this trial.

¶4 The evidence complained of consists of the results of a hospital obtained blood sample, "rainbow draw," taken at 12:08 a.m. in the course of the hospital emergency room protocol. Admission of the results of this sample does not constitute plain error, because Appellant has not shown that the results affected the outcome of this trial.

¶5 Even ignoring the "rainbow draw" results, the State presented overwhelming evidence of Appellant's guilt. The State introduced blood test results performed on blood obtained at 4:38 a.m. which showed a blood alcohol level of .208 grams per 100 milliliters of blood. Appellant also admitted to drinking prior to the accident. Tara Baker testified that Appellant was indeed drinking prior to the accident. Appellant smelled of alcohol. Numerous witnesses saw Appellant and believed him to be intoxicated. These witnesses included Oklahoma City Police Officer Nickolas O'Bryant and EMSA Paramedic Stuart Wegenka.

¶6 The fact that Appellant was traveling at an extreme rate of speed before slamming into the rear end of the victim's vehicle and his initial denial of driving also lends evidence to support his intoxication. Appellant's combativeness at the scene, on his way to the hospital in the ambulance, and at the hospital are also indicative of his intoxication.

¶7 I would find that the introduction of the results of the blood test on this "rainbow draw" did not affect the outcome of this trial and, therefore, that no plain error occurred.

1. Appellant will be required to serve 85% of his sentence before becoming eligible for parole. 21 O.S.Supp.2015, § 13.1.

2. As I stated in my separate writing in *Hodges*, 2020 OK CR 2, ¶ 4, 457 P.3d 1093, 1099, (Lumpkin, J., concurring in results), "[w]hile certain procedures in the taking of blood or breath samples may go to the weight and credit of that evidence, the ultimate decision as to admissibility of that evidence is vested in the trial courts of this State."

Opinions of Court of Civil Appeals

COCA-ADM-2020-1

December 14, 2020

OKLAHOMA CITY AND TULSA DIVISIONS

JUDICIAL DIVISION ASSIGNMENTS

AND

ELECTION OF PRESIDING JUDGES

TO THE CLERK OF THE APPELLATE COURTS:

You are hereby requested to cause the following notice to be published twice in the Oklahoma Bar Journal and posted on the OSCN website:

NOTICE

For the calendar year 2021, the Honorable Brian Jack Goree has been elected to serve as Presiding Judge for **Division One** of the Court of Civil Appeals, Oklahoma City Division. **Division One** will consist of Brian Jack Goree, Presiding Judge; E. Bay Mitchell III, Judge; and a judge to sit by designation in the absence of retiring Judge Kenneth L. Buettner.

For the calendar year 2021, the Honorable Jane P. Wiseman has been elected to serve as Presiding Judge of **Division Two** of the Court of Civil Appeals, Tulsa Division. **Division Two** will consist of Jane P. Wiseman, Presiding Judge, Deborah B. Barnes, Judge; and P. Thomas Thornbrugh, Judge.

For the calendar year 2021, the Honorable Trevor Pemberton has been elected to serve as Presiding Judge of **Division Three** of the Court of Civil Appeals, Oklahoma City Division. **Division Three** will consist of Trevor Pemberton, Presiding Judge; Barbara G. Swinton, Chief Judge; and Robert D. Bell, Judge.

For the calendar year 2021, the Honorable Stacie L. Hixon has been elected to serve as Presiding Judge for **Division Four** of the Court of Civil Appeals, Tulsa Division. **Division Four** will consist of Stacie L. Hixon, Presiding Judge; John F. Fischer, Vice-Chief Judge; and Keith Rapp, Judge.

DONE BY ORDER OF THE COURT OF CIVIL APPEALS this 11th day of December, 2020.

/s/ JANE P. WISEMAN
Chief Judge

COCA-ADM-2020-2

December 14, 2020

OKLAHOMA CITY AND TULSA DIVISIONS

ORDER

The Clerk of the Appellate Courts is directed to cause the following Notice to be published twice in the Oklahoma Bar Journal and posted on the OSCN website:

NOTICE

Judge Barbara G. Swinton has been elected to serve as Chief Judge of the Court of Civil Appeals of the State of Oklahoma for the year 2021. Judge John F. Fischer has been elected to serve as Vice-Chief Judge of the Court of Civil Appeals of the State of Oklahoma for the year 2021.

Dated this 11th day of December, 2020.

/s/ JANE P. WISEMAN
Chief Judge
Court of Civil Appeals

2020 OK CIV APP 62

BRYAN LINN and CARRIE LINN, Plaintiffs/Appellees, vs. OKLAHOMA FARM BUREAU MUTUAL INSURANCE COMPANY, Defendant/Appellant.

Case No. 117,311. April 7, 2020

APPEAL FROM THE DISTRICT COURT OF GRADY COUNTY, OKLAHOMA

HONORABLE KORY KIRKLAND, TRIAL JUDGE

AFFIRMED

James A. Scimeca, BURCH, GEORGE & GERMANY, P.C., Oklahoma City, Oklahoma, and

Paul A. Bezney, Marlene Thomson, ADKERSON, HAUDER & BENZNEY, Dallas, Texas, for Plaintiffs/Appellees

David B. Donchin, Katherine T. Loy, Kaci L. Trojan, DURBIN, LARIMORE & BIALICK, Oklahoma City, , for Defendant/Appellant

P. THOMAS THORNBRUGH, PRESIDING JUDGE:

¶1 Oklahoma Farm Bureau Mutual Insurance Company (OFB) appeals the judgment resulting from the jury trial of a breach of contract and insurance bad faith case. On appeal, we affirm the court's order.

BACKGROUND

¶2 The Linns ran a cattle stocker operation. They purchased calves that were between 400 and 450 pounds, fed them until they were approximately 700 pounds, and then sold them by the pound. The Linns began financing the purchase of calves through National Livestock Credit Union in 2012. During a quarterly inventory verification count conducted in June 2013 by Jim White of National, the Linns discovered as many as 500 head were missing. The missing cattle were never located.

¶3 The Linns had a policy with OFB that covered loss of cattle by theft if theft was "likely," and in August 2013 they filed a proof of loss with OFB. OFB did not pay the claim, apparently on the basis that it did not deem that theft was "likely." The Linns alleged that, as a result of this shortfall, their stocker operation failed, and they went out of business. In February 2014, the Linns filed suit alleging breach of contract and bad faith claims handling. At the conclusion of a jury trial, the jury found for the Linns and awarded them $566,000 on their breach of contract claim, $650,000 in bad faith damages, and $250,000 in punitive damages. OFB now appeals the judgment on that verdict.

STANDARD OF REVIEW

¶4 Several issues are raised, each with differing standards and conventions for review. As such, we will state the relevant standards of review in each individual section.

ANALYSIS

I. THE QUALIFICATION OF BURL DANIEL AS AN EXPERT WITNESS

¶5 OFB's first proposition of error is that the district court erred in allowing Burl Daniel to testify as an expert regarding insurance claims handling and bad faith. Under the Oklahoma Evidence Code, the trial court stands as a "gatekeeper," admitting or excluding evidence based on the judge's assessment of its relevance and reliability. *Myers v. Missouri Pac. R. Co.*, 2002 OK 60, ¶ 36, 52 P.3d 1014. The clear abuse of discretion standard applies when we review a decision on the admissibility of expert testimony. In the context of a ruling on the relevance of proffered evidence, "a judgment will not be reversed based on a trial judge's ruling to admit or exclude evidence absent a clear abuse of discretion." *Christian v. Gray*, 2003 OK 10, ¶ 43, 65 P.3d 591, quoting *Myers*.

¶6 The admission of expert testimony in Oklahoma is governed by 12 O.S. § 2702.

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise, if:
>
> 1. The testimony is based upon sufficient facts or data;
>
> 2. The testimony is the product of reliable principles and methods; and
>
> 3. The witness has applied the principles and methods reliably to the facts of the case.

Inquiries into this standard may include the compatible but more specifically stated requirements of the *Daubert* test adopted in *Christian v. Gray*, 2003 OK 10, 65 P.3d 591.

A. "Assisting the Trier of Fact"

¶7 OFB's first challenge argues that the question of whether an insurer's claims-handling duty was performed in good faith is not one upon which an expert should be allowed to testify because a jury needs no assistance to recognize bad faith in this context. OFB cites two opinions of a federal trial court in the Northern District of Oklahoma as persuasive authority to that effect.[1] These opinions, if applied as characterized by OFB, directly contradict the holdings of the Oklahoma Supreme Court on this issue.[2] Oklahoma has consistently recognized the assistance of experts in this area, and the law of bad faith in the handling of insurance claims is a matter of individual state law unless an ERISA plan or other preemptive federal legislation is implicated. *See Hollaway v. UNUM Life Ins. Co. of Am.*, 2003 OK 90, 89 P.3d 1022. OFB asks this Court to depart from the mandatory precedent of the Oklahoma Supreme Court on the matter and change precedential Oklahoma common law to conform to these federal trial court opinions. We decline to do so.

B. "Qualified as an Expert by Knowledge, Skill, Experience, Training or Education"

¶8 OFB next argues that Daniel was not a "witness qualified as an expert by knowledge, skill, experience, training or education" pursuant to the first part of § 2702. The main thrust of OFB's argument is that, although Daniel held several certifications in various areas of insurance and risk management, he was not a licensed adjuster, nor had he actually worked as an adjuster. In *Christian v. Gray,* the Supreme Court explained that a clear abuse of discretion appellate standard applies when we review a decision on the admissibility of expert testimony, and a clear abuse of discretion may be shown by an error of law or an error of fact. "An abuse of discretion occurs when a court bases its decision on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling." *Nelson v. Enid Med. Associates, Inc.,* 2016 OK 69, ¶ 11, 376 P.3d 212. Although OFB's arguments raise questions as to Daniel's expert qualifications, they do not demonstrate a decision by the Court for which there is "no rational basis in evidence." We find no error in the admission of the testimony of Burl Daniel. Any questions as to the relevance of his qualifications and experience go to the weight the jury should have accorded his testimony, not its admissibility, and OFB had the opportunity to explore these issues at trial.

II. DIRECTED VERDICT

¶9 We review the denial of a motion for directed verdict *de novo. Computer Publications, Inc. v. Welton,* 2002 OK 50, 49 P.3d 732. In *Badillo v. Mid Century Ins. Co*., 2005 OK 48, 121 P.3d 1080 (as corrected June 22, 2005), the Supreme Court recognized that the essence of an action for breach of the duty of good faith and fair dealing "is the insurer's unreasonable, bad-faith conduct . . . and if there is conflicting evidence from which different inferences may be drawn regarding the reasonableness of insurer's conduct, then what is reasonable is always a question to be determined by the trier of fact by a consideration of the circumstances in each case." *Badillo* at ¶ 28, quoting *McCorkle v. Great Atlantic Ins. Co*., 1981 OK 128, 637 P.2d 583. Pursuant to this standard, the question before the district court was, therefore, whether the evidence was such that no juror applying the correct standards could find OFB's conduct in handling the claim was unreasonable or in bad faith.

A. The Parties' Positions

¶10 The core matter in this case is a question of theft, and OFB argues that it acted reasonably in delaying or not paying the Linns' claim because there was a reasonable dispute as to whether theft occurred. The parties appear to agree that the policy in question covered loss of cattle by theft if it was "likely" that the loss was due to theft. OFB's central argument is that a Texas Ranger, Kent Dowell, investigated the matter and stated to an OFB adjuster that he could find "*no evidence*" of theft. OFB argues that this report was sufficient to support a reasonable conclusion that theft was therefore not likely, and the insurer had no duty to pay the claim pursuant to the policy terms.

¶11 The Linns' counter-argument is that this conclusion was not based on a reasonable investigation of the circumstances of the alleged disappearances, but upon Ranger Dowell's mathematical calculation that there were either no missing cattle at all, or a maximum of 217 missing, a conclusion he arrived at by examining the Linns' books. The Linns argue that this report was wrong because of a simple math error by Ranger Dowell that should have been obvious during any reasonable investigation, and that OFB could not have reasonably relied on it because it was inconsistent with most of the other evidence.

B. "Reasonable Conduct" and "Legitimate Dispute"

¶12 *Badillo* clearly states that, when there is conflicting evidence from which *different inferences* may be drawn regarding the reasonableness of an insurer's conduct, what is reasonable is *always a question to be determined by the trier of fact*. This standard must be integrated with another doctrine, that of a "legitimate dispute as to coverage" precluding bad faith. For example, in *Andres v. Oklahoma Farm Bureau Mut. Ins. Co.*, 2009 OK CIV APP 97, ¶ 18, 227 P.3d 1102, this Court held that, when insurer OFB denied a claim on the ground that the claim was not covered by the policy, it relied upon decisions from nine other jurisdictions which supported its theory, its legal theory was plausible, and there was no Oklahoma precedent. This established the good faith of the insurer's interpretation of the policy and hence a legitimate dispute as to coverage, even though OFB's interpretation was later found to be contrary to Oklahoma law.

¶13 Situations similar to that presented here are less clear cut as to what behavior or reliance is reasonable, and often present a jury question. The question here was not primarily a legal dispute as to policy interpretation, but one of whether there was a reasonable and legitimate factual dispute as to theft pursuant to the Badillo standard. In clear situations such as *Andres* where the dispute is primarily legal, *i.e.*, one based on the interpretation of policy language, it is often possible for a court to determine reasonableness as matter of law.

¶14 Here, however, the coverage dispute was a purely factual dispute as to whether theft had "likely" occurred. In such a case, "reasonableness" tends more towards becoming a jury question. The fact pattern here was complex and did not lend itself to resolution as a matter of law. We find no error in the district court's refusal of a directed verdict.

III. EVIDENTIARY RULINGS DURING TRIAL

¶15 Under the Oklahoma Evidence Code, the trial court stands as a "gatekeeper," admitting or excluding evidence based on the judge's assessment of its relevance and reliability. *Myers v. Missouri Pac. R. Co*., 2002 OK 60, ¶ 36, 52 P.3d 1014. All relevant evidence is admissible, unless the trial court determines that "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise." *Id*. A trial court has discretion in deciding whether proffered evidence is relevant and, if so, whether it should be admitted, and a judgment will not be reversed based on a trial judge's ruling to admit or exclude evidence absent a clear abuse of discretion. *Id*.

A. Polygraph Tests

¶16 OFB raises a claim of error regarding the court's refusal to allow OFB to discuss two facts at trial: 1) that Bryan Linn and ranch hand Loren Zeiset were given polygraph tests as part of OFB's claims investigation, and that Loren Zeiset's test indicated he was telling the truth, and Bryan Linn's test was 'inconclusive;" 2) the fact that these tests were administered by agents of the U.S. Secret Service.

¶17 Oklahoma law has conclusively established that the results of polygraph tests are inadmissible before a jury. "Today, we reaffirm that polygraph evidence is inadmissible in criminal and civil proceedings." *Collier v. Reese,* 2009 OK 86, ¶ 17, 223 P.3d 966. Courts have further frowned upon mentioning polygraph tests that have not been introduced into evidence. *Hames v. Anderson*, 1977 OK 191, 571 P.2d 831, held that a reference to a jury that a party had volunteered and taken such a test was incompetent, although in that case it did not rise to the level of prejudice necessary to overturn a verdict. *Hames* was clear, however, that "Any reference to such tests in the presence of the jury in future trials is discouraged."

¶18 OFB relies on *Conti v. Republic Underwriters Ins. Co.*, 1989 OK 128, 782 P.2d 1357 and *Williamson v. Emasco Ins. Co.*, 696 F. Supp. 1583, 1583 (W.D. Okla. 1988) as contrary authority. The *Conti* Court held that a trial court could take the polygraph results into account when considering the appellant's motion for a directed verdict in a bad faith case, because the insurer's reliance on the polygraph could bolster the defense of the reasonableness of the insurer's conduct in assessing the claim. OFB attempts to go beyond the rule of *Conti*, however, and argue that not only should a judge be allowed to consider polygraph results in deciding a *directed verdict,* but also that a jury should be allowed to consider polygraph results in determining if an insurer acted in good faith. *Conti* rejected this very proposal. "We remain committed, however, to the rule that it is error to allow the jury to hear such evidence." *Id*., ¶ 24. We find the Oklahoma precedents on this issue clear. Any contrary view expressed by the federal Western District of Oklahoma in *Williamson v. Emasco Ins. Co*., 696 F. Supp. 1583, 1583 (W.D. Okla. 1988) was expressed prior to *Conti* and has no value in this inquiry. We find no error in the district court's exclusion of this evidence.

¶19 OFB further argues that the court erred in refusing any mention that the Secret Service "had been involved in the investigation." We fail to find any relevance in the fact that the Secret Service conducted the *inadmissible* polygraph tests. Such a statement appears designed to impermissibly bolster the jury perception of "reasonable investigation" by implying that the Secret Service, not OFB, directed and carried out the claims investigation.

B. The Email from the Linns' Counsel to the Linns That They Forwarded to National Livestock

¶20 During litigation, counsel for the Linns sent Bryan Linn emails discussing various aspects of the case. These emails appear to have included both ordinary and opinion work product. Bryan Linn then forwarded the contents of one such e-mail to a Mr. John Rich at National Livestock Credit Union, apparently as part of an attempt to convince National Livestock to extend the terms of a loan by demonstrating that the Linns had a good chance of recovering insurance proceeds from OFB.

¶21 OFB obtained this email through discovery and argued that privilege was waived and it could introduce the email as evidence. OFB's brief states that "the trial court erred in not allowing into evidence an email from Plaintiff's counsel to Plaintiffs which acknowledged problems with his case and was inconsistent with the position Plaintiffs took at trial." (BIC p. 22.) The brief cites passages of volumes V and VII of the trial transcript. In volume V, the question of the email was raised, and the court made a *provisional ruling that it was inadmissible.* The next day, counsel for OFB attempted to have the email deemed admissible on a different theory. In volume VII of the transcript, after a discussion that begins at p. 1382 and ends at p. 1412, the trial judge states that "*I'm going to admit it* [the email]." Counsel for OFB than questioned Bryan Linn regarding the email at pages 1423-1427 of the transcript, but did not attempt to introduce it into evidence.

¶22 Assuming that the email was admissible, if OFB proposes any error, it must be that the failure to deem the email admissible on November 1, as opposed to November 2, was somehow prejudicial to its case. We find no such argument in its brief, however, and no error by the trial court on this question.

C. Speculation

¶23 OFB argues that "the trial court let multiple witnesses engage in pure speculation that cattle were missing due to theft." The witness OFB identifies as engaging in such speculation is James White of National Livestock Credit Union, the organization that had loaned the Linns money to buy the missing cattle, and had initiated the audit inspection to determine if all the cattle in which the credit union had a security interest were still present. White did state that he had reached a conclusion that the missing cattle were likely stolen, and clearly stated the facts he took into account to reach this conclusion. *See* Tr. Trans., Vol. II, pp. 291-300. OFB's objection therefore goes to the weight or credibility the jury should have given Mr. White's testimony on this issue, not its admissibility.

D. "False Representations"

¶24 OFB next argues that the court erred in limiting testimony on the alleged involvement of ranch hand Loren Zeiset in any theft to a statement that there was "not sufficient information or evidence" to show that Zeiset was involved. OFB agrees that the phrase "not sufficient information or evidence" constitutes a *false representation* of the result of the investigation. OFB wished instead to introduce testimony that Zeiset was "cleared" by the investigation.

¶25 The court's ruling arose because, if Zeiset was "cleared," it was by the inadmissible polygraph test previously discussed. OFB argued previously that the jury should have been informed of the polygraph tests because their existence and results supported the good faith of the insurer's action. We rejected this argument based on Supreme Court precedent. OFB now resurrects it by a different means.

¶26 OFB argues that it should be allowed an evidentiary harpoon and to elicit testimony that Zeiset was "cleared," while the Linns could not explore that statement or conclusion on cross-examination without "opening the door" to the inadmissible polygraph evidence that OFB wished to introduce. We find no indication in current case law that passing a polygraph test "clears" a suspect as a matter of law. Hence we find no error in the court's decision. It represents a reasonable compromise between allowing OFB to present its case and excluding the inadmissible polygraph evidence. We find no clear abuse of discretion in this matter.

E. Post-Suit Conduct

¶27 OFB next argues, citing *Andres v. Oklahoma Farm Bureau Mut. Ins. Co.*, 2012 OK CIV APP 93, 290 P.3d 15, as persuasive authority, that the trial court erred by allowing its adjuster to be questioned "regarding not paying until the time of trial." OFB raises the same objection to the court allowing counsel to ask questions regarding the report of one Billy Clay, an investigator hired by OFB, on the grounds that the report was not actually submitted to OFB until after suit was filed.

¶28 The Supreme Court noted in *Lewis v. Farmers Ins. Co., Inc*., 1983 OK 100, 681 P.2d 67, that "a substantial part of the right purchased

by the insured is the right to receive benefits promptly. Unwarranted delay causes the sort of economic hardship which the insured sought to avoid by the purchase of the policy, and results in possible mental stress which may result from the loss." Delay is clearly an element that factors into a jury determination in such a case. A bad faith plaintiff's consequential damages do not cease accruing on the date suit is filed. Any business harm done by nonpayment of the claim continued to accrue, proximately caused by OFB's action. It would eviscerate the recognized tort of bad faith to hold that all damages cease to accrue at the moment suit is filed.

¶29 Regarding the second argument, OFB appears to interpret the holding of Andres beyond that intended. Andres confirmed the longstanding rule that unsuccessful litigation of a claim based on a good faith dispute as to value does not, in itself, constitute bad faith. It further confirmed that "to hold an insurer's **acceptable litigation tactics** as evidence of bad faith would be to deny the insurer a complete defense." (Emphasis added).

¶30 However, the situation in Andres was quite different from that presented here. In Andres, this Court initially upheld a summary judgment unfavorable to Andres' bad faith claim, but found her claim was covered by the policy in question. We remanded the matter for a determination of the value of the claim. On remand, Andres attempted to amend and add an *additional bad faith claim based solely on the insurer's conduct on remand*, arguing that OFB "simply sat back and waited for Plaintiff to 'prove'" her claim's value "without ever proffering its own evaluation." *Andres* at ¶ 3. In response, we noted:

> It is now the law of this case – and therefore not disputed – that OFB's initial denial of Plaintiff's claim was reasonable under the circumstances. It also is undisputed that the entirety of OFB's conduct – or failure to act – of which Plaintiff now complains occurred completely within the context of the parties' appropriate exercise of their rights in litigation. As such, the undisputed facts demonstrate that summary judgment in favor of OFB in this case was warranted.

¶31 OFB interprets this holding, however, as automatically excluding *any and all* evidence of an insurer's activities after a plaintiff files suit. It does so based on a quote from a treatise that was cited in *Andres*: Allan D. Windt, *2 Insurance Claims and Disputes 5th: Representation of Insurance Companies & Insureds*, § 9:28. The quote from the Windt treatise stated that "normal claims handling is superseded by the litigation proceeding" and that an insurer "relie[s] upon its counsel to conduct an investigation that is appropriate in a litigation context." Hence, OFB argues, nothing that occurred after the date of suit was relevant evidence as to OFB's alleged bad faith.

¶32 If we examine the full passage from § 9:28 of the Windt treatise, however, an opposite rule to that proposed by OFB is stated.

> It should logically make no difference when or how an insurer learns that policy benefits are owed; once it learns that benefits are owed, the insurer should pay them. Accordingly, the fact that the insurer is already being sued does not somehow insulate the insurer from having to pay what it knows that it owes. An insurer's duty of good faith might not, however, continue after a judgment is entered against the insurer.

Allan D. Windt, *2 Insurance Claims and Disputes* § 9:28 (6th ed.).

¶33 It was in this context – of the duty to an insured plaintiff on remand after coverage had been judicially determined – that *Andres* cited the Windt treatise. The treatise makes Windt's position even clearer a few paragraphs later:

> In short, allowing an insurer's litigation conduct to be the basis for a bad faith claim would impair its right to contest questionable claims and to defend against such claims . . . .
>
> . . .
>
> However, simply because the insurer's conduct should not, under the foregoing circumstances, give rise to a bad faith claim *does not* necessarily mean that the *conduct cannot constitute additional evidence of pre-existing bad faith.*

Id. (emphasis added).

¶34 We find the situation here substantially distinguishable from that in *Andres* and no indication that the rule of *Andres* should be extended to cover this situation.

F. Cases from Other States

¶35 OFB further argues that the common law of other states, including Ohio and Illinois, should be considered. A lack of good faith in the handling of an insurance claim is a quintessential matter of state law, and the common law of Oklahoma established by our Supreme Court is precedential on this question. We find no theory in these cases from other states that is not adequately addressed by our own state law.

IV. JURY INSTRUCTIONS

¶36 When reviewing jury instructions, the standard of review requires the consideration of the accuracy of the statement of law as well as the applicability of the instructions to the issues. *Johnson v. Ford Motor Co.*, 2002 OK 24, ¶ 16, 45 P.3d 86. The instructions are considered as a whole. When the trial court submits a case to the jury under proper instructions on its fundamental issues and a judgment within the issues and supported by competent evidence is rendered in accord with the verdict, the judgment will not be reversed for refusal to give additional or more detailed instructions requested by the losing party if it does not appear probable that the refusal has resulted in a miscarriage of justice or substantial violation of constitutional or statutory rights. *Id*. A judgment will not be disturbed because of allegedly erroneous instructions, unless it appears reasonably certain that the jury was misled thereby. The test of reversible error in instructions is whether the jury was misled to the extent of rendering a different verdict than it would have rendered if the alleged errors had not occurred. *Taliaferro v. Shahsavari,* 2006 OK 96, ¶ 25, 154 P.3d 1240.

¶37 OFB objected at trial to 21 of the instructions given by the court. In its appellate brief, OFB objects to all instructions regarding bad faith on the grounds that no possible bad faith was shown by the evidence. This issue was decided in Section II, *supra*, and we need not revisit it here. We now turn to the more specific objections.

A. Instruction No. 16

¶38 Instruction No. 16 stated as follows:

INSTRUCTION No. 16

Elements of a Claim for Breach of Contract

> The Linns are required to prove by the greater weight of the evidence the following in order to recover on the claim for breach of contract against Oklahoma Farm Bureau Insurance Company:
>
> 1. Formation of a contract between the Linns and Oklahoma Farm Bureau Insurance Company:
>
> 2. Oklahoma Farm Bureau Insurance Company breached the contract by failing to submit a written offer of settlement or rejection within 45 days after receipt of the Linns' proofs of loss or by failing to follow the timelines required by Oklahoma Farm Bureau's Standards of Care.
>
> 3. The Linns suffered damages as a direct result of the breach.

¶39 This instruction is legally accurate. Evidence showed a contractual agreement by OFB to submit a written offer of settlement or rejection within 45 days after receipt of the Linns' proofs of loss, and OFB had a required timeline for making an offer or denying claims. Failure to submit a written offer of settlement or rejection within 45 days after receipt of the Linns' proofs of loss could therefore constitute a breach of contract. OFB's argument is that, nonetheless, the instruction misdirected the jury away from the issue of whether it was "likely" that the cattle were stolen. OFB argues that this instruction allowed the jury to conclude that the Linns should be awarded contractual damages for the loss of all the missing cattle simply because OFB did not submit a written offer of settlement or rejection within 45 days.

¶40 If this instruction stood alone, it could have had the effect OFB complains of. However, the instructions are considered as a whole. Instruction No. 4 explicitly covers the question of coverage for "likely" theft. Instruction No. 13 also emphasized the refusal to pay the claim for the missing cattle. Further, an examination of the closing statements of both counsel (Tr. Trans. Vol. IX, 1620-1670) shows that the key issue of whether a theft was "likely" and the corresponding evidence for each side was extensively discussed and emphasized during closing. We find it unlikely, and not "reasonably certain," that the jury was misled to believe that the sole requirement for an award of damages was that OFB missed a deadline.

B. Instruction No. 22

¶41 OFB also objected to Instruction No. 22, which stated:

INSTRUCTION No. 22

Foreseeability of Special Damages

In addition to other damages, the Linns claim they are entitled to recover damages for increased interest costs and lost production. In order for you to award the Linns damages for these losses, you must be satisfied by the greater weight of the evidence that they are the kind that would ordinarily result from the breach of Defendant's duty of good faith and fair dealing. Oklahoma recognizes the availability of special damages in a bad faith case.

See Gov't Employees Ins. Co. v. Quine, 2011 OK 88, 264 P.3d 124; *Miller v. Liberty Mut. Fire Ins. Co.*, 2008 OK CIV APP 65, ¶ 17, 191 P.3d 1221. OFB argues that this instruction "[told] the jury it could specifically award interest and lost cattle production on the bad faith claim." OFB's brief states that this was "improper, had no legal basis, and misled the jury." OFB's brief does not expand further on the legal basis for its objection or cite supporting authority. OFB's argument regarding "interest" appears to be based on a misinterpretation of the instruction. The instruction clearly does not allow the jury to award "interest" on its bad faith verdict. It states that higher interest costs that the Linns' business allegedly suffered as a result of OFB's failure to pay their claim could be considered as a measure of special damages if properly proven. We find no error in this part of the instruction.

¶42 OFB's objection to the second half of the instruction is more difficult to fathom. Although it chose not to elaborate on its argument, OFB appears to argue that special damages for lost production cannot be recovered in this, or any similar case, as a matter of law. OFB directs us to no such principle of law, and our own review does not reveal such a principle. We find no error regarding Instruction No. 22.

C. The Court's Refusal to Give OFB's Proposed Instructions Nos. 1, 6, 13, 14, 16, 17, 18, 20, 22, 23, 24, 25 and 26

¶43 OFB argues that the court erred in refusing to give a total of thirteen instructions it had proposed. It briefs error regarding only four of these instructions, however: Instructions Nos. 13, 14, 16 and 17. On the question of bad faith, the court gave the standard OUJI 22.2, modified only to add the names of the parties. The standard instruction states:

Instruction No. 22.2

BAD FAITH - FIRST PARTY INSURANCE - FAILURE TO PAY CLAIM OF INSURED

[Plaintiff] claims that [the Insurer] violated its duty of good faith and fair dealing by unreasonably, and in bad faith, refusing to pay [Plaintiff] the proper amount for a valid claim under the insurance policy. In order for [Plaintiff] to recover damages in this case, [he/she] must show by the greater weight of the evidence that:

1. [The Insurer] was required under the insurance policy to pay [Plaintiff's] claim;

2. [The Insurer's] refusal to pay the claim in full was unreasonable under the circumstances, because [for example, that 1) it did not perform a proper investigation, 2) it did not evaluate the results of the investigation properly, 3) it had no reasonable basis for the refusal, or 4) the amount it offered to satisfy the claim was unreasonably low];

3. [The Insurer] did not deal fairly and in good faith with [Plaintiff]; and

4. The violation by [The Insurer] of its duty of good faith and fair dealing was the direct cause of the injury sustained by [Plaintiff].

¶44 OFB argues that this uniform instruction does not adequately reflect the law of bad faith in Oklahoma and that three other instructions were necessary as follows:

PROPOSED INSTRUCTION NO. 13

You are instructed that under Oklahoma law, the minimum level of culpability necessary for liability for bad faith against an insurer to attach is more than simple negligence, but less than reckless conduct.

Authority:

Badillo v. Mid Century Ins. Co., 121 P.3d 1080 (Okla. 2005)

PROPOSED INSTRUCTION NO. 14

LEGITIMATE DISPUTE AS DEFENSE TO BAD FAITH

Where an insurer has a legitimate dispute concerning coverage of a claim or where there is no conclusive precedential legal authority requiring coverage, withholding or delaying payment is not unreasonable or in bad faith.

The tort of bad faith does not prevent an insurer from denying, resisting or litigating any claim as to which the insurer has a reasonable defense.

Authority:

Ball v. Wilshire Ins. Co., 2009 OK 38, ¶22, 221 P.3d 717, 725

PROPOSED INSTRUCTION NO. 17

You are instructed that while considering Plaintiffs' claim for the breach of duty of good faith and fair dealing against Defendant Oklahoma Farm Bureau Mutual Insurance Company, the law provides that the insurer's conduct must be assessed from the standpoint of all facts known or knowable about the claim at the time the insureds requested the insurer to perform its contractual obligation.

Authority:

McCoy v. Oklahoma Farm Bureau Mut. Ins. Co., 841 P.2d 568 (Okl.1992)

Christian v. American Home Assur. Co., 577 P.2d 899 (Okl.1978)

Skinner v. John Deere Ins. Co., 998 P.2d 1219 (Okl.2000)

¶45 Whenever Oklahoma Uniform Jury Instructions (OUJI) contain an instruction applicable in a civil case or a criminal case, giving due consideration to the facts and the prevailing law, and the court determines that the jury should be instructed on the subject, the OUJI instructions shall be used unless the court determines that it *does not accurately state the law.* 12 O.S. § 577.2. It is the trial judge's duty to deviate from the OUJI if an instruction fails to accurately state the applicable law, is erroneous, or is improper. *In re T.T.S.*, 2015 OK 36, ¶ 18, 373 P.3d 1022.

¶46 The scope of OFB's argument that the current uniform instruction, standing alone, *does not accurately state the law* goes well beyond the current case. OFB inherently argues that a jury *cannot* decide a bad faith case in a manner consistent with the law of Oklahoma unless additional instructions beyond the standard uniform instruction are given. It inherently argues that new mandatory instructions have been necessary since 1978 at the earliest, and 2009 at the latest.

¶47 Precedential cases involving jury instructions, or even a jury verdict in a bad faith case, are rare. In 2015, the Supreme Court decided *Aduddell Lincoln Plaza Hotel v. Certain Underwriters at Lloyd's of London*, 2015 OK CIV APP 34, 348 P.3d 216. That case did identify certain jury instructions as erroneous, but did not examine the soundness of OUJI No. 22.2. Before that, the last precedential cases involving a jury award for bad faith appear to be *Badillo* in 2005 and *McCoy* in 1992. We find no indication that either the Supreme Court or the Court of Civil Appeals has ever found any insufficiency in OUJI No. 22.2, but also find little or no indication that the adequacy of the instruction has been directly challenged. We find no indication that Oklahoma Supreme Court Committee for Uniform Jury Instructions has recommended any change in OUJI No. 22.2. OFB asks us to declare that it is reversible error not to give its proposed additional instructions on the law, *i.e.,* that they are now *mandatory in a bad faith case.* We find no precedent indicating that this is so, and we decline to do so in this case.

V. ATTORNEY FEES

¶48 OFB alleges that the court erred in its award of attorney fees to the Linns and that OFB was actually entitled to fees. Under Oklahoma law, attorney fees are available in any suit on an insurance policy "so long as the 'core element' of the damages sought and awarded is composed of the insured loss." *Taylor v. State Farm Fire & Casualty Co.*, 1999 OK 44, 981 P.2d 1253.

A. The 12 O.S. § 1101.1 Offers

¶49 The facts regarding § 1101.1 offers appear undisputed. OFB offered, pursuant to 12 O.S. § 1101.1, to confess judgment in the amount of $694,744. The Linns counter-offered a judgment of $2,000,000. Neither party accepted the other's offer, so both were deemed denied. The Linns recovered a judgment between the two amounts. OFB contends that it was entitled to fees pursuant to § 1101.1 because the Linns recovered less than their own counteroffer. (OFB BIC p. 30). This theory is based on a misreading of the statute that was rejected more than ten years ago by this Court in *Oltman Homes, Inc. v. Mirkes*, 2008 OK CIV APP 64, ¶ 52, 190 P.3d 1182.

¶50 Title 12 O.S. § 1101.1 states in part that:

2. In the event a defendant files an offer of judgment, the plaintiff may, within ten (10)

days, file with the court a counteroffer of judgment directed to each defendant who has filed an offer of judgment. If a counteroffer of judgment is filed, each defendant to whom the counteroffer of judgment is made shall, within ten (10) days, file a written acceptance or rejection of the counteroffer of judgment. If a defendant fails to file a timely response, the counteroffer of judgment shall be deemed rejected.

3. In the event the plaintiff rejects the offer(s) of judgment and the judgment awarded the plaintiff is less than the final offer of judgment, then the defendant filing the offer of judgment shall be entitled to recover reasonable litigation costs and reasonable attorney fees incurred by that defendant from the date of filing of the final offer of judgment until the date of the verdict.

4. In the event a defendant rejects the counteroffer(s) of judgment and the judgment awarded to the plaintiff is greater than the final counteroffer of judgment, the plaintiff shall be entitled to recover reasonable litigation costs and reasonable attorney fees incurred by the plaintiff from the date of filing of the final counteroffer of judgment until the date of the verdict.

(Emphasis added).

Section 1101.1 sets out two clear rules:

1. A defendant can receive a fee only if:

a. the defendant makes an offer of judgment; and

b. the plaintiff recovers less at trial than the defendant's offer;

2. A plaintiff can receive a fee only if:

a. the plaintiff makes a counteroffer of judgment; and

b. the plaintiff recovers more at trial than the plaintiff's counteroffer.

¶51 Section 1101.1 therefore contemplates a situation in which, if the final award falls between a defendant's offer and a plaintiff's counteroffer, neither party can recover fees pursuant to the statute. That is the situation we have here.

¶52 As noted by *Oltman*:

> The statute is clear: under § 1101.1, defendants in lawsuits make offers to settle; plaintiffs make counteroffers. If a defendant's offer is rejected by the plaintiff, who then fails to obtain a verdict exceeding defendant's rejected offer, defendant is entitled to a fee. § 1101.1(B)(3). If a plaintiff's counteroffer is rejected by a defendant, and the plaintiff obtains a verdict greater than its counteroffer, plaintiff is entitled to a fee.

Because the recovery in this case fell between the two offers, we find that neither party was entitled to fees pursuant to 12 O.S. § 1101.1.

B. Title 36 O.S. § 3629

¶53 The version of 36 O.S. § 3629 in force at the time of the fee award, meanwhile, states that:

> It shall be the duty of the insurer, receiving a proof of loss, to submit a written offer of settlement or rejection of the claim to the insured within ninety (90) days of receipt of that proof of loss. Upon a judgment rendered to either party, costs and attorney fees shall be allowable to the prevailing party. For purposes of this section, the prevailing party is the **insurer** in those cases **where judgment does not exceed written offer of settlement**. In **all other judgments** the **insured** shall be the prevailing party. (Emphasis added.)

¶54 Recovery authorized by § 3629(B) embraces both contract and tort-related theories of liability so long as the "core element" of the damages sought and awarded is composed of the insured loss. *Taylor v. State Farm Fire & Cas. Co.*, 1999 OK 44, ¶ 2, ¶ 11, 981 P.2d 1253. The "written offer of settlement" noted in § 3629 is clearly the "written offer of settlement or rejection that must be made within 90 days of receipt of that proof of loss," not the "offer of judgment" pursuant to 12 O.S § 1101 or 1101.1. Section 3629 therefore provides a specific basis for fees in an insurance bad faith case that is separate from the general basis for fees provided by § 1101.1.[3]

¶55 The statute states that "the prevailing party is the insurer in those cases where judgment does not exceed written offer of settlement," and that "in **all other judgments** the insured shall be the prevailing party." (Emphasis added). This is not a case where the judgment was less than any written offer of settlement by OFB. In all other judgments the insured shall be

the prevailing party. Hence, the Linns were the prevailing party in this matter.

C. The 15 Percent Interest

¶56 OFB next argues that the Court erred in awarding 15 percent interest on the verdict pursuant to 36 O.S. § 3629(B), which states:

> If the insured is the prevailing party, the court in rendering judgment shall add interest on the verdict at the rate of fifteen percent (15%) per year from the date the loss was payable pursuant to the provisions of the contract to the date of the verdict.

The statute appears clear on this question. OFB's first argument is essentially the same argument it has made throughout – that the "loss was not payable" and no verdict in favor of the Linns was justified. The jury found otherwise, and we will not disturb that finding.

¶57 OFB further argues that § 3629(B), as written, violates the principle of *Taylor v. State Farm Fire & Cas. Co.*, 1999 OK 44, 981 P.2d 1253, that

> In sum, if a (property loss) demand's value is unascertainable until its quantum is judicially settled, no prejudgment interest is the victor's due. But if the value of the demand is fairly ascertainable before its settlement by judgment, prejudgment interest will accrue.

¶58 The *Taylor* opinion, authored by the late Justice Opala, appears to hold that § 3629(B) had no function beyond a belated "legislative approval of the applicable common law" regarding prejudgment interest. *Id.* at ¶ 17. We are unsure as to the basis of this statement. The general common law on sum-certain damages and interest was well-established for many years before 1999, and would already provide for prejudgment interest in a sum-certain case. We are unsure why the Legislature would suddenly "legislatively approve" a longstanding right to pre-judgment interest, but dictate a different statutory interest rate in a specialist statute relating *only to insurance* and use language that does not mirror the common law.[4] Whatever the legislative intent of § 3629(B), it does not appear to be a restatement of the common law. Despite these doubts, however, *Taylor* represents current precedent, and we will apply it in this case.

¶59 OFB argues that there was no sum that was "fairly ascertainable" in this case because the Linns submitted more than one claim amount based on an evolving count of how many cattle were missing. As OFB states the matter, "the [contract] verdict was approximately $100,000 less than the first proof of loss." Hence, it argues, the verdict shows damages that were not "fairly ascertainable" before settlement by judgment. As the Linns state it, a later proof of loss submitted to OFB in the amount of $566,470 was functionally identical to the $566,000 in contract damages awarded by the jury. We find this sufficient in this case to satisfy the requirements of § 3629(B).

CONCLUSION

¶60 As is clear from the record and the parties' briefing, this was a difficult case replete with factual questions and credibility issues. Such issues are properly reserved for a jury in our system. A jury heard the arguments and testimony of the parties on these questions during a prolonged trial. "In an action at law, a jury verdict is conclusive as to all disputed facts and all conflicting statements, and where there is any competent evidence reasonably tending to support the verdict of the jury, this Court will not disturb the jury's verdict or the trial court's judgment based thereon." *Florafax International, Inc. v. GTE Market Resources, Inc.*, 1997 OK 7, ¶ 3, 933 P.2d 282. "Where such competent evidence exists, and no prejudicial errors are shown in the trial court's instructions to the jury or rulings on legal questions presented during trial, the verdict will not be disturbed on appeal." *Id. See also C&H Power Line Constr. Co. v. Enter. Products Operating, LLC,* 2016 OK 102, ¶ 16, 386 P.3d 1027. "The sufficiency of the evidence to sustain a judgment in an action of legal cognizance is determined by an appellate court in light of the evidence tending to support it, together with every reasonable inference deducible therefrom, rejecting all evidence adduced by the adverse party which conflicts with it." *Badillo v. Mid Century Ins. Co.*, 2005 OK 48, ¶ 22, 121 P.3d 1080. While many facts were highly disputed, we find competent evidence reasonably tending to support the verdict of the jury, and no error of law in this matter.

¶61 **AFFIRMED**.

REIF, S.J. (sitting by designation), and WISEMAN, C.J., concur.

P. THOMAS THORNBRUGH, PRESIDING JUDGE:

1. *Grove v. State Farm Fire & Cas. Co.*, 13-CV-754-JED-FHM, 2014 WL 11532321, (N.D. Okla. Aug. 26, 2014) and *Higgins v. State Auto Prop. & Cas. Ins. Co.*, 11-CV-90-JHP-TLW, 2012 WL 2369007 (N.D. Okla. June 21, 2012).

2. *See e.g., Heffron v. Dist. Court Oklahoma Cty.*, 2003 OK 75, ¶ 17, 77 P.3d 1069 (the reasonableness of any investigation conducted by the insurer is, thus, often one of the main issues in the bad faith tort case. Also, expert testimony on the adequacy or inadequacy of the carrier's pre-denial investigation may be relied on by both sides to support their respective positions in the case.); *Hall v. Globe Life and Acc. Ins. Co.*, 1998 OK CIV APP 161, 968 P.2d 1263 (same); *Guideone Am. Ins. Co., Inc. v. Shore Ins. Agency, Inc.*, 2011 OK CIV APP 69, ¶ 14, 259 P.3d 864 (expert testified that GuideOne "acted in bad faith in connection with Roberts' uninsured motorist claim."); *Embry v. Innovative Aftermarket Sys. L.P.*, 2010 OK 82, ¶ 12, 247 P.3d 1158 (plaintiff offered an expert witness concerning the type of gap protection at issue. This expert explained in detail the ways in which the actions, omissions and decisions of the defendants violated industry standards and reflected bad faith).

3. In *Oulds v. Principal Mut. Life Ins. Co.*, 6 F.3d 1431, 1434 (10th Cir. 1993), the Tenth Circuit held that any written offer of settlement pursuant to § 3629, not just an offer made in the statutory period, is effective to defeat an insured's fee recovery if the tort/contract recovery is less than the offer. The Tenth Circuit cited its interpretation of *Shinault v. Mid-Century Ins. Co.*, 1982 OK 136, 654 P.2d 618, as supporting this view. Although *Shinault* stated that "the insured, on the other hand, is the prevailing party when the judgment is more than *any settlement offer* that was made," (emphasis added) this statement was made entirely in the context of a discussion of § 3629 and its 90-day window. We need not decide if *Oulds* is correct, however, because no offer of any type made by OFB, inside or outside 90 days, was greater than the Linns' recovery.

4. It is also somewhat difficult to reconcile this decision with Justice Opala's long-held view that acts of the Legislature provide only an overlay to the common law, rather than supplanting it, absent a showing of "clear intent" to do so. *See Rogers v. Meiser,* 2003 OK 6, ¶ 9, 68 P.3d 967. Section 3629(B) appears to be such an overlay that adds rights greater than the common law in a limited situation.

2020 OK CIV APP 63

MIDFIRST BANK, Plaintiff/Appellee, vs. JENIFER ANN POE, Defendant/Appellant, ALICE J. POE, personal representative of the estate of Jerry Daniel Poe, Deceased, Defendant.

Case No. 117,615; Cons. w/118,056
October 23, 2020

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE MARY FITZGERALD, JUDGE

REVERSED AND REMANDED

Jessie V. Pilgrim, Clint T. Swanson, SWANSON LAW FIRM, PLLC, Tulsa, Oklahoma, for Defendant/Appellant,

Robert P. Skeith, RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS, Tulsa, Oklahoma, for Plaintiff/Appellee.

B.J. Goree, Judge:

¶1 MidFirst Bank (Bank) filed a petition to interplead funds. It alleged it could be exposed to double liability with respect to $32,830.44 which it held on deposit and to which it claimed no interest. Bank named two defendants, Jenifer Ann Poe (Poe) and Alice J. Poe, personal representative of the Estate of Jerry Daniel Poe. The interpleader was granted before Poe had notice and an opportunity to be heard. We hold this was a denial of due process of law.

¶2 On the same day the petition was filed, the district court signed an order directing Bank to deposit the funds with the court clerk. The order was filed a few days later. Afterward, and in due time, Poe filed her answer and an amended answer. She denied Personal Representative was asserting a claim, she denied Bank may be exposed to double liability with respect to the funds, and she asserted Bank failed to state a claim. Poe raised affirmative defenses that Bank had acted in bad faith and with unclean hands, and she asserted a counterclaim that Bank was liable for conversion.

¶3 Poe filed an application requesting a hearing on her affirmative defenses and a motion to vacate the order directing deposit of the funds, arguing it was entered without notice and before she had an opportunity to object. Bank responded that the answers of the two defendants present opposing claims to the subject funds, thereby supporting its claim that it could be exposed to the potential for double liability. Bank explained that it merely tendered a proposed order to the district court when it filed its petition, and the fact that the order was filed without advance notice to Poe is of no legal consequence under the circumstances. Reiterating that it claimed no interest in the money, and that it was properly within the safekeeping of the court pending disputes between the two defendants, Bank asked the court to dismiss Poe's counterclaims and discharge it from the action.

¶4 The court (1) granted Bank's motion to dismiss Poe's counterclaims, (2) ordered Bank released and discharged from any and all liability to Defendants, and (3) ordered an attorney fee to be paid to Bank from the deposited funds in an amount to be determined in a future proceeding. By a separate order, the court awarded Bank $9,476.50 for attorney fees and $733.49 for costs. Poe appealed.[1]

¶5 In a proceeding commenced pursuant to 12 O.S. §2022, the district court's order directing a pleader to deposit the subject of the action into court is reviewed for an abuse of discretion. *Farmers Ins. Co. v. VanWinkle*, 2018 OK CIV APP 40, ¶3, 417 P.3d 1262, 1264 (holding that interpleader proceedings are equitable

in nature and are reviewed for an abuse of discretion). Review may encompass a claim of legal error or lack of an evidentiary basis, and both implicate the *de novo* standard. *Id.*

¶6 Oklahoma's interpleader statute provides that a party potentially exposed to double or multiple liability for wrongful payment may tender the claimed property into court for a decision on the priority of claims. *Shebester v. Triple Crown Insurers,* 1992 OK 20, ¶22, 826 P.2d 603, 611. According to Title 12 O.S. §2022(A), persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. "When the party seeking such relief claims no interest in the subject of the action, and it has been deposited with the court, the court should discharge the pleader from the action and from liability as to the claims of the other parties." §2022(C).[2] Bank's argument suggests that this language makes no provision for objection, affirmative defense, or counterclaims. If the party seeking relief claims no interest in the funds and they have been deposited with the court, then "the court should discharge the pleader" both from the action and from liability for claims of the other parties.

¶7 Although actions in interpleader are part of the Oklahoma Pleading Code,[3] its applicability is subject to an exception "where a statute specifies a different procedure." §2001. We must consider whether the Legislature intended by the language of §2022(C) to dispense with a defendant's right to file an answer and permit the court to order relief *instanter* after the petitioner states a claim.

¶8 Long before its codification at §2022, an action in interpleader was within the inherent power of the court. *Waggoner v. Johnston*, 1965 OK 192, ¶8, 408 P.2d 761, 765. The court had the initial task of determining whether interpleader was proper. *Id.* If so, the petitioner was to be discharged and the case advanced to a second stage where the validity of the competing claims to the fund would be determined on the merits. *See Stanford v. Stanford*, 1996 OK CIV APP 156, ¶13, 936 P.2d 352, 355. Interpleader actions involve "two successive litigations: one between the plaintiff and the defendants as to whether the defendants shall interplead; the other between the different defendants on the conflicting claims." *Turman Oil Company v. Lathrop*, 8 F.Supp. 870, 872 (N.D. Okla. 1934).

¶9 The party seeking relief under 12 O.S. §2022 may state a claim for relief by setting forth a short and plain statement of the claim showing it is entitled to relief and a demand for judgment. 12 O.S. §2008(A). We hold opposing parties must be afforded a right to state their defenses in accordance with 12 O.S. §2008(B). Section §2022(C) does not specify a procedure that eliminates a non-movant's right to object.

¶10 The U.S. Const. amend. XIV, § 1 and Okla. Const. Art. 2, § 7 ensure that no person may be deprived of life, liberty, or property without due process of law. At a minimum, due process requires notice and a meaningful opportunity to appear and be heard. *Crownover v. Keel*, 2015 OK 35, ¶14, 357 P.3d 470, 474. The right to be heard is the core element of due process. *Booth v. McKnight,* 2003 OK 49, ¶18, 70 P.3d 855, 862.

¶11 Because the court entered an order partially granting the relief requested by Bank, without the opportunity for Defendant Poe to assert and be heard on her defenses, the Order Interpleading Funds must be reversed. It necessarily follows that the court's orders dismissing Poe's counterclaims, dismissing Bank, and awarding attorney fees and costs must also be reversed. The latter have no viability in the absence of an enforceable order granting interpleader. *Stanford,* ¶16 (denial of interpleader fatally affected all subsequent proceedings).

¶12 On remand, the court must accord all parties due process and make a determination of whether Bank may be exposed to double or multiple liability and whether Bank claims an interest in the subject of the action. If these two basic requirements are met, interpleader proceedings may proceed. *Stanford*, ¶13.

¶13 The orders filed September 5, 2018, November 30, 2018, and June 4, 2019 are reversed and the case is remanded for further proceedings.

¶14 REVERSED AND REMANDED.

BELL, P.J., and BUETTNER, J., concur.

B.J. Goree, Judge:

1. Poe filed two appeals arising from separate orders filed in the same case. We entered an order consolidating Case No. 117,615 and Case No. 118,056. After considering the parties' supplemental briefs in aid of our inquiry into appellate jurisdiction, we conclude the orders are interlocutory orders appealable by right because they direct the payment of money *pendente lite* pursuant to 12 O.S. §993(A)(5) and in accordance with *Hammonds v. Osteopathic Hospital Founders Association*, 1996 OK 54, 917 P.2d 6. The order filed September 5, 2019, directed Bank to deposit $32,830.44 into the court registry. The order filed

November 30, 2018, decreed that an attorney fee and costs are to be paid from the deposited funds. The order filed June 4, 2019, awarded $9,476.50 for the attorney fee and $733.49 for costs. None of these orders is a final order because Poe has pending undetermined claims against the personal representative and the district court neither certified the orders as immediately appealable pursuant to 12 O.S. §952(b)(3) nor expressly stated there is no just cause for delaying the entry of a final judgment pursuant to 12 O.S. §994.

2. Title 12 O.S. 2011 §2022 provides, in part:

> A. Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this section supplement and do not in any way limit the joinder of parties permitted in Section 20 [Title 12 O.S. 2011 §2020] of this act.
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> . . .
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> C. . . . . Where the party seeking relief by way of interpleader claims no interest in the subject of the action and the subject of the action has been deposited with the court or with a person designated by the court, the court should discharge him from the action and from liability as to the claims of the other parties to the action with costs and, in the discretion of the court, a reasonable attorney fee.
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> . . .

3. "Scope of the Oklahoma Pleading Code – The Oklahoma Pleading Code governs the procedure in the district courts of Oklahoma in all suits of a civil nature whether cognizable as cases at law or in equity except where a statute specifies a different procedure. It shall be construed to secure the just, speedy, and inexpensive determination of every action. The provisions of Sections 1 through 2027 of this title may be cited as the 'Oklahoma Pleading Code'. Section captions are part of this act." 12 O.S. §2001.

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, December 3, 2020

F-2019-569 — Appellant Wayne Lee Allen was tried and convicted by jury for the crimes of Child Neglect (Count 1) and Sexual Abuse – Child Under 12 (Counts 2-6) in the District Court of Tulsa County, Case No. CF-2018-3994. In accordance with the jury's recommendation, the trial court sentenced Appellant to five years imprisonment on Count 1, 50 years on Count 3, and 35 years each on Counts 2, 4, 5 and 6. From this judgment and sentence Wayne Lee Allen has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concur; Kuehn, V.P.J., specially concur; Lumpkin, J., concur; Hudson, J., concur.

J-2020-440 — D.S.D., Appellant, appealed to this Court from an order entered by the Honorable Brian N. Lovell, Special Judge, denying Appellant's motion for certfication to the juvenile system in Case No. CF-2018-172 in the District Court of Garfield County. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J. concur.

F-2019-636 — Raven Veloz, Appellant, was tried by jury for the crime of Count 1, First Degree Murder; Counts 2 & 3, Assault and Battery with a Deadly Weapon in Case No. CF-2016-5732 in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment Life imprisonment on all counts. The trial court sentenced accordingly. From this judgment and sentence Raven Veloz has perfected his appeal. The Judgment and Sentence is AFFIRMED, and Mandate is ORDERED. Opinion by: Lumpkin, J.; Lewis, P.J., Concurs in Results; Kuehn, V.P.J., Concurs; Hudson, J., Concurs; Rowland, J., Recused.

F-2019-813 — Francisco V. Ramirez, Appellant, was tried by jury for the crime of Count 1, First Degree Rape and Count 4, Indecent or Lewd Acts with a Minor in Case No. CF-2016-7598 in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment Life imprisonment on both counts. The trial court sentenced accordingly. From this judgment and sentence Francisco V. Ramirez has perfected his appeal. The Judgment and Sentence is AFFIRMED and Mandate Ordered. Opinion by: Lumpkin, J.; Lewis, P.J., Concurs in Results; Kuehn, V.P.J., Concurs in Parts/Dissents in Parts; Hudson, J., Concurs; Rowland, J., Concurs.

F-2019-808 — Raul Sierra, Appellant, was tried by jury for the crime of Murder in the First Degree, in Case No. CF-2016-9905, in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment life imprisonment with the possibility of parole. The Honorable Timothy R. Henderson, District Judge, sentenced accordingly and imposed various costs and fees, ordered credit for time served and imposed post-imprisonment supervision. From this Judgment and Sentence Raul Sierra has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Appellant's *Application To Supplement the Appeal Record; In The Alternative, Request For Evidentiary Hearing Pursuant To Rule 3.11 On Sixth Amendment Claim of Ineffective Assistance of Counsel* is DENIED. Opinion by: Hudson, J.; Lewis, P.J., Concurs in Results; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Recuses.

F-2018-795 — Andrew Jordan Gaines, Appellant, was tried by jury, in Case No. CF-2016-51, in the District Court of Comanche County, of Count 1: Murder in the Second Degree, After Former Conviction of a Felony; Counts 2, 3 and 4: Robbery With a Dangerous Weapon, After Former Conviction of a Felony; Counts 5, 6 and 7: Attempted Robbery With a Dangerous Weapon, After Former Conviction of a Felony; and Count 8: Possession of a Firearm, After Former Felony Conviction. The jury returned a verdict of guilty and recommended as punishment a sentence of life imprisonment on Count 1; twenty years imprisonment on Count 2; fifteen years imprisonment on Count 3; ten years imprisonment each on Counts 4, 5, 6 and 7; and five years imprisonment on Count 8. The Honorable Emmit Tayloe, District Judge, sentenced Appellant in accordance with the jury's verdicts. Judge Tayloe imposed various costs, fees and restitution; ordered credit for time served;

imposed post-imprisonment supervision; and ordered the sentences for all eight counts to run consecutively. From this judgment and sentence Andrew Jordan Gaines has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Appellant's Application For Evidentiary Hearing On Sixth Amendment Claim And Brief In Support is DENIED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs in Results; Lumpkin, J., Specially Concurs; Rowland, J., Specially Concurs.

Thursday, December 10, 2020

F-2019-401 — Joshua Duane Fort, Appellant, was tried by jury for the crime of assault and battery with a deadly weapon in Case No. CF-2018-2687 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at twelve (12) years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Joshua Duane Fort 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-2019-427 — Douglas Aaron Smith, Appellant, was tried by jury for the crime of burglary in the first degree, after conviction of two or more felonies, in Case No. CF-2018-382 in the District Court of Bryan County. The jury returned a verdict of guilty and set punishment at twenty (20) years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Douglas Aaron Smith 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-2019-310 — Kedrin Ray Dixon, Appellant, was tried by jury for the crimes of Count 1, first degree burglary; Count 3, sexual battery; and Count 4, possession of a controlled dangerous substance, in Case No. CF-2018-257 in the District Court of Washington County. The jury returned a verdict of guilty and set punishment at twenty (20) years imprisonment and a $5,000.00 fine in each of Counts 1 and 3, and one (1) year imprisonment and a $1,000.00 fine in Count 4. The trial court sentenced accordingly and ordered the sentences to be served consecutively. From this judgment and sentence Kedrin Ray Dixon has perfected his appeal. The judgment and sentence is MODIFIED in Count 3 to ten (10) years imprisonment, consecutive to Count 1, and otherwise AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs in part and dissents in part; Rowland, J., concurs in part and dissents in part.

F-2019-296 — Ja'Vontay Jermaine Jenkins, Appellant, was tried by jury for the crime of first degree rape in Case No. CF-2016-394 in the District Court of Comanche County. The jury returned a verdict of guilty and set punishment at five (5) years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Ja'Vontay Jermaine Jenkins has perfected his appeal. The Judgment and Sentence is MODIFIED from one year to three years post-imprisonment community supervision, and otherwise AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

C-2020-45 — Petitioner Phillip Sherman Tomblinson appeals the denial of his motion to withdraw no contest plea in the District Court of LeFlore County in Case Nos. CF-2019-40 and CF-2019-87. Tomblinson entered a blind plea of no contest to two counts of Sexual Abuse of a Child Under 12, After Former Conviction of a Felony (Counts 1 and 2) in Case No. CF-2019-87 and one count of Failure to Register as a Sex Offender in Case No. CF-2019-40. The Honorable Marion D. Fry, Associate District Judge, accepted Tomblinson's no contest plea and sentenced him to five years imprisonment in CF-2019-40 and life imprisonment on each of Counts 1 and 2 in CF-2019-87. Judge Fry ordered the sentences on Counts 1 and 2 in CF-2019-87 to be served consecutively and consecutively to CF-2019-40. Tomblinson sent letters to the district court which the court treated collectively as a timely motion to withdraw his plea. After a hearing, the district court denied the motion. Tomblinson appeals. The Petition for a Writ of Certiorari is DENIED. The district court's denial of Petitioner's motion to withdraw plea is AFFIRMED. Tomblinson's motion for leave to file the Amended Petition for Writ of Certiorari is DENIED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

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

118,712 — Petition for Adoption of L.B.J., a Minor Child: Breauna Nichole Jolley, Appel-

lant, vs. Keith and Haley Belcher, Appellees. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Allen J. Welch, Trial Judge. Breauna Jolley appeals orders of the district court finding her child is eligible for adoption without her consent and adoption is in her best interests. Keith and Haley Belcher are the petitioners. Clear and convincing evidence supports both orders. Ms. Jolley voluntarily quit her job to take care of her fiancé's two children. She didn't know who had custody of L.B.J. for three months, but she never provided any support at any time. Ms. Jolley willfully failed to contribute to the support of her child according to her financial ability, and the trial court correctly determined L.B.J. was eligible for adoption without her consent pursuant to 10 O.S. §7505-4.2(B)(2). The Court considered the quality of the relationship between the child and the Belcher family and did not unduly rely on the period of time L.B.J. was in their care. AFFIRMED. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

Friday, December 4, 2020

117,908 — James D. Kinder, Petitioner/Appellee, v. Gloria Ann Kinder, Respondent/Appellant. Appeal from the District Court of Lincoln County, Oklahoma. Honorable Sheila Kirk, Judge. Petitioner/Appellee James D. Kinder (Husband) and Respondent/Appellant Gloria Ann Kinder (Wife) sought and were granted a divorce via Consent Decree (the Decree). The Decree incorporated a Settlement Agreement (the Agreement) reached by the parties through mediation. Wife moved for post-decree relief to clarify certain provisions of the Agreement, and then later sought to withdraw the Agreement and vacate the Decree. Prior to the hearing on Wife's post-decree motions, Wife discharged her legal counsel and the hearing on Wife's motions was continued. Neither Wife nor her new counsel appeared at the rescheduled hearing. The trial court granted Wife's motions for clarification, but dismissed Wife's Motion to Vacate for failure to prosecute. The court granted Husband's Motion to Enforce the Decree. Wife moved to Vacate the court's order, alleging neither she nor her new counsel ever received notice of the rescheduled hearing. The trial court denied Wife's motion, stating that Wife received constructive notice of the hearing and was otherwise estopped from attacking the Decree. Husband also sought attorneys' fees, which the trial court granted. Wife appeals. We AFFIRM IN PART AND REVERSE AND REMAND IN PART. Opinion by Buettner, J.; Bell, P.J., and Goree, J., concur.

118,274 — In the Matter of the Estate of Donald Gene Wilkerson, deceased. Jamie Pritchett and Gary Don Wright, Appellants, v. Peggy Beth Wilkerson, Appellee. Appeal from the District Court of Canadian County, Oklahoma Honorable Paul Hesse, Trial Judge. Jamie Pritchett and Gary Don Wright, Appellants, seek review of an order appointing Peggy Beth Wilkerson, Appellee, personal representative and admitting a will to probate. The trial court's order concluding the testator had testamentary capacity, was not subjected to undue influence, and had executed his will in accordance with the requisite statutory formalities, was not against the clear weight of the evidence. AFFIRMED. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

Tuesday, December 8, 2020

118,537 — Eddie Santana, Plaintiff/Appellant, vs. City of Tulsa, Defendant/Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Caroline Wall, Trial Judge. This is an accelerated appeal from the district court's judgment dismissing with prejudice the petition filed by Plaintiff/Appellant, Eddie Santana, *pro se*. Appellant's petition sought to temporarily enjoin Defendant/Appellee, City of Tulsa (City), from enforcing a parking ordinance against Appellant. Appellant was notified that by parking in his front yard, he violated Title 42, Chapter 55 §090-F-1 of the Revised Ordinances of the City of Tulsa. Appellant appealed the City's violation determination, but did not attend the hearing. The administrative hearing officer denied Appellant's appeal. Appellant did not appeal the administrative hearing officer's decision to the City Counsel within ten (10) days after the date of the decision. Instead, Appellant filed the instant petition with the district court. City moved to dismiss Appellant's petition on the basis that the petition failed to state a claim upon which relief can be granted because Appellant failed to exhaust his administrative remedies before filing the petition in district court. We hold the district court properly dismissed the petition with prejudice because Appellant failed to exhaust his administrative remedies. The district court's order of dismissal with prejudice is AFFIRMED. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

Thursday, December 10, 2020

117,779 — Crackshot Corporation, Inc., Plaintiff/Appellee, v. Jeffrey S. Hargrove, Wind River Designs Inc., James A. West and Nancy Reiss, Defendants, and William F. Cederquist, Defendant/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Caroline Wall, Judge. Defendant/Appellant, William F. Cederquist, appeals from the trial court's denial of his motion for partial release of a judgment lien held by Plaintiff/Appellee, Crackshot Corporation, Inc. Crackshot obtained a judgment against Appellant and others, recorded a judgment lien on Appellant's real property/homestead, and began pursuing collection efforts against Appellant. Crackshot and Appellant then executed an "Agreement," in which Crackshot agreed not to pursue further collection activities on the judgment against Appellant in exchange for Appellant's pickup truck. However, the Agreement also stated it was not a release and satisfaction of the judgment. Eight years later, Appellant filed the instant motion, claiming the Agreement caused the judgment lien against his real property to become "otherwise unenforceable" pursuant to 12 O.S. 2011 §706(E)(2). Although the Agreement contains seemingly inconsistent clauses, we hold the intent of the parties in executing the Agreement is plainly set forth therein. Interpreted together and with the remainder of the Agreement, the two clauses demonstrate an understanding that Crackshot would forego ongoing and expected active collection efforts in exchange for Appellant's truck, but would retain its right to foreclose its duly recorded lien upon some future contingency. AFFIRMED. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

(Division No. 2)
Friday, December 4, 2020

118,760 — In the Matter of E.S., T.S., and E.S., Jr., Deprived Children: Lakeish Banks, Appellant, v. State of Oklahoma, Appellee. Appeal from the District Court of Cleveland County, Hon. Stephen Bonner, Trial Judge. In this termination of parental rights proceeding, Lakeish Banks (Mother) appeals from an order of the district court denying her motion to vacate the court's default order terminating her parental rights to her three minor children. From our review of the appellate record, we conclude Mother had notice of the hearing at which her parental rights were terminated and the court had evidence from which it could reasonably determine that Mother's failure to appear was not as a result of unavoidable casualty or misfortune. The record demonstrates Mother was accorded her due process rights of notice and a meaningful opportunity to be heard. We conclude the trial court did not abuse its discretion in denying Mother's motion to vacate the termination of parental rights order. AFFIRMED. Opinion by Barnes, P.J.; Rapp, J., and Fischer, J., concur.

Tuesday, December 8, 2020

118,803 — Patricia Greenlee, Plaintiff/Appellant, vs. Dicus Cash Super Market, Inc., d/b/a Apple Market, Defendant/Appellee. Appeal from an Order of the District Court of Pontotoc County, Hon. Steven Kessinger, Trial Judge. Trial court plaintiff, Patricia Greenlee, appeals the trial court's Order Sustaining Defendant's Motion for Summary Judgment in this premises-liability action against Defendant, Dicus Cash Super Market, Inc., d/b/a Apple Market. This appeal proceeds under Supreme Court Rule 1.36, 12 O.S.2011, ch. 15, app. 1, without appellate briefing. Based on the undisputed facts and the present Oklahoma premises liability case law, this Court finds the trial court did not err in granting Defendant's Motion for Summary Judgment. The trial court's Order Sustaining Defendant's Motion for Summary Judgment is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

Wednesday, December 9, 2020

115,500 — Buck Reed, as Attorney-in-fact for Norva Lee Clark, Plaintiff/Appellant, v. Skyline Heights Operating Co., LLC, d/b/a Maplewood Care Center, and Skyline Heights, LLC, Defendants/Appellees. Appeal from the District Court of Tulsa County, Hon. Daman H. Cantrell, Trial Judge. Plaintiff appeals from the trial court's order denying his motion to vacate the trial court's order of dismissal. Based on our review, we affirm the trial court's order denying the motion to vacate. Although we conclude the filing of Plaintiff's motion to vacate on the basis of an alleged irregularity in obtaining the order of dismissal was timely, the statutory basis of the motion – 12 O.S. 2011 § 1031(3) – requires some failure on the part of the district court or court clerk to adhere to the established rules or mode of procedure in the orderly administration of justice. Because Plaintiff makes no allegation that the court below failed to follow an established rule or mode of

procedure applicable to the proceeding at issue, we conclude the trial court properly denied the motion. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Fischer, J., concurs, and Rapp, J., concurs in result.

Thursday, December 10, 2020

118,725 — In the Matter of H.M., Alleged Deprived Child, Serenity Morse, Appellant, vs. State of Oklahoma, Appellee. Appeal from an Order of the District Court of Tulsa County, Hon. Rodney Sparkman, Trial Judge. Serenity Morse (Mother) appeals a Judgment Order entered in a nonjury trial which terminated her parental rights to H.M. The action was initiated by the appellee, State of Oklahoma. The attorney for H.M. has joined the State's Brief in support of the appealed Order. The trial court found that H.M. is a deprived child and that termination of Mother's parental rights is in the best interests of H.M. The trial court further found that the conditions resulting in the deprived finding were the subject of a previous deprived adjudication of H.M.'s sibling and that Mother had not corrected the conditions, although given the opportunity to do so. Mother's first proposition argues that 10A O.S. Supp. 2019, § 1-4-904(B)(14) is unconstitutional. Her contention is that the statute permits a finding of a child as deprived in the termination of parental rights phase to be based upon a "preponderance of the evidence" standard rather than the constitutionally required "clear and convincing evidence" standard. Mother reached this conclusion based on the preponderance of the evidence standard for a deprived child in the adjudication phase of the proceedings, as set out in 10A O.S.2011, § 1-4-603(A). Mother's argument is rejected, and the statute has not been shown to be unconstitutional. Mother next argues that the evidence at trial did not prove that H.M. is a deprived child. After review of the evidence, this Court finds that the clear and convincing evidence establishes that H.M. is a deprived child. Therefore, the judgment of the trial court terminating Mother's parental rights to H.M. is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

118,819 — Jackie R. Dobrinski, Petitioner, vs. Platinum Express, LLC, National American Insurance Company, and The Workers' Compensation Commission, Respondents. Proceeding to Review an Order of The Workers' Compensation Commission, Hon. T. Shane Curtin, Administrative Law Judge. Jackie R. Dobrinski (Claimant) seeks review of an order of the Oklahoma Workers' Compensation Commission affirming the order of an administrative law judge (ALJ) denying compensability of certain body parts, and denying medical treatment and temporary total disability. Based on our review, we sustain the March 2020 order of the Oklahoma Workers' Compensation Commission affirming the order of the ALJ. SUSTAINED. Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Rapp, J., and Fischer, J., concur.

Monday, December 14, 2020

118,341 — Glen Folsom, Plaintiff/Appellant, vs. Staff In State and Private Prison, et al., Defendants/Appellees. Appeal from Order of the District Court of Pittsburg County, Hon. Tim Mills, Trial Judge. Appellant Glen Folsom appeals the district court's decision finding that he failed to exhaust his administrative remedies and failed to state a claim pursuant to the Oklahoma Governmental Tort Claims Act. After review of the record and relevant law, we find that Folsom failed to exhaust his administrative remedies as required by 57 O.S.2011 § 564, 57 O.S.2011 § 566, 57 O.S.2011 § 566.3, and 57 O.S.2011 § 566.5. Additionally, Folsom failed to provide pre-suit notice to the Department of Corrections as required by 51 O.S.2011 § 156 and failed to comply with 51 O.S.2011 § 157 by filing the present action prior to receiving a denial of his claims from the Department of Corrections. Accordingly, the district court's dismissal of Folsom's claims is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Fischer, J.; Barnes, P.J., concurs, and Rapp, J., concurs in part and dissents in part.

117,818 — B&C Rental Properties, Plaintiff/Appellee, vs. Josephine Johnson, Defendant/Appellant. Appeal from Order of the District Court of Muskogee County, Hon. Weldon Stout, Trial Judge. Appellant Josephine Johnson appeals the district court's order granting judgment in favor of Appellee B&C Rental Properties in this forcible entry and detainer action. We find that the district court's judgment is supported by competent evidence and affirm. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Fischer, J.; Barnes, P.J., and Rapp, J., concur.

(Division No. 3)
Tuesday, December 1, 2020

118,283 — In the Matter of the Adoption of S.M.G., minor child: Charles Kelley and Kathy Kelley, Petitioners/Appellees, vs. Tammera Flores and Timothy Garcia, Respondents, and Frank Gonzales and Cynthia Gonzales, Third-Party Intervenors/Appellants. Appeal from the District Court of Bryan County, Oklahoma. Honorable Mark R. Campbell, Trial Judge. Third-Party Intervenors/Appellants Frank and Cynthia Gonzales (Appellants) appeal from the trial court's denial of their motion for new trial following dismissal of their counter-petition to adopt S.M.G. ("the child"). The child was born in August 2014. Four days later the child was placed in foster care with Petitioners/Appellees Charles and Kathy Kelley, who later sought to adopt the child without the consent of the natural parents. Appellants, who were related to the child, intervened and filed a counter-petition to adopt. At the final adoption hearing, the Kelleys and the child sought dismissal of Appellants for failure to provide a current and complete home study, which the trial court granted. The trial court later denied Appellants' motion for new trial and entered the Final Decree of Adoption in favor of the Kelleys. Appellants correctly note a home study does not have to be attached to a petition to adopt. In this case, however, Appellants appeared for the final adoption hearing with notice that the home study they attached was out of date and incomplete. On *de novo* review, we AFFIRM. Opinion by Swinton, V.C.J.; Mitchell, P.J., and Bell, J. (sitting by designation), concur.

Friday, December 4, 2020

118,555 — Amber Loftis, Plaintiff/Appellant, v. Trey Trotter, Defendant/Appellee. Appeal from the District Court of Kay County, Oklahoma. Honorable Nikki G. Leach, Trial Judge. Amber Loftis ("Appellant") seeks review of the trial court's January 3, 2020 order, which granted Trey Trotter's ("Appellee") Motion for Summary Judgment, dismissing the matter in its entirety. Appellant first contends the trial court erred in its basis for sustaining Appellee's Motion for Summary Judgment by finding the Appellee was entitled to judicial immunity. Appellant's second contention is the trial court impermissibly weighed the evidence while deciding Appellee's Motion for Summary Judgment. We find the trial court properly granted summary judgment regarding Appellant's tort claims filed against Appellee. Judgment was also properly granted as to Appellant's breach of contract claim, albeit for a reason different than provided by the trial court. Therefore, we AFFIRM. Opinion by Pemberton, J.; Swinton, V.C.J., and Mitchell, P.J., concur.

Wednesday, December 9, 2020

118,556 — Amber Loftis, Plaintiff/Appellant, v. Trey Trotter, Defendant/Appellee. Appeal from the District Court of Kay County, Oklahoma. Honorable Nikki G. Leach, Trial Judge. Amber Loftis ("Appellant") seeks review of the trial court's January 3, 2020 order, which granted Trey Trotter's ("Appellee") Motion for Summary Judgment, dismissing the matter in its entirety. Appellant first contends the trial court erred in its basis for sustaining Appellee's Motion for Summary Judgment by finding the Appellee was entitled to judicial immunity. Appellant's second contention is the trial court impermissibly weighed the evidence while deciding Appellee's Motion for Summary Judgment. We find the trial court properly granted summary judgment regarding Appellant's tort claims filed against Appellee. Judgment was also properly granted as to Appellant's breach of contract claim, albeit for a reason different than provided by the trial court. Therefore, we AFFIRM. Opinion by Pemberton, J.; Swinton, V.C.J., and Mitchell, P.J., concur.

Thursday, December 10, 2020

117,927 — Davina Langwell, Plaintiff/Appellant, v. Community Action Resource and Development, Inc. And Wes Barbee Construction, Defendants/Appellees. Appeal from the District Court of Wagoner County, Oklahoma. Honorable Dennis N. Shook, Trial Judge. Plaintiff Davina Langwell appeals two trial court orders entered in the underlying breach of contract and warranty action she filed on January 20, 2016 against Defendants Community Action Resource and Development, Inc. (CARD) and Wes Barbee Construction (WBS), (collectively Defendants). The first order granted summary judgment in favor of Defendants and dismissed Plaintiff's action. The second order de-nied her motion to vacate. By Supreme Court order, "this case shall proceed as an accelerated appeal pursuant to [Ok. Sup. Ct.] Rule 1.36," 12 O.S. 2011, ch. 15, app. 1, without appellate briefing. Based on the record and applicable law, this appeal must be DISMISSED for lack of an appealable order. Opinion by Swinton, V.C.J.; Mitchell, P.J., and Pemberton, J., concur.

Friday, December 11, 2020

118,090 — In The Matter Of The Estate Of Beatrice Louis Nutty, Deceased, The Estate of Beatrice Louis Nutty, Scott Semegran, Personal Representative, Plaintiff/Appellee, v. Bobby Nutty, Billy Nutty, Susan Eeds, and The Estate of Jean Willis Nutty, Defendants/Appellants. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Richard Kirby, Trial Judge. Defendants/Appellants Bobby Nutty, Billy Nutty, Susan Eeds, and the Estate of Jean Willis Nutty seek reversal of the trial court's judgment against them for conversion of funds belonging to Beatrice Louise Nutty as surviving joint tenant of Jean Willis Nutty. The findings of fact and conclusions of law of the trial court adequately explain the decision and we AFFIRM by summary opinion under Oklahoma Supreme Court Rule 1.202(d). Opinion by Swinton, V.C.J.; Mitchell, P.J., and Pemberton, J., concur.

117,770 — Wayne D. Kalbaugh, Plaintiff/Appellant, v. David Prater, District Attorney for The 7th Prosecutorial District, State of Oklahoma, and City of Oklahoma City, Defendants/Appellees. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Aletia Haynes Timmons, Tiral Judge. Plaintiff/Appellant Wayne D. Kalbaugh (Plaintiff) appeals from an order denying his motion for the return of seized property in an action filed against Defendants/Appellees David Prater, District Attorney for the 7th Prosecutorial District (Prater), the State of Oklahoma (State), and the City of Oklahoma City (City) (collectively Defendants). Plaintiff argues that the State's efforts to seek forfeiture are barred by the relevant statute of limitations, that he was not given proper notice of any forfeiture proceedings by Defendants, that his constitutional property rights have been violated, and that the case was improperly dismissed *sua sponte.* In response, Defendants argue that many of the items listed by Plaintiff were never seized, and that most of the items that were seized could not be returned to Plaintiff by statute. Further, the State urges that it no longer has possession of any of the items that Plaintiff requested to have returned, and that any items were returned to the City's police department after Plaintiff's criminal trial for preservation and storage because they are evidence in an active criminal case. We affirm. Opinion by Swinton, V.C.J.; Mitchell, P.J., and Pemberton, J., concur.

(Division No. 4)
Wednesday, December 2, 2020

118,388 (Companion to Appeal No. 118,739) — Michelle Schonholtz, Plaintiff/Appellant, vs. TTCU Federal Credit Union, Defendant/Appellee. Appeal from an Order of the District Court of Tulsa County, Hon. Jefferson D. Sellers, Trial Judge. Michelle Schonholtz appeals the district court's grant of summary judgment in favor of Defendant, TTCU Federal Credit Union (TTCU), on her claims for bad faith breach of contract. Schonholtz appealed following denial of her Motion for New Trial by order of October 11, 2019. This action is a companion case to Appeal No. 118,739, which we address today by separate Opinion. Schonholtz failed to preserve any error for appeal in her Motion for New Trial of September 13, 2019, following the trial court's grant of summary judgment to TTCU on September 9, 2019. We therefore dismiss Schonholtz's appeal. APPEAL DISMISSED. Opinion from the court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C.J., and Thornbrugh, P.J., concur.

118,739 — In the Matter of Darrell E. Hendrick, Deceased: Michelle Schonholtz, Appellant, vs. TTCU Federal Credit Union and Catherine Curtin, special Administrator of the Estate of Darrell E. Hendrick, Deceased, Appellee. Appeal from an Order of the District Court of Wagoner County, Hon. Dennis N. Shook, Trial Judge. Michelle Schonholtz (Schonholtz) appeals the district court's denial of her motion for new trial, following denial of her motion for summary judgment in the underlying probate proceeding. This action is a companion case to Appeal No. 118,388, which we address today by separate Opinion. Schonholtz's Motion for New Trial rests on denial of an interlocutory order which is not a final judgment or order, nor appealable by right. Hence, the district court's denial of Schonholtz's Motion for New Trial is not appealable. Therefore, we dismiss Schonholtz's appeal. APPEAL DISMISSED. Opinion from the Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C.J., and Thornbrugh, P.J., concur.

Thursday, December 3, 2020

118,621 — In the Matter of J.N., and J.N., Alleged Deprived Children, Jacob Nelson, Appellant, vs. State of Oklahoma, Appellee. Appeal from an order of the District Court of Oklahoma County, Hon. Susan K. Johnson, Trial Judge, adjudicating the minor children as deprived as to Jacob Nelson (Father). The issue

before us is whether the trial court's order is supported by competent evidence. The trial court was not required to accept Father's version of events simply because there was no "physical evidence" of abuse. State presented evidence of a history of domestic violence demonstrated by police reports. That evidence, coupled with testimony by Mother and two DHS employees, constitutes competent evidence that JN and JN are deprived because of domestic violence and that it is in their best interests to be declared deprived and made wards of the court. Father failed to show the trial court's decision was unsupported by competent evidence. Accordingly, we affirm the trial court's decision adjudicating JN and JN as deprived. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, C.J.; Thornbrugh, P.J., and Hixon, J., concur.

Friday, December 4, 2020

118,721 — Harold Price and Patricia Price, Plaintiffs/Appellants, vs. La Faver Fiberglass Corp. and Bobby Joe La Faver, Defendants/Appellees. Appeal from an Order of the District Court of Wagoner County, Hon. Douglas Kirkley, Trial Judge. Harold Price and Patricia A. Price (collectively, the Prices) appeal a March 3, 2020 order awarding La Faver Fiberglass Corporation and Bobby Joe La Faver (collectively, La Faver) an attorney's fee and costs. The trial court entered partial summary adjudication for La Faver on each of the Prices' theories of recovery. Subsequently, La Faver sought fees and costs pursuant to 12 O.S.2011, § 940 as a prevailing party. However, La Faver's counterclaims remain pending before the trial court. Accordingly, La Faver has not received an affirmative judgment in its favor upon the conclusion of the case. The trial court therefore erred in granting La Faver's Application for Attorney Fees & Costs. The March 3, 2020 order is therefore reversed. REVERSED. Opinion from the Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C.J., and Thornbrugh, P.J., concur.

118,970 — Zachary and Rebekah Foote, Plaintiffs/Appellants, vs. McLean Air Duct Coating & Cleaning, Inc., Defendant/Appellee. Appeal from an order of the District Court of Tulsa County, Hon. William Musseman, Trial Judge, granting summary judgment in favor of McLean Air Duct Coating & Cleaning, Inc. Our *de novo* review of the record shows no evidence on which to conclude that a substantial controversy as to one or more material facts exists requiring a trial on the merits. The rules of summary judgment process and the record before us require the entry of judgment in favor of the movant as a matter of law. We affirm the trial court's decision granting summary judgment to McLean Air because the undisputed material facts presented by McLean Air demonstrate it is entitled to judgment as a matter of law. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, C.J.; Thornbrugh, P.J., and Hixon, J., concur.

Tuesday, December 8, 2020

118,916 — James R. Simonson, Plaintiff/Appellee/Counter-Appellant, vs. Natasha N. Simonson, Defendant/Appellant/Counter-Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Richard C. Ogden, Trial Judge. Natasha N. Simonson (Natasha) appeals the trial court's June 22, 2020 Journal Entry of Judgment granting James R. Simonson's (James) motion for summary judgment and entering a judgment of $60,496.66 against her. In his counter-appeal, James appeals the trial court's August 11, 2020 Order finding he was not entitled to prejudgment interest on the judgment amount. Natasha alleges the trial court erred by granting James summary judgment in this contribution action. The undisputed facts show that a separate entity paid the parties' personal tax debt to the IRS. Accordingly, James could not show he discharged the debt so as to entitle him to summary judgment under a contribution theory of recovery. Given our finding that the trial court erred by granting summary judgment, there is no judgment on which to premise an award of prejudgment interest. Accordingly, James' counter-appeal challenging the trial court's August 11, 2020 Order denying him prejudgment interest is moot. As we reverse summary judgment, we must also reverse the ancillary award of costs and post-judgment interest. We therefore reverse the trial court's June 22, 2020 Journal Entry of Judgment granting summary judgment, reverse the August 11, 2020 Order, and remand this case to the trial court for further proceedings consistent with this Opinion. 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.

118,166 — Greg Hyatt, Plaintiff/Appellant, vs. Matthew Alan Taylor and Print Finishing Systems, Inc., Defendants/Appellees. Appeal from an Order of the District Court of Creek

County, Hon. Douglas W. Golden, Trial Judge. Plaintiff Greg Hyatt (Hyatt) appeals judgment in favor of Defendants Matthew Alan Taylor (Taylor) and Print Finishing Systems, Inc. (Employer), following unanimous jury verdict for Defendants in this auto negligence action. Hyatt contends the jury's verdict in favor of Taylor is "inconsistent with the uncontroverted evidence of record" and must therefore be reversed. Hyatt did not preserve that argument by moving for directed verdict, and even so, the jury's verdict was supported by sufficient, if disputed, evidence. Hyatt also asserts that the trial court erred by preventing him from questioning Taylor on his denial of liability during litigation. The trial court did not abuse its discretion or err in excluding Taylor's denial, after he admitted fault. Finally, Hyatt contends that the trial court erred by prohibiting him from testifying that he was denied tribal benefits to pay for surgery. We find the trial court did not err in prohibiting the testimony. We affirm the trial court's judgment entered July 11, 2019. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C.J., and Thornbrugh, P.J., concur.

Wednesday, December 9, 2020

117,430 — Jerry Ray, as Trustee of the G.H. Ray Living Trust, and Jerry Ray, as Trustee of the Juanita M. Ray Living Trust, Plaintiffs/Appellees, vs. Joyce Ray, Individually, Anthony Ray, Individually, Scott Ray, individually, and Waneta Jan Ray (Aman), Individually, Defendants/Appellees, and Scott Ray, Defendant/Cross-Complainant/Appellant, vs. Jerry Ray, Individually, Juanita M. Ray Living trust, the Estate of Juanita M. Ray, deceased, the Estate of Barbara Jan Hawkins, deceased, Joyce Ray, Individually, Revocable Trust of George Hendrix Ray III, Brett Hawkins, Individually, Misty D. Friend, Individually, Gavin L. Hawkins, Individually, Hobby Horse Farm, Inc., an Oklahoma Corporation, Dead Horse oil and Gas, LLC, an Oklahoma limited liability company, Cross-Defendants/ Appellees. Appeal from an Order of the District Court of Osage County, Oklahoma, Honorable John Kane, Trial Judge. Scott Ray appeals the decisions of the district court in a case involving the management and distribution of a trust or trusts. As we noted in the opening analysis of our opinion, the former Federal Estate Tax has a good deal to answer for in terms of involving ordinary families in somewhat complex tax avoidance trusts involving splits. It is also a fact of human nature that the family members themselves may not pay much attention to these technical devices when managing the trust, especially when the trust has been in force *in vivo* for some years before the split. These problems were compounded here because G.H. Ray not only split his Trust on his death, but split it into two trusts with requirements that differed both from those of his original trust, and from each other. These trusts were further embroidered with "preferences" that were not requirements. Despite the 80 stipulations, the district court was faced with a formidable lack of "hard" facts where they were crucial. It is entirely within the range of possibility that Scott Ray did not receive the amount he was entitled to from the various trusts. The trial court was required to make findings by a preponderance of evidence, however, and we review those factual findings only for abuse of discretion. Pursuant to this standard of review, we find no error in the district court's determinations. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Thornbrugh, P.J.; Wiseman, C.J., and Hixon, J., concur.

Thursday, December 10, 2020

118,139 — Silas Wilson, Jr., Plaintiff/Appellant, vs. Oklahoma Department of Corrections, Administrative Review Authority, Joe M. Allbaugh and Mark Knutson, Defendants/Appellees. Appeal from an order of the District Court of Beckham County, Hon. Jill C. Weedon, Trial Judge, denying Appellant Silas Wilson, Jr.'s petition for a writ of mandamus compelling Appellees Oklahoma Department of Corrections, Administrative Review Authority, Joe M. Allbaugh, and Mark Knutson to grant him a "'stamped and non-backdated response (from the law library) to [Wilson's] request to staff dated and filed on 8-14-2017."' Wilson argues the trial court's decision denying him a writ of mandamus must be reversed and remanded with directions to consider DOC Policy No. OP-090124 requiring it to properly date stamp its response to Wilson's Request to Staff and date when the response was provided to him. Based on our review of the record and applicable law, we conclude DOC failed to follow its own policy, and Wilson cannot be found to have abused any process in filing a grievance to obtain a response to the August 14, 2017 Request to Staff in compliance with DOC policy. We reverse the trial court's order and direct DOC to follow the instructions delineated in our Opinion to provide the specified relief to Wilson. REVERSED WITH DIRECTIONS.

Opinion from the Court of Civil Appeals, Division IV, by Wiseman, C.J.; Thornbrugh, P.J., and Hixon, J., concur.

118,641 — Toccara Jean Titus, Petitioner/Appellee, vs. Michael Anthony Snow, Defendant/Appellant. Appeal from an order of the District Court of Rogers County, Hon. David Smith, Trial Judge. Michael Anthony Snow appeals a protective order entered against him in favor of Toccara Jean Titus. We address whether the trial court abused its discretion in granting a continued protective order. Titus claimed several incidents of contact by Snow that caused her fear and anxiety. Reviewing the record presented to the trial court, we are not convinced that it was clearly erroneous for the trial court to enter the continued protective order. It is not unreasonable and well within its discretion for the trial court to find the evidence supported the need to continue the order for three additional months but was insufficient to warrant a final or continuous protective order. The trial court weighed the evidence, assessed the witnesses' credibility, and found sufficient evidence to support the entry of a protective order. We see no abuse of discretion by the trial court in its order, and we affirm. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, C.J.; Thornbrugh, P.J., and Hixon, J., concur.

Friday, December 11, 2020

118,544 — Barrett Trailers and Sentinal Insurance, Petitioners, vs. Shaun Jackson and The Workers' Compensation Commission, Respondents. Proceeding to Review an Order of the Workers' Compensation Commission. Barrett Trailers (Employer) seeks review of an order of the Workers' Compensation Commission *en banc,* affirming the Administrative Law Judge order finding compensability, authorizing surgical treatment, and awarding temporary total disability benefits for Shaun Jackson. We find no error and sustain the WCC's December 17, 2019 order affirming the ALJ's order determining compensability, authorizing surgical treatment, and awarding TTD benefits to Claimant. SUSTAINED. Opinion from the Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C.J., and Thornbrugh, P.J., concur.

ORDERS DENYING REHEARING
(Division No. 1)
Tuesday, December 8, 2020

118,296 — George A. Esch, Jr., and Lynda A. Hamlet, as Trustees of the Esch and Hamlet Family Trust, dated March 10, 2016, Plaintiffs/Appellants, vs. Chitwood Farms, LLC; Manuel DeLeon III; Jorie A. DeLeon and Hisle Yard, LLC, Defendants/Appellees, Manuel DeLeon III; Jorie A. DeLeon; and Hisle Yard, LLC, Counterclaim Plaintiffs, vs. George A. Esch, Jr., and Lynda A. Hamlet, Counterclaim Defendants. Plaintiff/Appellants' Petition for Rehearing and Brief in Support, filed November 24, 2020, is *DENIED.*

117,949 (Comp. with 116,270) — Beau Williams, Plaintiff/Appellee, vs. Deborah Odez Hicks, Defendant/Appelant. Defendant/Appellant's Application and Brief in Support of Rehearing of Companion Cases, filed September 30, 2020, is *DENIED*.

(Division No. 2)
Friday, December 11, 2020

117,786 — Deutsche Bank National, Trust Company, as Trustee, Plaintiff/Appellee, vs. Richard Rice, Defendant/Appellant, and Spouse of Richard Rice, if Married, John Doe, as Occupant of the Premises, Jane Doe, as Occupant of the Premises, and Wells Fargo Bank, National Association, Defendants. Appellant's Petition for Rehearing is hereby *DENIED*.

(Division No. 3)
Tuesday, December 8, 2020

116,992 (Comp. with 118,962) — Deutsche Bank National Trust Company, as Trustee of ARgent Mortgage Securities, Inc. Asset Backed Pass Through Certificates, Series 2006-WI1 under the Pooling and Servicing Agreement Dated as of February 1, 2006, Plaintiff/Appellant, vs. Bobbie S. Andrews and John Doe, her spouse, if married; Occupants of the Premises; Bank One, N.A.; Light House; Light House Harbor, Inc.; B&B Funding, L.L.C.; Andrews Group Investments, Inc.; Richard Lathrop; Camela Lathrop and Joe Laumer, Defendants/Appellees. Plaintiff/Appellant's Petition for Rehearing Combined with Brief, filed November 30, 2020, is *DENIED*.

(Division No. 4)
Monday, December 7, 2020

118,848 — Kalen Lavender, Plaintiff/Appellant, vs. Dominick Palmisano, Jr., and Dominick's Anesthesia Service, Inc., Defendants/Appellees, and Thomas J. Byrne, M.D.; and Craig General Hospital, Defendants. Appellees' Petition for Rehearing is hereby *DENIED*.

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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, not to exceed 14 months, which may be extended. Salary is based on the number of years of professional attorney experience. Applicants must possess a J.D. degree, be an active member of the bar in good standing (any U.S. jurisdiction) and have at least one (1) year post-J.D. legal or other relevant experience. See vacancy announcement 21-OKW-10982606-A-03 at www.usa jobs.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. This announcement will close on December 28, 2020.

ASSOCIATE ATTORNEY: Titus Hillis Reynolds Love is a mid-size downtown Tulsa AV-rated law firm and is seeking a general civil litigation attorney with 2-7 years' experience. Applicants must be proficient at legal research, writing, analysis, and practical litigation strategies, and must be able to work in a fast-paced team environment. Salary commensurate with experience. Firm provides excellent benefits. Please send resume to DeAnn Farthing, 15 E. 5th St, Suite 3700, Tulsa, Oklahoma 74103 or DFarthing@titushillis.com.

POSITIONS AVAILABLE

CENTER FOR EMPLOYMENT LAW is seeking an associate attorney to join their team. Regardless of experience level, this position presents an opportunity to grow, including significant hands-on experience. Legal research and writing are vital to success in this position, as well as initiative and attention to detail. This associate will work collaboratively with the partners to prepare matters for civil litigation and/or through administrative investigations and hearings from start to finish. Professionalism, verbal and written communication skills, and ability to work with a diverse client base is essential. Please send your resume, cover letter, and writing sample to Info@CenterForEmploymentLaw.com.

PARALEGAL/LEGAL ASSISTANT: Titus Hillis Reynolds Love is a mid-size downtown Tulsa AV-rated law firm and is seeking a Paralegal/Legal Assistant with 5 or more years' experience in litigation. Applicants must be proficient in most aspects of a litigation practice with some general Non-litigation experience considered a plus. Must be a self-starter and work independently in a fast-paced team environment. Salary commensurate with experience. Firm provides excellent benefits. Please send resume to DeAnn Farthing, 15 E. 5th St, Suite 3700, Tulsa, Oklahoma 74103 or DFarthing@titushillis.com.

THE OKLAHOMA INDIGENT DEFENSE SYSTEM (OIDS) currently has an opening for DEFENSE COUNSEL in our Non-Capital Trial Division, Sapulpa office. For more details and how to apply, visit us @ http://www.ok.gov/OIDS/. Deadline is January 6, 2021.

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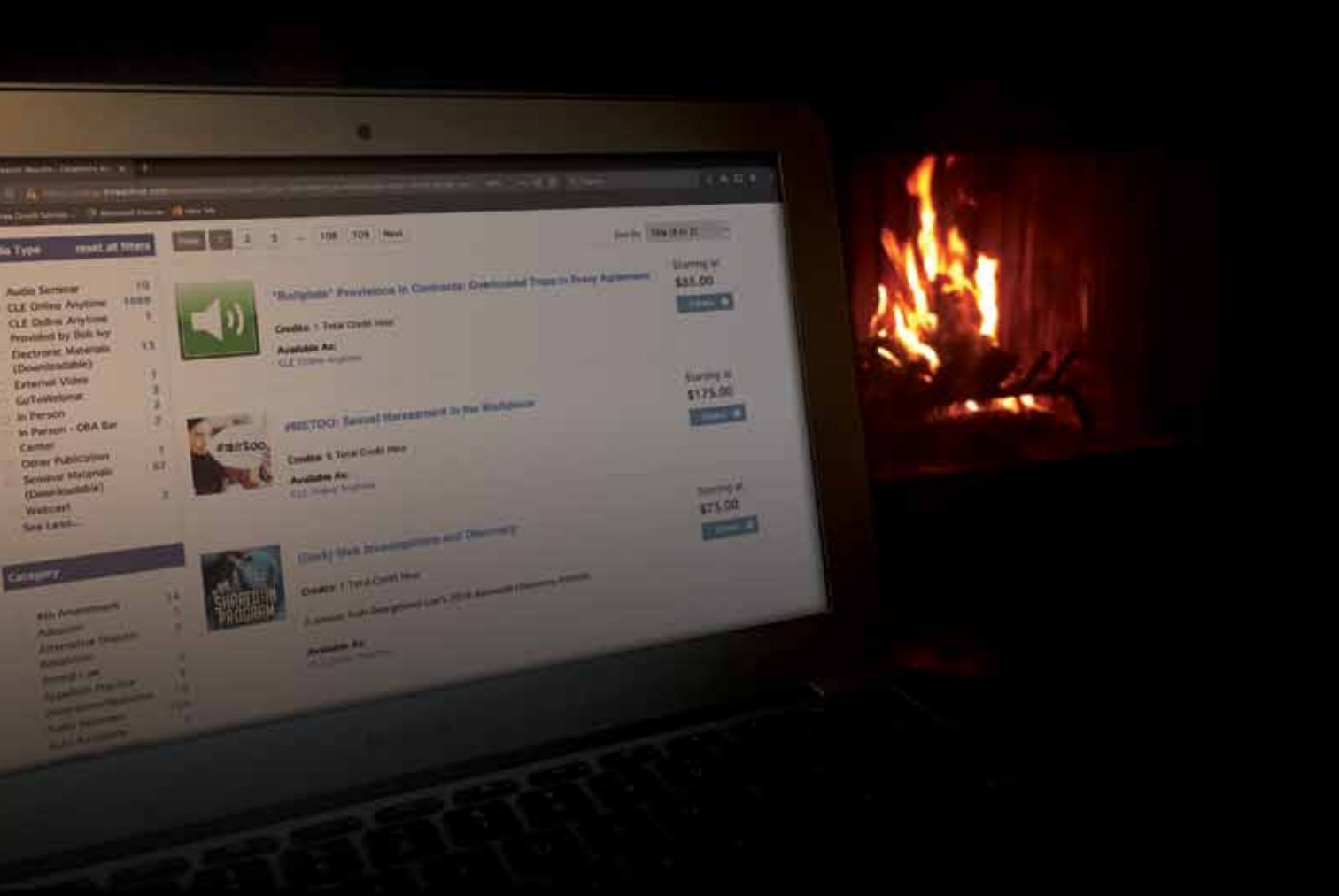

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