THE Oklahoma Bar JOURNAL

Volume 83 ◆ No. 13 ◆ May 12, 2012

oba cle
continuing legal education

To Testify or Not to Testify?
That is the Question

May 17, Tulsa
Renaissance Hotel
6808 S. 107th East Ave.

May 18, OKC
Oklahoma Bar Center,
1901 N. Lincoln Blvd.

www.okbar.org/cle

8:30 a.m.
Registration and Continental Breakfast

9
Putting Your Client On in a Federal Criminal Trial
Jack Dempsey Pointer, Jack Dempsey Pointer P.C., Oklahoma City

9:50
Break

10
The Ethical Considerations with the Accused Taking the Stand (ethics)
Tulsa Program
David McKenzie
OKC Program
Jacquelyn Ford

10:50
Observations from the Bench: When the Defendant Takes the Stand
Tulsa Program
Judge Tom Gillert, Tulsa County District Judge, Tulsa
OKC Program
Judge Ray C. Elliott, Oklahoma County District Judge, OKC

11:40
Networking lunch (included in registration)

12:10
The Pros and Cons of the Defendant Testifying
Elliott Crawford

1
What Happens When a Defendant Takes the Stand: Prosecution Standpoint
Edward J. Kumiega, Assistant United States Attorney for the Western District, Oklahoma City

1:50
Break

2
Issues That Occur When the Defendant Takes the Stand
James Hankins, Attorney at Law, Oklahoma City

2:50
Adjourn

The OKC program will be webcast.

Planners/Moderators:

Elliott C. Crawford, Attorney at Law, Oklahoma City
Jacquelyn L. Ford, Ford Law, Oklahoma City
Garvin Isaacs, Garvin A. Issacs Inc., Oklahoma City
David T. McKenzie, Office of the Public Defender of Oklahoma County, Oklahoma City

Credit: Approved for 6 hours MCLE/ 1 Ethics.

Tuiton: $150 for early-bird registrations with payment received at least four full business days prior to the seminar date; $175 for registrations with payment received within four full business days of the seminar date.

Cancellation Policy: Cancellations will be accepted at any time prior to the seminar date; however, a $25 fee will be charged for cancellations made within four full business days of the seminar date. Cancellations, refunds, or transfers will not be accepted on or after the seminar date.

NOTICE of change of address (which must be in writing and signed by the OBA member), undeliverable copies, orders for subscriptions or ads, news stories, articles and all mail items should be sent to the Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152-3036.

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EVENTS CALENDAR

MAY 2012

15 **OBA Bench and Bar Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Barbara Swinton 405-713-7109

16 **OBA Women in Law Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Deirdre Dexter 918-584-1600

17 **OBA Work/Life Balance Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Sarah Schumacher 405-752-5565

OBA Justice Commission Meeting; 2 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Drew Edmondson 405-235-5563

18 **OBA Board of Governors Meeting;** 9:30 a.m.; Tulsa, OK; Contact: John Morris Williams 405-416-7000

OBA Environmental Law Section Meeting; 11:30 a.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Mike Wofford 405-319-3504

19 **OBA Young Lawyers Division Meeting;** Tulsa County Bar Center, Tulsa; Contact: Jennifer Kirkpatrick 405-553-2854

22 **OBA Solo and Small Firm Conference Planning Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Collin Walke 405-235-1333

OBA Civil Procedure and Evidence Code Committee Meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton 918-591-5229

24 **OBA Strategic Planning Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Jim Stuart 405-275-0700

OBA Men Helping Men Support Group; 5:30 p.m.; The University of Tulsa College of Law, 3120 East 4th Place, Tulsa, John Rogers Hall (JRH 205); RSVP to: Kim Reber 405-840-3033

28 **OBA Closed** – Memorial Day Observed

31 **OBA Member Services Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Roe Simmons 405-359-3600

For more events go to www.okbar.org/calendar

The Oklahoma Bar Association's official website: **www.okbar.org**

THE OKLAHOMA BAR JOURNAL (ISSN 0030-1655) IS PUBLISHED THREE TIMES A MONTH IN JANUARY, FEBRUARY, MARCH, APRIL, MAY, AUGUST, SEPTEMBER, OCTOBER, NOVEMBER AND DECEMBER AND BIMONTHLY IN JUNE AND JULY. BY THE OKLAHOMA BAR ASSOCIATION, 1901 N. LINCOLN BOULEVARD, OKLAHOMA CITY, OKLAHOMA 73105. PERIODICALS POSTAGE PAID AT OKLAHOMA CITY, OK. POSTMASTER: SEND ADDRESS CHANGES TO THE OKLAHOMA BAR ASSOCIATION, P.O. BOX 53036, OKLAHOMA CITY, OK 73152-3036. SUBSCRIPTIONS ARE $55 PER YEAR EXCEPT FOR LAW STUDENTS REGISTERED WITH THE OKLAHOMA BAR ASSOCIATION, WHO MAY SUBSCRIBE FOR $25. ACTIVE MEMBER SUBSCRIPTIONS ARE INCLUDED AS A PORTION OF ANNUAL DUES. ANY OPINION EXPRESSED HEREIN IS THAT OF THE AUTHOR AND NOT NECESSARILY THAT OF THE OKLAHOMA BAR ASSOCIATION, OR THE OKLAHOMA BAR JOURNAL BOARD OF EDITORS.

Diversity Committee Introduces New Awards

Nomination Deadline June 1

Ada Lois Sipuel Fisher

The Oklahoma Bar Association's Diversity Committee is seeking nominations for its first Ada Lois Sipuel Fisher Diversity Awards. All nominations must be received by June 1, 2012.

- Three diversity awards will be given to a business, group or organization that has an office in the state of Oklahoma.
- Two more diversity awards will be given to licensed attorneys and an additional award will be given to a member of the Oklahoma judiciary.

Nomination Submission

- Include name, address and contact number of the nominee.
- Describe the nominee's contributions and accomplishments in the area of diversity.
- Identify the diversity award category (business/group/organization, licensed attorney or judiciary) in which the nominee is being nominated.

Submissions must be received by June 1, 2012. Submissions should not exceed five pages in length.

Submit Nominations to diversityawards@okbar.org

For complete selection criteria and nomination process, visit www.okbar.org/members/committees/diversityawards.htm

For additional information please contact Kara I. Smith at 405-923-8611.

Oklahoma Bar Association

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Index To Orders of Court of Civil Appeals

2012 OK 40

HILLCREST MEDICAL CENTER, Petitioner, v. TRACY JO TRIPLETT and THE WORKERS' COMPENSATION COURT, Respondents.

No. 110,488. April 23, 2012

ORDER

¶1 In this proceeding, the employee/respondent filed her motion to reopen the claim due to a change of condition for the worse to her right knee. Her original injury to the right knee occurred on June 7, 2006. The trial court heard evidence and issued an order for a Court Appointed Independent Medical Examiner (CIME) on February 24, 2012, without making a determination of whether the employee/respondent suffered a change of condition for the worse. The Employer/Petitioner objected to the trial judge's Order of February 24, 2012 that appointed Dr. Bradford Boone as a CIME and ordered the Employer/Petitioner to pay all expenses in connection with the examination.

¶2 The Court, on its own motion, dismisses this review proceeding for lack of a reviewable order. The Employer/Petitioner's objection preserved all issues regarding the appointment of the CIME. Employer/Petitioner will have the opportunity to seek review of the trial judge's February 24, 2012 order in a later review proceeding.

¶3 DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 23rd DAY OF APRIL, 2012.

/s/ Steven W. Taylor
CHIEF JUSTICE

¶4 ALL JUSTICES CONCUR.

¶5 VOTE TO PUBLISH ORDER:

TAYLOR, C.J., COLBERT, V.C.J., KAUGER, WINCHESTER, EDMONDSON, COMBS, GURICH, JJ. - CONCUR

WATT and REIF, JJ. - NOT VOTING

2012 OK 27

STATE OF OKLAHOMA, ex rel., OKLAHOMA BAR ASSOCIATION, Complainant, v. Tammy Laverne Bass-Lesure, Respondent.

SCBD 5842. April 30, 2012

ORDER

¶1 Respondent's request for hearing contained in the April 11, 2012, Response and Request for Hearing, is granted on the limited scope of mitigation and recommendation of discipline to be imposed.

¶2 The Professional Responsibility Tribunal is directed to hold such hearing within thirty (30) days of the date of this order. The trial panel shall follow procedures as set out in Rule 6, Rules Governing Disciplinary Proceedings.

¶3 Briefs shall be filed according to the following schedule:

The Oklahoma Bar Association shall file its brief within twenty (20) days of the filing date of the report of the Professional Responsibility Tribunal. The application for costs shall be filed concurrent with the filing of the Brief in Chief of the Oklahoma Bar Association.

Respondent's brief shall be filed not more than fifteen (15) days after the complainant's brief is filed. Respondent's response to the application for costs shall be filed concurrent with the filing of the Respondent's brief.

Complainant may reply within ten (10) days after the respondent's brief is filed.

¶4 DONE BY ORDER OF THE SUPREME COURT THIS 30th DAY OF APRIL 2012.

/s/ Steven W. Taylor
CHIEF JUSTICE

2012 OK 28

STATE OF OKLAHOMA ex rel. OKLAHOMA BAR ASSOCIATION, Complainant, v. GEORGE WAYNE OLMSTEAD, Respondent.

SCBD 5843. April 30, 2012

ORDER

¶1 Respondent's request for hearing contained in the April 11, 2012, Response of George Wayne Olmstead, is granted on the limited scope of mitigation and recommendation of discipline to be imposed.

¶2 The Professional Responsibility Tribunal is directed to hold such hearing within thirty (30) days of the date of this order. The trial panel shall follow procedures as set out in Rule 6, Rules Governing Disciplinary Proceedings.

¶3 Briefs shall be filed according to the following schedule:

The Oklahoma Bar Association shall file its brief within twenty (20) days of the filing date of the report of the Professional Responsibility Tribunal. The application for costs shall be filed concurrent with the filing of the Brief in Chief of the Oklahoma Bar Association.

Respondent's brief shall be filed not more than fifteen (15) days after the complainant's brief is filed. Respondent's response to the application for costs shall be filed concurrent with the filing of the Respondent's brief.

Complainant may reply within ten (10) days after the respondent's brief is filed.

¶4 DONE BY ORDER OF THE SUPREME COURT THIS 30th DAY OF APRIL 2012.

/s/ Tom Colbert
VICE CHIEF JUSTICE

2012 OK 42

In re Initiative Petition No. 395, State Question No. 761

No. 110,545. April 30, 2012

ORDER

¶1 Upon consideration of the Protestants' challenge to the legal sufficiency of Initiative Petition No. 395 which proposes to amend the Oklahoma Constitution in the above styled and numbered cause, THE COURT FINDS:

1. The people of Oklahoma have reserved to themselves "the power to propose laws and amendments to the Constitution." Okla. Const. art. 5, § 1.
2. The proposals, however, are subject to the constitutional limitation that "such changes be not repugnant to the Constitution of the United States." Okla. Const. art. 2, § 1.
3. Therefore, "[a] pre-submission determination of the constitutionality of [an] initiative petition is appropriate and necessary where the proposal is facially unconstitutional and is justified when a costly and futile election may be avoided." In re Initiative Petition No. 349, State Question 642, 1992 OK 122, ¶ 16, 838 P.2d 1, 8. In 2009, the Oklahoma Legislature codified that holding. A protest to the legal sufficiency of an initiative petition must now be heard by this Court in advance of a challenge to the numerical sufficiency of the initiative petition. See Okla. Stat. tit. 34, § 8 (2011).
4. The United States Supreme Court has spoken on this issue. The measure is clearly unconstitutional pursuant to Planned Parenthood v. Casey, 505 U.S. 833 (1992). The states are duty bound to follow its interpretation of the law. Twenty years ago, this Court was presented with an initiative which facially conflicted with the Casey decision. This Court held: "The issue of the constitutionality of the initiative petition is governed by the United States Supreme Court's pronouncement in Casey."
5. The only course available to this Court is to follow what the United States Supreme Court, the final arbiter of the United States Constitution has decreed. In re Initiative Petition 349, 1992 OK 122, ¶ 8, 838 P.2d 1, 5.
6. The mandate of Casey is as binding on this Court today as it was twenty years ago. Initiative Petition No. 395 conflicts with Casey and is void on its face and it is hereby ordered stricken.

¶2 IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED, that Initiative Petition No. 395 is void on its face and it is hereby ordered stricken. DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 30th day of April, 2012.

/s/ Steven W. Taylor
CHIEF JUSTICE

ALL JUSTICES CONCUR.

2012 OK 36

STATE OF OKLAHOMA ex rel. OKLAHOMA BAR ASSOCIATION, Complainant, v. JOSH T. WELCH, Respondent.

SCBD No. 5868. April 19, 2012

ORDER OF IMMEDIATE INTERIM SUSPENSION

The Oklahoma Bar Association (OBA), in compliance with Rule 7.1 and 7.2 of the Rules Governing Disciplinary Proceedings (RGDP), 5 O.S.2011, ch. 1, app. 1-A, has forwarded to this Court a certified copy of a Judgment and Sentence on an "Alford Plea" by the respondent, Josh T. Welch, for obstructing an officer in violation of 21 O.S. § 540. Rule 7.3 of the RGDP provides: "Upon receipt of the certified copies of Judgment and Sentence on a plea of guilty, order deferring judgment and sentence, indictment or information and the judgment and sentence, the Supreme Court shall by order immediately suspend the lawyer from the practice of law until further order of the Court." This Court has received the certified copies of these papers and orders that Josh T. Welch is immediately suspended from the practice of law. Josh T. Welch is directed to show cause, if any, no later than May 3, 2012, why this order of interim suspension should be set aside. See RGDP Rule 7.3. The OBA has until May 11, 2012, to respond to Josh T. Welch's statement should one be filed.

Rule 7.2 of the RGDP provides that the certified copies of the order deferring judgment and sentence "shall constitute the charge and be conclusive evidence of the commission of the crime upon which the judgment and sentence is based and shall suffice as the basis for discipline in accordance with these rules." Pursuant to Rule 7.4 of the RGDP, Josh T. Welch has until May 11, 2012, 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 May 18, 2012, to respond.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 19th day of April 2012.

/s/ Steven W. Taylor
CHIEF JUSTICE

CONCUR: TAYLOR, C.J.; COLBERT, V.C.J.; and WATT, WINCHESTER, EDMONDSON, REIF, and COMBS, JJ.

NOT PARTICIPATING: KAUGER and GURICH, JJ.

2012 OK 37

STATE OF OKLAHOMA ex rel. OKLAHOMA BAR ASSOCIATION, Complainant, v. ROBERT SAMUEL KERR, IV, Respondent.

SCBD No. 5869. April 19, 2012

ORDER OF IMMEDIATE INTERIM SUSPENSION

The Oklahoma Bar Association (OBA), in compliance with Rule 7.1 and 7.2 of the Rules Governing Disciplinary Proceedings (RGDP), 5 O.S.2011, ch. 1, app. 1-A, has forwarded to this Court a certified copy of a Plea of Alford and Summary of Facts Part A: Findings of Fact; Acceptance of Plea and a certified copy of Plea of Guilty Part B: Sentence on Plea, Judgment and Sentence wherein the respondent, Robert Samuel Kerr IV, entered an Alford Plea for obstructing an officer in violation of 21 O.S. § 540. Rule 7.3 of the RGDP provides: "Upon receipt of the certified copies of Judgment and Sentence on a plea of guilty, order deferring judgment and sentence, indictment or information and the judgment and sentence, the Supreme Court shall by order immediately suspend the lawyer from the practice of law until further order of the Court." This Court has received the certified copies of these papers and orders that Robert Samuel Kerr IV is immediately suspended from the practice of law. Robert Samuel Kerr IV is directed to show cause, if any, no later than May 3, 2012, why this order of interim suspension should be set aside. See RGDP Rule 7.3. The OBA has until May 11, 2012, to respond to Josh T. Welch's statement should one be filed.

Rule 7.2 of the RGDP provides that the certified copies of the order deferring judgment and sentence "shall constitute the charge and be conclusive evidence of the commission of the crime upon which the judgment and sentence is based and shall suffice as the basis for discipline in accordance with these rules." Pursuant to Rule 7.4 of the RGDP, Josh T. Welch has until May 11, 2012, 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 May 18, 2012, to respond.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 19th day of April 2012.

/s/ Steven W. Taylor
CHIEF JUSTICE

CONCUR: TAYLOR, C.J.; COLBERT, V.C.J.; and WATT, WINCHESTER, EDMONDSON, REIF, and COMBS, JJ.

NOT PARTICIPATING: KAUGER and GURICH, JJ.

2012 OK 38

RE: REVOCATION OF CERTIFICATES OF CERTIFIED SHORTHAND REPORTERS

No. SCAD-2012-26. April 23, 2012

ORDER

By order numbered SCAD-2012-5, 2012 OK 16, filed February 27, 2012, this Court suspended the certificates of the following certified shorthand reporters for failure to timely pay the 2012 annual renewal fee and/or to timely report the 2011 continuing education:

1. Charyse Carmine Crawford, CSR #973
2. Lisa Ann Cromley, CSR #1840
3. Marjorie L. Miller, CSR #299
4. Joseph L. Welch, CSR #398
5. Cynthia Williams, CSR #1682

The State Board of Examiners of Certified Shorthand Reporters advises that the above-named certified shorthand reporters continue to be delinquent in the payment of the 2012 annual renewal fees and they, except Marjorie L. Miller, continue to be delinquent in reporting the continuing education for calendar year 2011. 20 O.S.2011, §§ 1503.1 and 1506, and Rules 20, 21, and 23 of the Rules of the State Board of Examiners of Certified Shorthand Reporters, 20 O.S.2011, ch. 20, app. 1. Accordingly, the State Board of Examiners of Certified Shorthand Reporters recommends the certificates of the above-named certified shorthand reporters be revoked pursuant to Rules 20 and 23.

IT IS HEREBY ORDERED that the certificates authorizing the above-named shorthand reporters to engage in shorthand reporting in this state shall be and hereby are revoked.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 23rd day of April, 2012.

/s/ Steven W. Taylor
CHIEF JUSTICE

ALL JUSTICES CONCUR.

2012 OK 41

IN THE MATTER OF THE INCOME TAX PROTEST OF SCIOTO INSURANCE COMPANY: SCIOTO INSURANCE COMPANY, Appellant, v. OKLAHOMA TAX COMMISSION, Appellee.

No. 108,943. May 1, 2012

CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION I, ON APPEAL FROM THE OKLAHOMA TAX COMMISSION

¶0 The Oklahoma Tax Commission assessed corporate income taxes against Scioto Insurance Company, a Vermont corporation, for 2001 through 2005, based on payments Scioto received from the use of Scioto's intellectual property by Wendy's restaurants in Oklahoma. In response, Scioto protested these assessments on the ground that it did not contract with the Wendy's restaurants in Oklahoma for use of the property in question and did not conduct any business whatsoever in Oklahoma. The Tax Commission denied Scioto's protest and the Court of Civil Appeals affirmed. This Court has previously granted certiorari. Upon review, we vacate the Court of Civil Appeals opinion, reverse the Tax Commission's denial of Scioto's protest and remand with instructions to sustain Scioto's protest.

CERTIORARI PREVIOUSLY GRANTED; COURT OF CIVIL APPEALS OPINION IS VACATED; ORDER OF THE OKLAHOMA TAX COMMISSION IS REVERSED AND REMANDED WITH INSTRUCTIONS.

Timothy Manuel Larason, Anne E. Zachritz, ANDREWS DAVIS, A PROFESSIONAL CORPORATION, Oklahoma City, Oklahoma, and Paul H. Frankel, MORRISON & FOERSTER, LLP, New York, New York, for Appellant,

Marjorie L. Welch, Interim General Counsel; Abby Dillsaver, Assistant General Counsel; Elizabeth Field, Assistant General Counsel, OKLAHOMA TAX COMMISSION, Oklahoma City, Oklahoma, for Appellee.

REIF, J.,

¶1 This case concerns the liability of Scioto Insurance Company, a Vermont corporation, for Oklahoma corporate income taxes for the years 2001 through 2005. The Oklahoma Tax Commission assessed Scioto corporate income taxes for these years based on payments it received from the use of Scioto's intellectual property by Wendy's restaurants in Oklahoma. The intellectual property in question consists of trademarks and operating practices for Wendy's restaurants.

¶2 In support of its assessment, the Oklahoma Tax Commission points out that the amount of money Scioto receives for use of this intellectual property is based on a percentage of the gross sales of the Wendy's restaurants in Oklahoma. The Tax Commission contends that the case of *Geoffrey, Inc. v. Oklahoma Tax Commission*, 2006 OK CIV APP 27, 132 P.3d 632, holds that this type of business connection to Oklahoma is sufficient to support taxation of an out-of-state corporation.

¶3 In support of its protest of the assessment, Scioto notes it was established under the laws of the State of Vermont by Wendy's International, Inc., to insure various risks of Wendy's International and its affiliates. In establishing Scioto, Wendy's International transferred the intellectual property to Scioto to meet the capitalization requirements of the State of Vermont for an insurance business. Scioto stresses that it is not in the restaurant business and has no say where a Wendy's restaurant will be located, including Oklahoma. Scioto notes that it does not provide insurance to any person or entity in Oklahoma.

¶4 Scioto admits that it derives income from licensing the use of the intellectual property but notes its only licensing agreement is with Wendy's International. Individual Wendy's restaurants in Oklahoma acquire the right to use the intellectual property under a sublicense with Wendy's International. Wendy's restaurants in Oklahoma pay 4% of their gross sales to Wendy's International for use of the intellectual property and Wendy's International reports such income to the Oklahoma Tax Commission. Wendy's International, in turn, pays an amount equal to 3% of such gross sales to Scioto under the licensing agreement with Scioto and deducts this 3% payment amount on its Oklahoma tax return.

¶5 It is clear that use of the intellectual property in question by individual Wendy's restaurants in Oklahoma has several taxable consequences. First, it produces both sales of products and income that are taxable under Oklahoma law. Second, the use of the intellectual property by Wendy's restaurants in Oklahoma plays an important role in the production of employment-based taxes. Third, the right to use the intellectual property by an individual Wendy's restaurant is subject to ad valorem taxation as personal property in the county where the restaurant is located. *See Southwestern Bell Telephone Co. v. Oklahoma State Board of Equalization*, 2009 OK 72, 231 P.3d 638. Finally, there is no question that Oklahoma can tax the value received by Wendy's International in contracting with individual Wendy's restaurants in Oklahoma to use the intellectual property.

¶6 What is not clear is the basis for Oklahoma to tax the value received by Scioto from Wendy's International under a licensing contract that was not made in the State of Oklahoma and no part of which was to be performed in Oklahoma. Any further transfer of the right to use the intellectual property, including sub-licensing agreements with Wendy's restaurants in Oklahoma, is the legal act and sole responsibility of Wendy's International. In addition, the obligation of Wendy's International to pay Scioto based on a percentage of sales by Wendy's restaurants in Oklahoma is not dependent upon the Oklahoma restaurants actually paying Wendy's International. Wendy's International must pay Scioto under their licensing agreement whether or not any of the Oklahoma restaurants ever pay Wendy's International.

¶7 Oklahoma simply has no connection to or power to regulate the licensing agreement between Scioto and Wendy's International, any more than it had a say in whether the State of Vermont should license Scioto or allow the intellectual property to be one of Scioto's capital assets. Unlike the situation in the *Geoffrey* case, Scioto is not a shell entity and the licensing agreement between Scioto and Wendy's International is not a sham obligation to support a deduction under Oklahoma law.[1] The sum paid by Wendy's International under the licensing agreement with Scioto is a bona fide obligation, and the payments received by Scioto are a source of income for Scioto's insurance business (none of which is carried on in Oklahoma). The Oklahoma Tax Commission cannot summarily disregard the licensing agreement simply because it produces a deduction that the Commission does not like.

¶8 Scioto and Wendy's International, like any taxpayers, are entitled to rely on settled law in the use of their property and in ordering their affairs, to maximize any benefits allowed under the state and federal tax laws of this nation. One of the most important principles of settled law upon which a taxpayer may rely is that a state will apply its tax laws consistent with due process of law. In the case at hand, due process is offended by Oklahoma's attempt to tax an out of state corporation that has no contact with Oklahoma other than receiving payments from an Oklahoma taxpayer (Wendy's International) who has a bona fide obligation to do so under a contract not made in Oklahoma. *See Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). The fact that the Oklahoma taxpayer can deduct such payments in determining the Oklahoma taxpayer's income tax liability is not justification to chase such payments across state lines and tax them in the hands of a party who has no connection to the State of Oklahoma.[2]

CERTIORARI PREVIOUSLY GRANTED; COURT OF CIVIL APPEALS OPINION IS VACATED; ORDER OF THE OKLAHOMA TAX COMMISSION IS REVERSED AND REMANDED WITH INSTRUCTIONS.

¶9 **COLBERT, V.C.J., KAUGER, WATT, WINCHESTER, REIF, and COMBS, JJ., concur.**

¶10 **TAYLOR, C.J., and GURICH, J., dissent.**

¶11 **EDMONDSON, J., disqualified.**

1. Geoffrey, Inc. was formed and incorporated as a part of a reorganization of its parent corporation Toys 'R' Us, Inc. The parent corporation assigned its trademarks and operating practices to Geoffrey in exchange for Geoffrey, Inc. stock. Geoffrey, Inc., in turn, licensed use of the trademarks and operating practices back to its parent corporation. The parent corporation engaged in business in Oklahoma and paid taxes on its Oklahoma derived income, but deducted the royalty paid to Geoffrey. During the tax years at issue, Geoffrey had no full-time employees, conducted its business from office space it leased from an accounting firm and its sole activity was to license the trademarks and operating practices to the parent corporation. *Geoffrey*, 2006 OK CIV APP 27, ¶ 3, 132 P.3d at 634. In contrast, Scioto is a licensed and regulated insurance company that carries on a business entirely different from Wendy's restaurant business.

2. The proper point at which Oklahoma can assess taxes on the amount that Wendy's International pays to Scioto is when those funds are in the hands of Wendy's International. If the Tax Commission believes the amount paid by Wendy's International to Scioto should be taxed, then the Tax Commission should ask the Legislature to eliminate the deduction for payments made under licensing arrangements like the one in this case. While the Tax Commission is properly concerned with the taxation of business activity in Oklahoma, the Tax Commission cannot unilaterally close deduction lacunae or gaps in the revenue law with which the Commission disagrees. "[T]he proper remedy for OTC is not to have the courts expand the . . . Tax Code's scope . . . but rather to press for the gap's closure by the Legislature." *Globe Life & Accident Ins. Co. v. Oklahoma Tax Commission*, 1996 OK 39, ¶ 19, 913 P.2d 1322, 1329.

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

¶1 I respectfully dissent. I would affirm the imposition of corporate income tax by the Oklahoma Tax Commission.

¶2 Scioto Insurance Company is a subsidiary of Wendy's International, Inc. The company is responsible for providing business interruption insurance to Wendy's and its affiliates.[1] Oldemark, LLC is a Vermont holding company whose sole purpose is to maintain ownership of Wendy's intellectual property rights.[2] Oldemark controls the fast-food company's trademarks, copyrights, and knowledge related to opening and operating a Wendy's restaurant. In return, Oldemark receives revenue associated with the use of these intangibles by Oklahoma Wendy's franchises. Scioto is the sole member of Oldemark; therefore, the LLC is a disregarded entity for tax purposes.[3] All income of Oldemark is attributable to Scioto.

¶3 Pursuant to an October 2001 amended licensing agreement, Oldemark granted Wendy's the right to use and sublicense its intellectual property to affiliate-owned and franchisee-owned restaurants. In return, Wendy's paid Oldemark a license fee equal to three percent (3%) of restaurant gross sales. Wendy's sublicensed the intellectual property rights to individual franchises for a fee equal to four percent (4%) of the restaurant's gross sales.

¶4 Wendy's franchise disclosure documents informed prospective franchisees that Oldemark was the owner of the intellectual property. The disclosure documents also indicated that Oldemark "***records on its books the royalty income received by Wendy's from you and its other franchisees, while Wendy's serves as the collecting agent for the Oldemark royalty income***."[4] Following receipt of royalty payments from Oklahoma franchises, Oldemark loaned the income back to Wendy's in exchange for demand notes. Wendy's claimed deductions equivalent to the three percent (3%) royalties and interest on the notes which was paid to Oldemark.[5] The practical effect of these transactions was the virtual elimination of state income tax liability on earnings associated with licensing fees emanating from Oklahoma sales.[6]

¶5 For the relevant taxable periods, only Wendy's filed Oklahoma corporate income tax returns. On February 21, 2008, the Oklahoma Tax Commission (OTC) issued an assessment of corporate income tax, penalties, and interest against Scioto totaling $546,644.00. A revised assessment was issued on October 5, 2009, in

the amount of $434,361.00.[7] Scioto filed a protest, alleging the company lacked minimum contacts with the State of Oklahoma and that levying a tax constituted a violation of the Commerce Clause.

DUE PROCESS CLAUSE

¶6 In its first assignment of error, Scioto argues that the OTC corporate tax assessment is a violation of the Due Process Clause of the United States Constitution because the company lacks minimum contacts with Oklahoma. In Quill Corp. v. North Dakota By and Through Heitkamp, 504 U.S. 298, 306, (1992), the Supreme Court defined the limitations placed on state taxing authorities by the Due Process Clause:

> The Due Process Clause requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax, and that the income attributed to the state for tax purposes must be rationally related to values connected with the taxing State. (internal citations & quotations omitted).

However, physical presence is not mandatory to establish a constitutionally sufficient connection to meet the minimum contacts requirements of the Due Process Clause. When a taxpayer "purposefully avails itself of the benefits of an economic market," exercise of *in personam* jurisdiction will not offend due process, "even if [the taxpayer] has no physical presence in the state." Id. at 307-308. In this case, Scioto authorized the use of Wendy's intellectual property rights in all fifty (50) states, including Oklahoma. Scioto directed its activities at the residents of Oklahoma and benefitted from the economic contact created via the Wendy's name and proprietary information. To put it another way, every hamburger sold in Oklahoma by Wendy's had a direct economic benefit to Scioto.

¶7 The first state court case to address the interplay between the Due Process Clause and taxation of an out-of-state corporation's income attributable to intellectual property was decided by the South Carolina Supreme Court in Geoffrey, Inc. v. South Carolina Tax Comm'n, 437 S.E.2d 13 (S.C. 1993). Geoffrey, Inc. was an entity created and solely owned by Toys R Us, Inc. Id. at 15. The parent company transferred its intellectual property rights to Geoffrey, who in turn, allowed the toy company to utilize those rights and business know-how in exchange for a payment equal to one percent (1%) of net sales. Id. Toys R Us filed income tax returns, but offset its corporate revenue with a deduction equivalent to the one percent (1%) license fee paid to Geoffrey. Id. The South Carolina taxing authority issued an assessment, and Geoffrey protested. Id. Finding Geoffrey had a sufficient connection to the state, the court rejected any claim that taxation violated the Due Process Clause:

> Geoffrey's business is the ownership, licensing, and management of trademarks, trade names, and franchises. By electing to license its trademarks and trade names for use by Toys R Us in many states, Geoffrey contemplated and purposefully sought the benefit of economic contact with those states. Geoffrey has been aware of, consented to, and benefitted from Toys R Us's use of Geoffrey's intangibles in South Carolina. Moreover, Geoffrey had the ability to control its contact with South Carolina by prohibiting the use of its intangibles here as it did with other states. We reject Geoffrey's claim that it has not purposefully directed its activities toward South Carolina's economic forum and hold that by licensing intangibles for use in South Carolina and receiving income in exchange for their use, Geoffrey has the minimum connection with this State that is required by due process.

Id. at 16. Geoffrey sought review in the United States Supreme Court; however, certiorari was denied. Geoffrey, Inc. v. South Carolina Tax Comm'n, 437 S.E.2d 13 (S.C. 1993), cert. denied 510 U.S. 992 (1993).

¶8 Scioto intentionally placed Wendy's intellectual property in the stream of Oklahoma commerce, and purposefully sought the advantages of economic contact with our state. The income generated from restaurant sales in Oklahoma was recorded on the books of Oldemark. This economic presence was sufficient contact to satisfy the fundamental principles mandated by the Due Process Clause.

COMMERCE CLAUSE

¶9 Scioto also challenges Oklahoma's assessment of income tax based on an alleged violation of the Commerce Clause of the U.S. Constitution.[8] Although review of the constitutional constraints on state income taxation under the Commerce Clause is similar to the analysis required by the Due Process Clause, the two are not identical. Quill, 504 U.S. at 305. The validity of a state tax under the Commerce

Clause is measured according to a four-part test:

> Under Complete Auto's four-part test, we will sustain a tax against a Commerce Clause challenge so long as the tax (1) is applied to an activity with a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the State.

Quill, 504 U.S. at 311, (citing Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279, (1977)); see also In The Matter Of The Assessment Of Personal Property Taxes Against Missouri Gas Energy, A Division Of Southern Union Company, For Tax Years 1998, 1999, and 2000, 2008 OK 94, ¶ 43, 234 P.3d 938, 953. The first and fourth prongs of the Complete Auto analysis limit a state's ability to impose taxation which would burden interstate commerce. Quill, 504 U.S. at 313. The second and third requirements prohibit taxation that places an unfair share of the tax burden on interstate commerce. Id.

¶10 Scioto suggests that taxation by Oklahoma would offend the protections provided by the Commerce Clause because the company lacks a substantial nexus with the state. The Oklahoma Court of Civil Appeals rejected the application of a bright-line physical presence requirement. Geoffrey, Inc., v. Oklahoma Tax Commission, 2006 OK CIV APP 27, ¶ 19, 132 P.3d 632, 638-639 (declining to apply the physical presence test required for sales/use tax and finding the real source of the holding company's income was customers from Oklahoma).[9] Since 1996, an OTC regulation put foreign corporations on notice that the licensing of intangible property rights in this state creates a nexus sufficient to subject the entity to income taxation.[10] I agree with the Geoffrey analysis and would hold that the substantial nexus test was satisfied because Scioto's receipt of royalty income was directly connected to the use of its intellectual property in Oklahoma. The use of the Wendy's name and other intangibles in Oklahoma created an economic presence justifying taxation in this state. The majority of jurisdictions addressing the Commerce Clause and taxation of royalties received by an out-of-state holding company for use of the company's intellectual property have rejected the physical presence test and allowed imposition of state income tax based on an economic nexus.[11]

¶11 Scioto also maintains that the income tax imposed by Oklahoma was not fairly apportioned. The OTC applied 68 O.S.Supp. 2010 § 2358(A)(5) and prior opinions from this Court to determine whether Scioto's income was derived from a unitary business enterprise. The OTC sufficiently established that Wendy's, Scioto, and Oldemark were part of a unitary business enterprise. The motivation behind this corporate anatomy was to shelter royalties generated from use of Wendy's trademarks and the company's proprietary information throughout the United States. The OTC correctly imposed corporate income tax.

CONCLUSION

¶12 Electronic commerce continues to expand, and increasingly, interstate and international businesses have significant economic impact in a state without having a physical presence. While new legal concepts are challenging established law, the taxation of intangibles is not a recent phenomenon. Oklahoma courts and the OTC are in harmony.[12] Scioto intentionally placed its property into the stream of Oklahoma commerce, realizing the benefits and protections afforded by the people and laws of this state. The presence of Scioto's intellectual property within Oklahoma is a sufficient nexus for the imposition of corporate income taxes. As such, I would affirm the determination by the OTC and authorize the imposition of income tax against Scioto.

1. During oral argument, counsel for Scioto acknowledged the company has never paid an insurance claim.

2. Oldemark acquired the intellectual property rights through a series of corporate reorganizations, licensing agreements, and assignments, beginning in approximately 1989.

3. It is undisputed that Oldemark was a disregarded entity under federal law — meaning any tax obligation of the LLC became the responsibility of Scioto. Oklahoma follows the federal rule for tax treatment of a single member LLC. 68 O.S.2011 § 202(j). No error is alleged.

4. Wendy's International, Inc. Franchise Offering Circular (2005) (emphasis added). This language would seem to create a direct connection between use of the intellectual property in Oklahoma through Oldemark and Scioto.

5. The dynamic behind this kind of corporate structuring to eliminate taxation was explained in a legal treatise:

> One of the standard tax-planning devices corporations have employed to reduce taxable income in states where they conduct their operations is to transfer their trademarks or trade names to an intangibles holding company (IHC) and license back the trademarks or trade names for a royalty. The royalty, which is deductible to the operating company, reduces its income in the states where it carries on its business. The IHC, on the other hand, ordinarily pays no tax on its royalty income because it is taxable — or at least taxpayers so contend — only in a state that does not tax such income (e.g., Delaware).

J. Hellerstein & W. Hellerstein, State Taxation ¶ 9.20[7][j] (3d ed. 2012).

6. Examining the precise tax scheme faced in this case, the South Carolina Supreme Court noted that the "net effect of this corporate structure has been the production of 'nowhere' income that escapes all state income taxation." Geoffrey, Inc. v. South Carolina Tax Comm'n,

437 S.E.2d 13, 15, n.1 (S.C. 1993) (citing Rosen, *Use of a Delaware Holding Company to Save State Income Taxes*, 20 Tax Adviser 180 (1989)).

7. This change reflected an adjustment to coincide with a federal amortization deduction.

8. The Commerce Clause contains more than an affirmative grant of power; it also includes a negative component, often referred to as the dormant Commerce Clause. KFC Corp. v. Iowa Dept. of Revenue, 792 N.W.2d 308, 313 (Iowa 2010). This aspect of the clause has been construed as a limit on the power of states to impose taxes, even in the absence of affirmative acts of Congress. Id.

9. By a vote of 7-1 this Court denied certiorari in Geoffrey v. Oklahoma Tax Commission, Supreme Court Case No. TC-99,938, on March 20, 2006.

10. Okla. Admin. Code § 710:50-17-3(10) (1996). The relevant section, titled "What constitutes 'Nexus,'" reads in relevant part:

If a corporation has one or more of the following activities in Oklahoma, it is considered to have "nexus" and shall be subject to Oklahoma income taxes:

(9) Leasing of tangible property and ***licensing of intangible rights for use in Oklahoma***. (emphasis added).

Other states have enacted similar administrative regulations. see e.g., Fla. Admin. Code Ann. R. 12C-1.011(1)(p)(1)(2006); Iowa Admin. Code 701-52.1(4)(422), Example 7 (Westlaw 2008); Mass. Dep't of Revenue, Corporate Excise DOR Directive 96-2, July 3, 1996.

11. See e.g., KFC v. Iowa Dept. of Revenue, 792 N.W.2d 308, 328 (Iowa 2010) (concluding Commerce Clause is not offended based on Iowa income tax on royalties earned by allowing use of intangibles within the State of Iowa); Geoffrey, Inc. v. Comm'r of Revenue, 899 N.E.2d 76, 92 (Mass. 2009) (applying substantial nexus test and rejecting Commerce Clause challenge based on income earned through use of intangible property in state); Lanco, Inc. v. Director, Div. of Taxation, 879 A.2d 1234, 1242 (N.J. Super. Ct. App. Div. 2005) (finding physical presence of Delaware holding company was not mandatory to impose income tax associated with licensing fees attributable to intellectual property targeting New Jersey consumers); Geoffrey, Inc. v. South Carolina Tax Comm'n, 437 S.E.2d at 18-19 (holding that by licensing intangibles for use in South Carolina, holding company had substantial nexus, such that taxing royalties from intellectual property would not violate the dormant Commerce Clause); A&F Trademark, Inc. v. Tolson, 605 S.E.2d 187, 195 (N.C. Ct. App. 2004), cert. denied, 546 U.S. 821 (2005) (determining that "where a wholly-owned subsidiary licenses trademarks to a related retail company operating stores located within North Carolina, there exists a substantial nexus with the State sufficient to satisfy the Commerce Clause"); Tax Comm'r of State v. MBNA America Bank, 640 S.E.2d 226, 234 (W.Va. 2006) (rejecting physical presence test and noting such a rigid interpretation of the Commerce Clause "makes little sense in today's world"); Comptroller of the Treasury v. SYL, Inc., 825 A.2d 399, 415 (Md. Ct. App. 2003) (recognizing that entities holding intellectual property for parent company "had no real economic substance," and allowing taxation of a portion of income attributable to parent corporations' business in the state); see also Surtees v. VFJ Ventures, Inc., 8 So.3d 950, 976-981 (Ala. Ct. App. 2008), cert. denied, 129 S.Ct. 2051 (2009); Secretary, Dept. of Revenue, State of La. v. GAP (Apparel), Inc., 886 So.2d 459, 462 (La. Ct. App. 2004); Bridges, Secretary of Dept. of Revenue, State v. Geoffrey, Inc., 984 So.2d 115, 128 (La. Ct. App. 2008).

12. see n.9 and n.10, supra.

2012 OK 45

Nomac Drilling LLC, Chesapeake Energy Corporation and (Own Risk #19509), Petitioners, v. Kelly Mowdy and the Workers' Compensation Court, Respondents.

No. 108,677. May 8, 2012

CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION II

¶0 Claimant commenced this worker's compensation action for an alleged spider bite injury to the right knee/leg. The Workers' Compensation Court awarded Temporary Total Disability (TTD) benefits, and the three-judge panel affirmed. The Court of Civil Appeals reversed the TTD award and ordered the claim dismissed. Claimant appeals.

CERTIORARI PREVIOUSLY GRANTED; OPINION OF COURT OF CIVIL APPEALS VACATED; AWARD OF THE WORKERS' COMPENSATION COURT SUSTAINED.

Laura Beth Murphy, Murphy & Murphy, Oklahoma City, Oklahoma, for Petitioner.

John C. Forbes, Forbes & Forbes, Midwest City, Oklahoma, for Respondent.

Colbert, V.C.J.

¶1 The issue presented on certiorari review is whether the claimant's expert medical testimony, relying in part on prior diagnosis by other medical professionals, satisfies the standards for expert medical testimony in a workers' compensation action. This Court answers in the affirmative.

FACTS AND PROCEDURAL HISTORY

¶2 Kelly Mowdy (Claimant) is employed by Nomac Drilling, LLC (Employer) as a floor hand. Claimant is a resident of Lindsay, Oklahoma, but his duty station was at a Louisiana well site. Claimant's regular work shift was "seven days on and seven days off," and he commuted back to Lindsay on his days off. As part of Claimant's compensation, Employer provided housing in a mobile home at the well site, where Claimant and eight other workers lived.

¶3 On August 22, 2009, Claimant awoke to get ready for work and noticed two small red dots on his right knee. Claimant thought it looked like a spider bite, and he reported the injury to his supervisor. His supervisor was unconcerned about the injury. Over the next few days, Claimant's knee became swollen and infected. The area turned dark red and purple, with red streaks running up his thigh and down his calf. Claimant applied triple antibiotic ointment to the area and again showed the injury to two of his supervisors. But, neither supervisor was concerned. On August 28, Claimant returned to Lindsay and sought treatment at the South Central Medical Resource Center.

¶4 At South Central, Claimant was examined by a nurse practitioner, who diagnosed Claimant's injury as a 5-6 day old abscessed spider bite. Claimant was placed on antibiotics and

cultures were taken. The lab tests revealed the presence of methicillin-resistant staphylococcus aureus (MRSA) - a staph infection. Following that diagnosis, Claimant's leg pain worsened. He went to the emergency room in Moore, Oklahoma, where he was placed on intravenous antibiotics for four to five hours and was released with instructions to return if his symptoms did not improve. Ultimately, the leg required surgery to remove the dead and infected tissue. Claimant missed work from approximately August 27 to October 1, 2009, on orders from South Central and his surgeon.

¶5 Claimant filed a Form 3 on September 14, 2009, alleging a spider bite to the right knee. Employer answered and denied Claimant's injury was the result of his employment. The case was tried on August 27, 2010. On direct examination, Claimant was asked to describe the living arrangements provided by Employer. He attested that the trailer house was located in a wooded forest area, about twenty feet from the tree line. Claimant also testified that the trailer home was "not real clean, not real kept up." In addition, Claimant indicated that there was a "big hole" underneath his bed, which opened all the way through the trailer to the outdoors. Although Claimant maintained that he believed the two red dots on his leg were caused by a spider bite, on cross-examination, Claimant admitted that he neither saw a spider bite him, nor witnessed puncture wounds in his leg. Further Claimant testified that he did not experience immediate pain in the knee.

¶6 Claimant introduced, over Employer's probative value objection, the report of his medical expert, Lonnie Litchfield, M.D. Dr. Litchfield referenced Claimant's August 28, 2009 diagnosis of a spider bite by South Central. He also included all of Claimant's current medical history, as well as all of Claimant's relevant past medical history. Dr. Litchfield concluded that the Claimant's injury arose out of and in the course of Claimant's employment-related activities and that the employment was the major cause of Claimant's injury. In response, Employer introduced the medical report of John Munneke, M.D., who opined that Claimant's employment was not the major cause of his injury.

¶7 The Workers' Compensation Court found Claimant's testimony was credible and persuasive. The Court concluded that the incident in Louisiana was the predominant cause of Claimant's right leg injury, and awarded Claimant TTD benefits. Employer appealed to the three-judge panel. The panel sustained the award. The Court of Civil Appeals, however, vacated the award and ordered the claim dismissed.

STANDARD OF REVIEW

¶8 Because Claimant's injury precedes the effective date of the November 1, 2010 amendments to the Workers' Compensation Act, the law at the time of Claimant's injury governs. Thus, the "any competent evidence" standard applies. See Dunlap v. Multiple Injury Trust Fund, 2011 OK 14, ¶ 1, 249 P.3d 951, 952. This Court must sustain the Workers' Compensation Court's determination of a fact issue if it is supported by any competent evidence. Parks v. Norman Mun. Hosp., 1984 OK 53, ¶ 12, 684 P.2d 548, 552. Our task is to "canvass the facts, not with an object of weighing conflicting proof in order to determine where the preponderance lies but only for the purpose of ascertaining whether the tribunal's decision is supported by competent evidence." Id. It is only in the absence of this support that the trial court's decision may be viewed as erroneous. Id.

ANALYSIS

¶9 This Court has previously held that "[w]hen a trial judge's decision rests on a flawed, yet curable, medical report" the party who offered the flawed medical report is entitled to the opportunity on remand to rehabilitate the medical evidence. City of Norman v. Garza, 2003 OK 111, ¶ 15, 83 P.3d 851, 855. See also Hammons v. Okla. Fixture Co., 2003 OK 7, 64 P.3d 1108, Gaines v. Sun Refinery and Mktg., 1990 OK 33, 790 P.2d 1073 (rev'd on other grounds). In Garza, the claimant, a police officer, alleged a stomach injury due to Post Traumatic Stress Syndrome and depression. The claimant's medical expert report omitted a "critical element:" the discovery and treatment of H. Pylori bacteria in the claimant's stomach. Garza, ¶ 14, 83 P.3d at 855. The omission of this critical element rendered the medical report incompetent to support the trial panel's award. Id. However, this Court remanded the claim to provide the claimant an "opportunity to explain the omission of this critical fact." Id. ¶ 15, 83 P.3d at 855.

¶10 In the instant case, if Claimant's medical report had omitted a critical fact, Claimant would be allowed the opportunity to cure the defect on remand. However, we do not find that any critical fact has been omitted. Employ-

er argued, and the Court of Civil Appeals agreed, that because Dr. Litchfield's report did not directly diagnose Claimant's injury as a spider bite, the report was incompetent. Employer contends on appeal that the medical report is not curable. We cannot agree. This Court has consistently held that "[a] physician's opinion need not be given in categorical terms nor in the precise language of the statute," and an award "rests on competent evidence when it is supported by the general tenor and intent of the medical testimony." Nat'l Zinc Co. v. Stefanopoulos, 1965 OK 130, ¶ 14, 405 P.2d 998, 1001. See also Townley's Dairy v. Gibbons, 1964 OK 220, ¶ 14, 395 P.2d 947, 949.

¶11 For example, in Townley, the claimant strained his groin while lifting and shifting cases of milk inside his delivery truck. The claimant's medical expert testified by written report as follows: "This is to certify that Mr. Frank Gibbons was operated on August 1st, 1963 for bilateral, inguinal, indirect complete, reducible hernias. He dates his illness, his pain in the inguinal regions, from the time he was lifting something while working for Townley Dairy, on the 3rd of October, 1962." Townley, ¶ 12, 395 P.2d, 949. The employer attacked the medical report as insufficient because it did not directly specify that, in the doctor's opinion, the claimant's work with employer caused the injury.

¶12 This Court held that the medical report's general tenor and intent supported the proposition that the claimant's work caused his injury. Id. ¶ 15, 395 P.2d, 949. We emphasized that, unless the second sentence of the report was intended to show the connection between the claimant's work and his injury, it had no purpose. Id. In other words, "the only reasonable inference from the second sentence of the report . . . is that the accident caused the injury." Id. ¶ 17, 395 P.2d, 950.

¶13 Similarly, Dr. Litchfield's report noted that Claimant "was diagnosed with a spider bite" by the South Central Medical Resource Center. Dr. Litchfield also concluded: "It is my opinion that Mr. Mowdy has sustained a significant injury to his right knee/leg due to his work-related activities while employed by Nomac Drilling." (emphasis added). Dr. Litchfield made a clear connection between Claimant's injury and his employment. Dr. Litchfield's report included the relevant history — namely, the diagnosis and treatment of the spider bite injury to Claimant's right knee. From the tenor of Dr. Litchfield's statement that Claimant had been diagnosed with a spider bite, and from his clinical examination and findings, we believe the intent of Dr. Litchfield to be that a spider bite caused Claimant's disability.

¶14 The Court of Appeals also found that the report was fatally flawed because the included history was silent as to whether Claimant informed Dr. Litchfield that he did not see or feel a spider bite him; that he did not see any spiders at the work site; that Claimant's wife and father had also suffered staph infections; and that Claimant had previously suffered from cellulitis. However, in Black, Sivals & Bryson, Inc. v. Story, 1963 OK 20, ¶ 12, 378 P.2d 764, 767, we noted that "[i]t is not absolutely essential that the history include all the facts the evidence tends to prove. It is sufficient if the history substantially incorporate[s] such facts as the proof of the party fairly tends to establish and as are consistent therewith."

¶ 15 Dr. Litchfield's report contains all of Claimant's relevant and material medical history required to support his conclusion. The omitted information was irrelevant to Dr. Litchfield's conclusion that Claimant's spider bite injury and resulting infections arose out of and in the course of his employment.

¶16 An appellate court must sustain the Workers' Compensation Court's decision where there is any competent evidence supporting the decision. Claimant's expert medical report is not defective, and there is sufficient evidence to support the trial court's finding that the Claimant sustained an accidental injury arising out of and in the course of his employment.

CERTIORARI PREVIOUSLY GRANTED; OPINION OF COURT OF CIVIL APPEALS VACATED; AWARD OF THE WORKERS' COMPENSATION COURT SUSTAINED.

CONCUR: Colbert, V.C.J.; Watt, Edmondson, Reif, Combs, and Gurich, JJ.

DISSENT: Taylor, C.J. and Winchester, J.

NOT PARTICIPATING: Kauger, J.

2012 OK 39

GUY T. LEDBETTER and MIDGE LEDBETTER, individually and as husband and wife, Plaintiffs/Appellees, v. DEREK G. HOWARD, D.O., and RADIOLOGY SERVICES OF ARDMORE, INC., jointly and severally, Defendants/Appellants.

No. 105,902. April 24, 2012

CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION II

¶0 The plaintiffs/appellees, Guy T. Ledbetter (Ledbetter/patient) and Midge Ledbetter (wife, collectively Ledbetters), sued the defendant/appellant, Derek G. Howard, D.O. (Howard/doctor), and his employer, Radiology Services of Ardmore, Inc. (Radiology Services, collectively, defendants), for malpractice. Ledbetter alleged that the doctor misread an x-ray causing delayed treatment of his rapidly deteriorating left foot. Coupled with the malpractice claim was the wife's plea for loss of consortium. The jury found in favor of Howard and Radiology Services. The Ledbetters moved for judgment notwithstanding the verdict and for a new trial. The trial court denied the judgment request. Nevertheless, based on evidence of juror misconduct during deliberations, the motion for new trial was sustained. Howard and Radiology Services appealed. The Court of Civil Appeals reversed and remanded ordering the trial court to enter judgment in favor of the defendants. The foreperson assured the trial court in *voir dire* that she would not allow her expertise and experience to override the evidence presented at trial. Nevertheless, she not only did so on a personal level but went further by communicating her alleged professional knowledge and experiences to her fellow jurors with the apparent intent to sway their votes in favor of Howard and Radiology Services. Therefore, we determine that: 1) the juror's affidavit is admissible under the "extraneous prejudicial information" exception to 12 O.S. 2011 §2606(B); and 2) the trial court did not abuse its discretion in ordering a new trial for juror misconduct during deliberations.

CERTIORARI PREVIOUSLY GRANTED; COURT OF CIVIL APPEALS' OPINION VACATED; TRIAL COURT AFFIRMED AND CAUSE REMANDED.

Tom L. King, Richard M. Glasgow, Justin T. King, King Law Firm, Oklahoma City, Oklahoma, for plaintiffs/appellees,

Hilton H. Walters, R.Gene Stanley, Rife & Walters, Oklahoma City, Oklahoma, for defendants/appellants.

Allison A. Cave, Allison A. Cave, PLLC, Edmond, Oklahoma

WATT, J.:

¶1 We granted certiorari to address a single issue: whether the trial court erred in granting a motion for new trial on grounds of juror misconduct.[1] Resolution of this issue requires us first to answer the question of whether the juror's affidavit was properly submitted as evidence in the hearing on the request for new trial.

¶2 We hold that the juror's affidavit demonstrating the injection into the deliberative process of extraneous prejudicial information was admissible under the "extraneous prejudicial information" exception to 12 O.S. 2011 §2606(B).[2] Furthermore, counsel were entitled to rely on the foreperson's guarantee to the trial court that she would not allow her professional expertise to override the testimony presented. Because there is evidence to the contrary, we hold that there was no abuse of discretion in ordering a new trial for juror misconduct during deliberations.

FACTS AND PROCEDURAL HISTORY

¶3 Ledbetter has a long history of diabetes which grew worse over time requiring increased medical intervention. In 1997 or 1998, he developed signs of peripheral neuropathy of the legs, a diabetic complication affecting the nerves and which can lead to serious leg and foot complications, including amputation.

¶4 On May 31, 2005, Ledbetter went to his primary care physician, Dr. Kevin Reed, complaining of swelling, redness, and discomfort in his left foot and leg. Dr. Reed diagnosed Ledbetter with cellulitus, an infection of the soft tissues, and began treating him with a broad-spectrum oral antibiotic.

¶5 On Dr. Reed's orders, Ledbetter returned for a followup appointment on June 7th. There being no apparent improvement in Ledbetter's leg, Dr. Reed admitted him to the hospital and began intravenous antibiotics. Two days later, Dr. Reed ordered x-rays of Ledbetter's left foot because of concerns related to a potential bone infection. Howard read the x-rays concluding that there were no dislocations or fractures and that the foot was radiographically normal.

¶6 Having improved, Ledbetter was discharged from the hospital on June 11th. Although the symptoms continued to abate during the three (3) weeks after discharge, Ledbetter continued to have swelling in his left ankle. Dr. Reed ordered a second x-ray on July 5th which showed a dramatic deterioration of

the bones in Ledbetter's left foot. Dr. Reed referred Ledbetter to an orthopedic surgeon who sent Ledbetter to see Dr. Steven Lund, a podiatrist with experience treating Charcot Foot.[3]

¶7 Dr. Lund diagnosed Ledbetter with Charcot Foot. Because of the severity of the foot's deformity, Dr. Lund recommended reconstructive surgery to attach an external fixator to Ledbetter's foot. Ledbetter wore the fixator, which was adjusted daily, for approximately seven weeks. Thereafter, Ledbetter spent several weeks in a cast and then in a specially crafted boot for six to eight months. Finally, Ledbetter was fitted with a brace intended to be worn continually with a shoe. However, because the brace was uncomfortable, Ledbetter discontinued its use.

¶8 The Ledbetters sued Howard and Radiology Services for negligence. Ledbetter alleged that the doctor misread the July 9th x-ray causing delayed treatment of his rapidly deteriorating left foot. Coupled with the malpractice claim was the wife's plea for loss of consortium. The action was tried to a jury which returned a verdict in favor of the defendants. The Ledbetters filed two motions: one for judgment notwithstanding the verdict; and one for new trial on grounds of juror misconduct during deliberations. The trial court refused to grant judgment to the Ledbetters but sustained their motion for new trial finding that "**juror misconduct affected materially the substantial rights of the [Ledbetters]**".[4] The Court of Civil Appeals reversed and remanded ordering the trial court to enter judgment in favor of Howard and Radiology Services. The cause was assigned for consideration to this chamber on December 5, 2011.

Standard of Review

¶9 It has long been recognized that the granting of a new trial is within the wide discretion of the trial court.[5] We will not reverse an order granting a new trial unless error is clearly established in respect to some pure, simple, and unmixed question of law.[6] The judge who presides at the trial: hears the testimony; observes the witnesses; and has full knowledge of the proceedings during the trial process. It is that adjudicator who is in the best position to know whether substantial justice has been done. Where such a judge sustains a motion for new trial, a clear showing of manifest error and an abuse of discretion must be made before this Court is justified in reversing the ruling. The threshold for upholding the grant of a new trial is much lower than where the motion is overruled.[7] Furthermore, when, as here, the new trial is granted by the same judge who tried the case, a much stronger showing of error or abuse of discretion is required for this Court to reverse than if a party appeals from a refusal to grant a new trial.[8]

¶10 The Ledbetters allege they are entitled to a new trial based on juror misconduct.[9] They insist that the jury foreperson, a licensed practical nurse who regularly assists with the care and treatment of diabetic patients, improperly injected extraneous prejudicial information into the deliberative process. Howard and Radiology Services contend that the juror's affidavit utilized to impeach the verdict is inadmissible pursuant to 12 O.S. 2011 §2606(B).[10] In the alternative, they argue that the foreperson's statement interjected no extraneous information improperly influencing any juror. We disagree with both of the defendants' arguments.

¶11 a) The juror's affidavit regarding the foreperson's statements during deliberations is admissible under the "extraneous prejudicial information" exception to 12 O.S. 2011 §2606(B).

¶12 The primary goal of statutory interpretation is to ascertain and, if possible, give effect to the intention and purpose of the Legislature as expressed by the statutory language.[11] Intent is ascertained from the whole act in light of its general purpose and objective[12] considering relevant provisions together to give full force and effect to each.[13] The Court presumes that the Legislature expressed its intent and that it intended what it expressed.[14] Statutes are interpreted to attain that purpose and end[15] championing the broad public policy purposes underlying them.[16] Only where the legislative intent cannot be ascertained from the statutory language, *i.e.* in cases of ambiguity or conflict, are rules of statutory construction employed.[17] If the language is plain and clearly expresses the legislative will, further inquiry is unnecessary.[18]

¶13 Title 12 O.S. 2011 §2606(B)[19] provides in pertinent part:

> A juror **may**[20] testify on the question whether **extraneous prejudicial information was improperly brought to the jury's attention . . . An affidavit . . .** of any statement by the juror concerning **a matter about which the juror would be preclud-**

ed from testifying shall not be received . . . [Emphasis provided.]

The statute does not preclude the admission of all juror affidavits in queries involving juror misconduct. Instead, it blocks the offering of juror affidavits on a matter about which the juror would be precluded from testifying. **Jurors are specifically allowed under the statute to testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention**. Therefore, if the foreperson's statements constituted extraneous prejudicial information, admission of the juror-affidavit was not precluded.

¶14 During *voir dire*, the foreperson testified that she was a licensed practical nurse involved in home-health care and that she dealt daily with diabetics but never with anyone with Charcot foot. When the trial court asked whether she ever had a diabetic patient with complications she confirmed that she had. She also assured the Court that **nothing about her experiences** would cause her to be biased and that **she would not substitute her experience for the testimony of the witnesses in the trial**.[21]

¶15 In support of the new trial argument, the Ledbetters obtained a sworn affidavit from one of the foreperson's fellow jurors. It provides that: 1) the foreperson took charge of the deliberations "**eagerly sharing her experiences and knowledge** of the proper care and treatment of diabetic patients"; the foreperson and another juror stated that "they had been in similar situations as Dr. Howard" and that it was "**common place" to note a patient's condition as being "normal" when it was not**; the foreperson **shared "her experience and knowledge of diabetes"** stating that "all diabetics have podiatrists" then questioned why Ledbetter did not have a treating podiatrist; the foreperson **expounded that she was "certain" Ledbetter had prior foot problems** and was not following his doctor's instructions because, **in her experience, "most diabetics do not follow doctor's instructions;" the foreperson hypothesized that Ledbetter wasn't following his doctor's instructions because he was taking four shots of insulin per day** and that was "certainly a lot of insulin;" and, finally, the foreperson told jurors that because Ledbetter had Charcot foot, he **would "likely have had the same problems and result" regardless of any delay in treatment** caused by Howard's misreading of the original x-ray.[22]

¶16 These statements were clearly improper under 12 O.S. 2011 §2606(B). They were: made as statements of fact by the foreperson; involved purportedly extraneous information arising solely from the foreperson's professional experience; and were intended to sway the jury toward a defendant's verdict. The juror's affidavit regarding these statements was admissible under the "extraneous prejudicial information" exception to 12 O.S. 2011 §2606(B).[23]

¶17 b) **Counsel were entitled to rely on the foreperson's guarantee to the trial court that she would not allow her professional expertise to override the testimony presented. Because there is admissible evidence to the contrary, the trial court did not abuse its discretion in ordering a new trial for juror misconduct during deliberations.**

¶18 This is not a case in which we need make any sweeping statement as to when or how a professional may utilize individual training or expertise in the deliberative process or even may be allowed to communicate the same to fellow fact finders.[24] Neither does this cause stand for the proposition that a single false answer to a question on *voir dire* requires or supports the ordering of a new trial. Here, **the simple fact is that during *voir dire*, the foreperson clearly stated that she would not substitute her experiences as a nurse to diabetic patients to over-ride witness testimony. The affidavit indicates she did exactly what she promised not to do once deliberations began and went even further by attempting to influence her fellow jurors based on her professional knowledge and experiences, all while acting in the leadership position of foreperson on the jury**.[25]

¶19 We addressed the issue of a juror giving untruthful answers to a question during *voir dire* in Dominion Bank of Middle Tenn. v. Masterson, 1996 OK 99, 928 P.2d 291. There, the juror gave false information concerning his involvement in prior lawsuits. We stated:

> We need not determine whether the juror was biased against [the defendant] nor whether he had some influence upon the other jurors. It is enough that [the defendant] was deprived of an opportunity to delve deeper into [the juror's] qualifications during *voir dire* and under Oklahoma case law is entitled to a new trial.

Unlike the juror in Dominion, the foreperson here **gave sworn testimony that she would not allow her expertise and training to override the testimony presented**. Thereafter, **she accepted the leadership position as foreperson of the jury**, and specifically informed the other jurors that **because Ledbetter had Charcot foot, he would "likely have had the same problems and result" regardless of any delay in treatment caused by Howard's misreading of the original x-ray**.[26] She made these statements based solely on her experience and training in treating diabetics, **not** on the basis of the evidence presented.

¶20 Trial courts must scrupulously avoid allowing a jury to have access to matters not proper for consideration or to perform their functions irregularly.[27] The trial court attempted to meet that duty during *voir dire*. **Counsel were entitled to rely on the foreperson's guaranty to the trial court that she would not allow her professional expertise to override the testimony presented**. There is admissible evidence to the contrary. The foreperson made improper statements, involving extraneous information, intending to sway the jury toward a defendant's verdict. Under these facts, we determine that the plaintiffs are entitled to a new trial.

CONCLUSION

¶21 We express no opinion on the ability of the Ledbetters to prevail in a new trial. Furthermore, this decision should not be construed to stand for the proposition that a single untrue response to a question on *voir dire* will necessarily require a new trial. Here, however, we are presented with a false answer which led to a person clothed with the mantel of leadership attempting to persuade fellow jurors to reach a defendants' verdict on extraneous prejudicial information precluded by the legislative pronouncement in 12 O.S. 2011 §2606(B).[28]

¶22 The trial judge: conducted the initial *voir dire* in which the foreperson assured him that she would not allow her professional background to be substituted for the evidence presented by the witnesses; was present during the trial; observed the witnesses; and heard their testimony. After considering the motion for new trial and the juror's affidavit, the response, and the argument of counsel for all parties, he determined that the statements of the foreperson, taking on the persona of an expert witness during jury deliberations, constituted conduct materially and adversely affecting the Ledbetters' right to a fair trial. On the record presented, there has been no clear showing of manifest error and an abuse of discretion. Howard and Radiology Services simply have not met the difficult standard which must be demonstrated to show that the trial court erred in granting a new trial. Therefore, the trial court's new trial order must be upheld. The order of the trial court is affirmed and the matter is remanded for a new trial.

CERTIORARI PREVIOUSLY GRANTED; COURT OF CIVIL APPEALS' OPINION VACATED; TRIAL COURT AFFIRMED AND CAUSE REMANDED.

TAYLOR, C.J., COLBERT, V.C.J., WATT, REIF, COMBS, JJ. - CONCUR

GURICH, J. - CONCURS IN RESULT

WINCHESTER, EDMONDSON, JJ. - DISSENT

KAUGER, J. - NOT PARTICIPATING

1. In the petition in error, Howard and Radiology Services asserted that the trial court erred in failing to grant them a continuance to conduct discovery concerning the alleged juror misconduct. They did not pursue this argument on certiorari. Although Hough v. Leonard, 1993 OK 112, 867 P.2d 438 teaches that the prevailing party in the Court of Civil Appeals may obtain review of issues properly raised and briefed on appeal but not addressed by the appellate court without filing a petition for certiorari, we need not do so here. The trial court never ruled on the continuance request and the doctor and his employer waived any such argument by announcing their readiness to proceed at the May 7, 2008 new trial hearing. Transcript of Motions Hearing, May 7, 2008, providing in pertinent part at p. 3:

"THE COURT . . . Are the Plaintiffs ready to proceed?
MR. KING: Yes, Your Honor.
THE COURT: And the Defendant Howard?
MR. STANLEY: Yes, Your Honor. . . ."

Bentley v. Melton, 1957 OK 229, ¶3, 316 P.2d 591 [Party waives issue by failing to secure a ruling or by failing to reassert the same.].

2. Title 12 O.S. 2011 §2606(B), see note 10, infra.

3. Charcot Foot is a disease of the nerves causing the deterioration of the bony structure of the foot, related to diabetes, which can lead to multiple fractures in the bony regions and which is generally a progressive condition developing over a period of time. Matter of Workers' Compensation of Pederson, 939 P.2d 740 (Wyo. 1997); Fidelity Mutual Life Ins. Co. v. Workmen's Compensation Appeal Bd., 126 Pa.Comwlth. 188, 559 A.2d 84 (1989); Durphy v. Kaiser Foundation Health Plan, 698 A.2d 459 (D.C.App. 1997).

4. Transcript of Motions Hearing, May 7, 2008, p. 14.

5. Sligar v. Bartlett, 1996 OK 144, ¶13, 916 P.2d 1383; Propst v. Alexander, 1995 OK 57, ¶8, 898 P.2d 141; Austin v. Cockings, 1994 OK 29, ¶¶9-10, 871 P.2d 33; Rein v. Patton, 1953 OK 117, ¶¶19-20, 257 P.2d 280; Harper v. Pratt, 1943 OK 281, ¶3, 141 P.2d 562.

6. Rein v. Patton, see note 5, supra; Reyes v. Goss, 1951 OK 215, ¶11, 235 P.2d 950.

7. Rein v. Patton, see note 5, supra; Harper v. Pratt, see note 5, supra.

8. Sligar v. Bartlett, see note 5, supra; Propst v. Alexander, see note 5, supra.

9. Title 12 O.S. 2011 §651 providing in pertinent part:

"A new trial is a reexamination in the same court, of an issue of fact or law or both, after a verdict by a jury, the approval of the report of a referee, or a decision by the court. The former verdict, report, or decision shall be vacated, and a new trial granted, on the application of the party aggrieved, for any of the following causes, affecting materially the substantial rights of the party:

. . . 2. Misconduct of the jury or a prevailing party . . ."

10. Title 12 O.S 2011 §2606(B) providing:

"Upon an inquiry into the validity of a verdict or indictment, a juror shall not testify as to any matter or statement occurring during the course of the jury's deliberations or as to the effect of anything upon the juror's mind or another juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes during deliberations. **A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention** or whether any outside influence was improperly brought to bear upon any juror. An affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying shall not be received for these purposes." [Emphasis provided.]

11. White v. Lim, 2009 OK 79, ¶12, 224 P.3d 679; Head v. McCracken, 2004 OK 84, ¶13, 102 P.3d 670; Balfour v. Nelson, 1994 OK 149, ¶8, 890 P.2d 916, 39 A.L.R.5th 935.

12. Keating v. Edmondson, 2001 OK 110, ¶8, 37 P.3d 882; McSorley v. Hertz Corp., 1994 OK 120, ¶6, 885 P.2d 1343; Oglesby v. Liberty Mut. Ins. Co., 1992 OK 61, ¶8, 832 P.2d 834.

13. Haney v. State, 1993 OK 41, ¶5, 850 P.2d 1087; Public Serv. Co. of Oklahoma v. State *ex rel*. Corp. Comm'n, 1992 OK 153, ¶8, 842 P.2d 750.

14. Minie v. Hudson, 1997 OK 26, ¶7, 934 P.2d 1082; Fuller v. Odom, 1987 OK 64, ¶4, 741 P.2d 449; Darnell v. Chrysler Corp., 1984 OK 57, ¶5, 687 P.2d 132.

15. Oklahoma Ass'n for Equitable Taxation v. City of Oklahoma City, 1995 OK 62, ¶5, 901 P.2d 800, *cert. denied*, 516 U.S. 1029, 116 S.Ct. 674, 133 L.Ed.2d 523 (1995); Wilson v. State of Oklahoma *ex rel*. Oklahoma Tax Comm'n, 1979 OK 62, ¶5, 594 P.2d 1210.

16. Haggard v. Haggard, 1998 OK 124, ¶1, 975 P.2d 439; Price v. Southwestern Bell Tel. Co., 1991 OK 50, ¶7, 812 P.2d 1355.

17. State *ex rel*. Dept. of Human Serv. v. Colclazier, 1997 OK 134, ¶9, 950 P.2d 824; Matter of Estate of Flowers, 1993 OK 19, ¶11, 848 P.2d 1146.

18. White v. Lim, see note 11, supra; Rout v. Crescent Public Works Auth., 1994 OK 85, ¶10, 878 P.2d 1045.

19. Title 12 O.S. 2011 §2606(B), see note 10, supra.

20. The term "may" is ordinarily construed as permissive. See, MLC Mort. Corp. v. Sun America Mortgage Co., 2009 OK 37, fn. 17, 212 P.3d 1199; Osprey LLC v. Kelly-Moore Paint Co., Inc., 1999 OK 50, ¶14, 984 P.2d 194; Shea v. Shea, 1975 OK 90, ¶10, 537 P.2d 417.

21. Partial Transcript of Jury Trial, July 7-9, 2009, Volume I, providing in pertinent part at pp. 88-90:

". . . THE COURT: Okay. Is there anything about your training or experience that might impact on the way you'd look at this trial?

JUROR NORTON: No, except that I deal with - I do deal with diabetics daily. . . .

THE COURT: Have you ever dealt with someone with Charcot foot?

JUROR NORTON: No. . . .

THE COURT: You've already said you've dealt with diabetics and, I assume, have diabetics on your patient roll. And I'm assuming that some of them have probably had complications arising from that diabetes.

JUROR NORTON: Yes.

THE COURT: Would that experience make it difficult for you to be impartial in this lawsuit?

JUROR NORTON: (Shook head from side to side.)

. . . THE COURT: Do you feel confident that you will not be that ER nurse that I talked about earlier and substitute your experience for the testimony of the witnesses in this trial?

JUROR NORTON: Yes. . . ."

22. Affidavit of Dayle Baker, Plaintiff's Exhibit D to Motion for Judgment Notwithstanding the Verdict or in the Alternative Motion for New Trial, filed March 24, 2008.

23. Title 12 O.S. 2011 §2606(B), see note 10, supra. See also, the following cases in which evidence was admissible as "extraneous" under the statutory provision: Propst v. Alexander, see note 5, supra [In a negligence case, jurors considered workers' compensation after plaintiff's surgeon accidentally mentioned it in violation of motion in limine.]; Willoughby v. City of Oklahoma City, 1985 OK 64, 706 P.2d 883 [Juror conducted independent investigation relating to cause of death.]; Negrate v. Gunter, 1955 OK 118, 285 P.2d 194 [Jurors viewed exhibits which had not been admitted into evidence.]; Peoples Finance & Thrift Co. v. Ferrier, 1942 OK 343, 129 P.2d 1015 [Jurors considered a memo used by counsel that was not admitted into evidence.]; Swift & Co. v. Kirkley, 1942 OK 395, 131 P.2d 998 [Jurors viewed premises where accident could have happened without court permission]; Graybeal v. Martin Sand & Gravel, 2008 OK CIV APP 28, 179 P.3d 1278 [Jurors' affidavits admissible where jury foreperson made statement of fact indicating that personal representative had received large insurance settlement.]; Thompson v. Krantz, 2006 OK CIV APP 60, 137 P.3d 693 [A juror in a medical malpractice case conducted an internet search and obtained evidence regarding medical procedures and the results of other, similar lawsuits.]; Crane v. Nuttle, 2005 OK CIV APP 73, 121 P.3d 1124 [Three jurors viewed the accident scene to "see how the accident could have happened" without court permission.]; Bledsoe By & through Bledsoe v. Truster, 1992 OK CIV APP 25, 839 P.2d 673 [Jury misconduct in speculating that excluded deposition contained material weighing on decision].

24. See, Marquez v. City of Albuquerque, 399 F.3d 1216 (10th Cir. 2005); Kendrick v. Pippin, 252 P.3d 1052 (Colo. 2011); Meyer v. State, 80 P.3d 447 (Nev. 2003); State v. Mann, 39 P.3d 124 (N.M. 2002); People v. Maragh, 94 N.Y.2d 569, 708 N.Y.S.2d 701, 729 N.E.2d 701 (2000); Brooks v. Zahn, 170 Ariz. 545, 826 P.2d 1171 (Ct.App. 1991); Baker v. Wal-Mart Stores, Inc., 727 S.W.2d 53 (Tex.App. 1987). See also, M. Mushlin, "Bound and Gagged: The Peculiar Predicament of Professional Jurors," 25 Yale L. & Pol'y Rev. 239 (2007).

25. See, Stevens v. State, 94 Okla.Crim. 16, 232 P.2d 949 (1951) [Election foreperson reflects evidence of juror's qualities for leadership.].

26. See, ¶15 and accompanying footnotes, supra.

27. Barnhart v. International Harvester Co., 1968 OK 49, ¶0, 441 P.2d 1000.

28. Title 12 O.S. 2011 §2606(B), see note 10, supra.

GURICH, J., specially concurring in result:

¶1 The trial judge, in this case, after hearing arguments from both parties, granted the plaintiffs' motion for new trial, finding juror misconduct during deliberations. Because the trial judge was in the best position to evaluate the post-trial motions of the parties, I concur with the majority that the Defendants did not overcome the heavy burden of proving that the trial judge abused his discretion in granting a new trial. Taliaferro v. Shahsavari, 2006 OK 96, ¶ 14-15, 154 P.3d 1240, 1244-45. However, the majority does not address whether and to what extent jurors may rely upon professional or occupational expertise during deliberations and whether a juror's statements based on such expertise constitute extraneous prejudicial information. I write separately to comment on these issues.

¶2 Over the past thirty years, occupational exemptions from jury service have been eliminated across the country.[1] Oklahoma is no exception.[2] The only professionals exempt from jury service in Oklahoma state courts are Justices of the Supreme Court, judges of the Court of Civil Appeals, judges of the Court of Criminal Appeals, judges of the district courts, sheriffs, and "licensed attorneys engaged in the practice of law." 38 O.S. 2009 § 28. Jurors with professional or occupational expertise routinely sit on juries, and often, as in this case, they sit on cases involving an issue related to their area of expertise.

¶3 Parties to the litigation are responsible for questioning prospective jurors during voir dire regarding any knowledge or expertise they may have in an area relevant to the litigation. Any concerns about a juror's ability to remain fair and impartial because of his or her exper-

tise should be resolved before the jury is seated. See Rule 6, Rules for District Courts of Oklahoma, 12 O.S. Ch. 2, App. If a juror with expertise remains on the jury, the trial court, in addition to giving Oklahoma Uniform Jury Instruction 1.4,[3] should consider giving the following instruction:

> Should you have professional or occupational expertise in an area that is relevant to this litigation, you may rely on that expertise and experience in informing your deliberations. You may share that expertise and experience with other members of the jury as it applies to the specific evidence introduced in this case. However, you may not consider extra facts or law, not introduced at trial, that are specific to parties or an issue in this case that may be based on your professional or occupational expertise.[4]

¶4 No error is committed when jurors with professional or occupational expertise rely on their expertise to evaluate the evidence. But when a jury verdict is challenged on such grounds, the trial court should set aside the verdict only when it is clear a juror has introduced specific facts or legal content relevant to the case from outside the record.[5]

¶5 Generally, affidavits, depositions, and oral testimony of jurors may not be used to impeach a jury verdict. Oxley v. City of Tulsa, 1989 OK 166, ¶ 25, 794 P.2d 742, 747. Section 2606(B) is an exception to this general rule. Id. It authorizes jurors to testify regarding allegations of misconduct:

> *A juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention* or whether any outside influence was improperly brought to bear upon any juror. An affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying **shall not be received for these purposes**. 12 O.S. 2001 § 2606(B) (emphasis added).

¶6 To set aside a verdict for juror misconduct based on the introduction of extraneous prejudicial information to the jury, the trial court must find both that extraneous information was improperly before the jury and that the extraneous information prejudiced the verdict.[6] See id. When determining whether a juror with expertise improperly introduced extraneous information to the jury, the trial court must first decide whether the "experience used by the juror in deliberations [was] part of the juror's background, gained before the juror was selected to participate in the case," or was the result of independent investigation into a matter relevant to the case. Id.

¶7 If the trial court finds that extraneous information was introduced to the jury, it must also determine that the extraneous information *prejudiced* the jury's verdict. Because section 2606(B) prohibits a juror from testifying "to the effect of anything upon the juror's mind or another juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes during deliberations," the trial court's inquiry into the element of prejudice must be an objective one. The trial court must determine whether the average hypothetical juror would be influenced by the juror misconduct. Meyer, 80 P.3d at 566. Affidavits or statements by jurors about the *actual effect* of the misconduct on the deliberations or their individual decisions are *not* admissible to determine the impact of the misconduct upon a verdict. Id. Rather, the trial court should consider, for example, how the material was introduced to the jury, the length of time it was discussed by the jury, the timing of its introduction, whether the information was ambiguous, vague, or specific in content, whether it was cumulative of other evidence adduced at trial, whether it involved a material or collateral issue, or whether it involved inadmissible evidence. Id.

¶8 Such an approach by trial courts protects the policy behind section 2606(B):

> [T]here are compelling interests for prohibiting testimony about what goes on in the jury room after a verdict has been rendered. *The rule protects the finality of verdicts. It protects jurors from harassment by counsel seeking to nullify a verdict. It reduces the incentive for jury tampering. It promotes free and frank jury discussions that would be chilled if threatened by the prospect of later being called to the stand. Finally, it preserves the community's trust in a system that relies on the decisions of laypeople [that] would all be undermined by a barrage of postverdict scrutiny.*

United States v. Benally, 546 F.3d 1230, 1233-34 (10th Cir. 2008) (internal citations and quotations omitted).[7] Additionally, this approach recognizes the traditional role of the jury. Jurors are expected to call on their personal experi-

ences and common sense in reaching a verdict. Oklahoma Uniform Jury Instruction 1.4 provides: "You may make deductions and reach conclusions *which reason and common sense* lead you to draw from the facts which you find to have been established by the testimony and evidence in the case." Oklahoma Uniform Jury Instruction 1.4 (emphasis added). Instruction 1.8A also instructs the jury to make its decision based on "the reasoning" each juror has. Oklahoma Uniform Jury Instruction 1.8A.

¶9 The line between a juror's application of his or her professional or occupational expertise to evidence in the record and a juror's introduction of legal content or specific factual information learned from outside the record is often a fine one. As such, the procedure set forth in section 2606(B) must be precisely followed, and a jury verdict set aside only when it is clear a juror with professional or occupational expertise has introduced specific facts or legal content relevant to the case from outside the record. Otherwise, all jury verdicts are subject to challenge.

1. For a discussion of occupational exemptions from jury service and the recent statutory reforms abolishing most occupational exemptions, see Michael B. Mushlin, Bound and Gagged: The Peculiar Predicament of Professional Jurors, 25 Yale L. & Pol'y Rev. 239 (2007); See also Jury Service Reform, American Tort Reform Association (2011), http://www.atra.org/issues/jury-service-reform.

2. In 2004, the Legislature amended 38 O.S. § 28 to encourage jury service by business and other professionals by reducing the time commitment and allowing professionals flexibility in rescheduling to meet the needs of their offices.

3. "Do not read newspaper reports or obtain information from the internet about this trial or the issues, parties or witnesses involved in this case, and do not watch or listen to television or radio reports about it. Do not attempt to visit the scene or investigate this case on your own." Oklahoma Uniform Jury Instruction 1.4.

4. See Kendrick v. Pippin, 252 P.3d 1052, 1063 (Colo. 2011).

5. A majority of courts, including the Tenth Circuit, have held that jurors' intradeliberational statements, when based on personal knowledge and occupational or professional experience, do not constitute extraneous prejudicial information. This approach allows jurors with professional or occupational expertise to rely on that knowledge to inform their deliberations and to communicate their opinions to fellow jurors so long as they do not bring in legal content or specific factual information learned from outside the record. Under this approach, jurors with expertise can apply their expertise to evidence already introduced at trial. See e.g., Kendrick, 252 P.3d 1052; Marquez v. City of Albuquerque, 399 F.3d 1216 (10th Cir. 2005); Meyer v. State, 80 P.3d 447 (Nev. 2003); State v. Mann, 39 P.3d 124 (N.M. 2002); Brooks v. Zahn, 826 P.2d 1171 (Ariz. 1991); Baker v. Wal-Mart Stores, Inc., 727 S.W.2d 53 (Tex. App. 1987).

6. This Court has applied the extraneous-prejudicial-information exception contained in § 2606(B) on two previous occasions. See Oxley, 1989 OK 166, 794 P.2d 742; Willoughby v. City of Okla. City, 1985 OK 64, 706 P.2d 883.

7. This Court has recognized that 12 O.S. 2001 § 2606(B) is "substantially similar to the federal rule"; therefore, Benally's discussion of Federal Rule of Evidence 606(B) is instructive. Willoughby, 1985 OK 64, ¶ 12, 706 P.2d 883, 887.

WINCHESTER, J., with whom Edmondson, J., joins, dissenting:

¶1 I dissent to today's majority opinion because I do not believe that a juror's personal experiences constitute an external influence under the meaning of Section 2606(B). The majority affirms the granting of a new trial based solely on the affidavit of one of the jurors in the case alleging that the jury foreperson "shared her knowledge of the proper care and treatment of diabetic patients" in jury deliberations.[1] I do not believe that the jury's free deliberation process should be tampered with on such thin grounds. Thus, I would sustain the jury verdict and find the proposed juror affidavit inadmissible.

¶2 It is the court's duty to protect jury verdicts from unwarranted intrusions. Jurors may not testify to invalidate their own verdict unless extraneous prejudicial information is brought to their attention or an improper outside influence is brought to bear upon them. 12 O.S. 2001 § 2606(B). The rule that jurors may not impeach their verdict was designed to encourage free and frank discussion among jurors, promote verdict finality, protect jurors from harassment by losing parties, and preserve the viability of the jury system. *U.S. v. Benally*, 546 F.3d 1230, 1234 (10th Cir. 2008). The majority opinion threatens these goals.

¶3 Prior to trial, the parties and their counsel were well aware of the foreperson's work experience as a home health nurse who had dealt with diabetic patients on numerous occasions. In fact, the juror was questioned about her employment in-depth on *voir dire*. She freely disclosed that she was a licensed practical nurse and she also admitted that diabetics were common among her patients. Despite this knowledge, and the ability to dismiss the juror during *voir dire*, the parties and their counsel opted to retain her as a juror and thereby waived any objections to her qualifications.

¶4 The majority claims that the foreperson's conduct improperly injected extraneous prejudicial information into the deliberation process. In support of this claim, the majority places heavy reliance on the fact that the foreperson stated she would not substitute her experiences for those of the testimony from the trial witnesses, going so far as to claim that the foreperson *lied* under oath during *voir dire*.[2] Notably, there is not one shred of evidence that the foreperson, or any of the other jurors, did not base her decision on the evidence presented in the case. That she may have applied personal observations, obtained from her job as a

home health nurse, to the facts of this case does not present the catastrophic prejudice the majority contends it does.

¶5 In *Benally*, the Tenth Circuit cautioned courts to be careful "not to confuse a juror who introduces outside evidence with a juror who brings his personal experiences to bear on the matter at hand." *U.S. v. Benally*, 546 F.3d 1230, 1237 (10th Cir. 2008)(citing *Marquez v. City of Albuquerque*, 399 F.3d 1216, 1223 (10th Cir.2005) ("A juror's personal experience, however, does not constitute 'extraneous prejudicial information.'"). In *Marquez v. City of Albuquerque*, 399 F.3d 1216 (10th Cir.2005), a juror's experience training police dogs was specifically relevant to the case at issue and it was learned that the juror had, in fact, discussed that experience to help the jury determine the issue before it which was whether the use of a police dog constituted excessive force. The Tenth Circuit held that the juror's comments were not extraneous, prejudicial information. *Marquez v. City of Albuquerque*, 399 F.3d 1216, 1223 (10th Cir.2005).[3]

¶6 Attacking a jury verdict with juror comments made during deliberation impermissibly leads to public exposure of what was intended to be a private discussion, exactly what § 2606(B) was designed to avoid. Internal influences on a verdict during the jury's deliberative process do not constitute outside influences and evidence thereof is inadmissible to impeach a jury's verdict. Here, there is absolutely no evidence that the foreperson brought any extraneous facts specific to the litigants or the case into the jury room or that she conducted any independent fact-finding regarding the case. Rather, the statements attributed to her came from her own work experience dealing with diabetic patients. Diabetes is, unfortunately, a common ailment that many people have either dealt with personally or who have family members or friends that have it, as indicated by several of the jurors during *voir dire.*

¶7 The necessity of democracy requires juries to have great latitude during deliberation. All jurors enter the jury system with a variety of life experiences, including their work experience. It is difficult to fathom any jury arriving at a verdict in a case without some, if not all, of the members drawing on their own experiences and asserting their individual ideas and opinions on the matters submitted to them. A juror's personal experience, be it professional or otherwise, so long as not directly related to the facts and parties in the underlying litigation, does not constitute a prejudicial, external influence necessitating a new trial. Accordingly, I dissent.

1. The jury verdict was 9-3 in favor of the defendants. Juror Baker, the affiant, apparently was not unduly influenced by the foreperson as she did not join the verdict for Defendants. Regardless, Section 2606(B) prohibits a juror from testifying as to "the effect of anything upon the juror's mind or another juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes during deliberations." 12 O.S. 2001 § 2606(B).

2. "[A]llowing juror testimony through the backdoor of a voir dire challenge risks swallowing the rule. A broad question during voir dire could then justify the admission of any number of jury statements that would now be re-characterized as challenges to voir dire rather than challenges to the verdict. Given the importance that Rule 606(b) places on protecting jury deliberations from judicial review, we cannot read it to justify as large a loophole as [the defendant] requests." *United States v. Benally*, 546 F.3d 1230, 1236 (10th Cir.2008).

3. Significantly, not one of the cases cited by the majority finds that the personal or professional experience of a juror is the type of extraneous influence allowed to be exposed by the affidavits of other jurors after trial. Rather, all of the cited cases deal with actual, concrete influences such as external exhibits, independent investigations or the injection of facts outside the record of the specific case. There were no such external influences brought to bear on the instant matter. Numerous other jurisdictions have held that a juror's statements made during deliberation, when based on personal knowledge that is gained through work or otherwise and not directly related to the litigation at issue, do not constitute prejudicial, extraneous information. *See, e.g., U.S. ex rel. Owen v. McMann*, 435 F.2d 813, 817 (2nd Cir. 1970)("[T]he Court has never suggested that jurors, whose duty it is to consider and discuss the factual material properly before them, become 'unsworn witnesses' within the scope of the confrontation clause simply because they have considered any factual matters going beyond those of record. To resort to the metaphor that the moment a juror passes a fraction of an inch beyond the record evidence, he becomes 'an unsworn witness' is to ignore centuries of history and assume an answer rather than to provide the basis for one."); *Hard v. Burlington Northern Railroad Co.*, 870 F.2d 1454, 1462 (9th Cir. 1989)("It is expected that jurors will bring their life experiences to bear on the facts of a case); *Bethea v. Springhill Memorial Hosp.*, 833 So. 2d 1 (Ala. 2002)(jurors' discussion during deliberation of their personal knowledge of or experience with induced labor, which was at heart of dispute, held not extraneous, prejudicial information); *Brooks v. Zahn*, 826 P.2d 1171, 1177-1178, (Ariz. App.1991)("We expect jurors to draw upon their common sense and experience and use their knowledge to assist in reaching a verdict. … [W]e [must] distinguish between a juror's knowledge, opinions, feelings or bias and 'the type of after-acquired information that potentially taints a jury verdict.' … [The juror's] statements are the product of her own experience and knowledge. We reject the invitation to categorize specialized knowledge possessed by a juror and discussed during deliberations as extrinsic or extraneous information. To do so would cause endless examination into jurors' comments during deliberations to determine whether a particular juror drew upon unusual or expert knowledge to reach a verdict."); *Leavitt ex rel. Leavitt v. Magid*, 598 N. W.2d 722 (Neb. 1999)(legal knowledge of attorney-juror on issue of proximate cause, brought into jury deliberations, was not prejudicial, extraneous information); *Baker v. Wal-Mart Stores, Inc.*, 727 S.W.2d 53, 55 (Tex.App. 1987)(in negligence action to recover damages for personal injuries, jurors could not testify as to medical information supplied by another juror who was a registered nurse since the source of the information was inside the jury, not outside); *Caldararo v. Vanderbilt Univ.*, 794 S.W.2d 738 (Tenn.App. 1990)(foreman's claim during deliberations that because he was married to nurse he had specialized knowledge about diabetics was not extraneous information).

2012 OK 43

U.S. BANK, N.A., as Trustee, for Credit Suisse First Boston HEAT 2005-4, Plaintiff/Appellee, v. JOHN W. ALEXANDER, III, and LISA ALEXANDER, Defendants/Appellants,

AND CITIFINANCIAL SERVICES, INC., Defendant.

No. 109,648. May 1, 2012

ON APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY HONORABLE TOM A. LUCAS DISTRICT JUDGE

¶0 This matter comes before this Court as an accelerated appeal from an order granting summary judgment in favor of U.S. Bank National Association, as Trustee, for Credit Suisse First Boston HEAT 2005-4, against John W. Alexander, III, and Lisa Alexander.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

Sally E. Garrison, BAER, TIMBERLAKE, COULSON AND CATES, P.C., Oklahoma City, Oklahoma; Mark Edward Hardin, Tulsa, Oklahoma; Kari Y. Hawkins, Oklahoma City, Oklahoma, for Plaintiff/Appellee.

Michael R. Warkentin, MICHAEL R. WARKENTIN, P.C., Norman, Oklahoma, for Defendants/Appellants.

COMBS, J.

¶1 On May 10, 2005, John W. Alexander, III (Alexander), executed a note to MILA, Inc., DBA Mortgage Investment Lending Associates, Inc. (MILA), and a mortgage to Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for MILA and its successors and assigns. The mortgage also contains language, identifying MERS as the mortgagee under this security instrument.

¶2 Wells Fargo Bank, N.A. (Wells Fargo), filed a foreclosure petition on July 23 2009, alleging appellant defaulted on the note for installments beginning April 1, 2009.[1] The petition further states Wells Fargo was the present holder of the note and mortgage, and Wells Fargo took the note and mortgage for good and valuable consideration from the original lender. A copy of the note and part of the mortgage was attached to the original petition. The note attached to the original petition contained no indorsements.

¶3 On October 6, 2009, an Order Granting Motion for Substitution of Plaintiff and Modification of Caption was filed in response to a Motion filed that same date. Appellee, U.S. Bank National Association, as Trustee, for Credit Suisse First Boston HEAT 2005-4 (Appellee) was substituted in place of Wells Fargo. The motion stated Wells Fargo had subsequently assigned all of its rights in the mortgage to Appellee. Appellee also filed, on October 6, 2009, its First Amended Petition. This amended petition re-alleged all of the allegations of Wells Fargo's petition and identified additional defendants as parties who may have an interest in the property. Appellee attached to the amended petition, a copy of the same unindorsed note and mortgage originally executed by the Appellant John W. Alexander, III, in 2005.

¶4 Appellants (John W. Alexander, III, and Lisa Alexander) never answered the petition and a judgment was entered against Appellants on April 19, 2010. One day later, on April 20, 2010, Appellants' counsel made an entry of appearance and the judgment was vacated by order of May 19, 2010.

¶5 On June 8, 2010, Appellee filed a motion for summary judgment. Appellee claims, in this motion for summary judgment, it is the holder of the note and mortgage, and that Appellants have been in constant default since the July 1, 2009, installment payment was due. Appellee further alleges that Appellants have made no tender sufficient to reinstate the loan, and there has been no extension or renewal of the note. Appellee attached a copy of the same unindorsed note and parts of the mortgage included in its First Amended Petition. It also attached an affidavit and assignment of real estate mortgage. The affidavit was executed by a Vice President Loan Documentation of Appellee and generally affirms the allegations in the motion. The assignment of real estate mortgage reflects an execution date of August 13, 2009, but made effective March 1, 2005.[2] This assignment was from MERS (as nominee for the lender) to Appellee of the real estate mortgage **"together with the note, debts and claims thereby secured."** (emphasis added).

¶6 Appellants filed an objection to Appellee's motion for summary judgment and later filed a supplement to the objection. Appellants challenged certain comments in Wells Fargo's motion to substitute which stated Wells Fargo subsequently assigned its rights under the mortgage to Appellee after the filing of the original petition on July 23, 2009. The assignment of real estate mortgage executed August 13, 2009, is from MERS to Appellee. This document, it is asserted by Appellee, provides evidence of the attempt to assign the note. **The**

assignment of real estate mortgage from MERS to Appellee, was made retroactive to March 1, 2005, seventy (70) days prior to the note and mortgage being executed. Appellants assert the retroactive assignment may have been designed to cover possible violations of prohibited transactions for retirement plans or to demonstrate the transfer occurred prior to MILA filing bankruptcy on July 7, 2007. Appellants demanded, in their response to the motion for summary judgment, proof that MILA had authority to execute an assignment of the mortgage and indorsement of the note.

¶7 Appellants assert the note provided by Appellee does not have an indorsement and they claim such indorsement is necessary under the Uniform Commercial Code, 12A O.S. 2001, Sections 3-103(a), 3-203 and 3-204. Appellants fear without an indorsement they are vulnerable to future liability on the original note by another party.[3]

¶8 A summary order was filed August 18, 2010, denying Appellee's motion for summary judgment because there were factual issues to be resolved.

¶9 Appellee filed a second motion for summary judgment on April 15, 2011. Appellee attached to the second motion for summary judgment, for the first time, a copy of the note with a blank allonge purportedly executed by an assistant funding manager of MILA. This allonge reflects "payable to the order of" "without recourse." Appellee asserted appellant did not contest the genuineness, authenticity and execution of the note and mortgage, and further, Appellants admitted at deposition they were behind on their payments.[4] Therefore, Appellee asserted a prima facie case for foreclosure, specifically a valid mortgage exists and there had been a default.

¶10 Appellants filed an objection and cross motion for summary judgment on May 4, 2011. Appellants admit Alexander signed the note and mortgage on May 5, 2005. Appellants allege, on July 7, 2007, MILA filed for Chapter 11 bankruptcy in the Western District of Washington, and there has been no relief from the automatic stay for the subject property of this action.[5]

¶11 The trial court, on June 7, 2011, granted summary judgment in favor of Appellee and awarded Appellee costs and attorney fees. On June 10, 2011, Appellee alleges counsel for Appellants would not sign the journal entry of judgment because he thought attorney fees were unreasonable.[6] Appellee filed a motion to settle journal entry on June 17, 2011, and Appellants filed an objection on June 27, 2011. The basis for the objection is that Appellee's attorney fees are unreasonable due to Appellants' inability to determine who was the holder of the note by reason of the inconsistencies in the various pleadings, and Appellees' failure to provide loan transfer documents to Appellants when requested in discovery.

¶12 Appellants filed their petition in error on July 7, 2011, and later amended the petition in error to include the file stamped copy of the journal entry of judgment filed August 15, 2011. The Journal Entry of Judgment favored Appellee and found no substantial controversy as to any material fact. The Journal Entry of Judgment also denied Appellants cross motion for summary judgment.

STANDARD OF REVIEW

¶13 An appeal on summary judgment comes to this court as a *de novo* review. *Carmichael v. Beller, 1996 OK 48, ¶2, 914 P.2d 1051, 1053*. All inferences and conclusions are to be drawn from the underlying facts contained in the record and are to be considered in the light most favorable to the party opposing the summary judgment. *Rose v. Sapulpa Rural Water Co., 1981 OK 85, 631 P.2d 752*. Summary judgment is improper if, under the evidentiary materials, reasonable individuals could reach different factual conclusions. *Gaines v. Comanche County Medical Hospital, 2006 OK 39, ¶4, 143 P.3d 203, 205.*

ANALYSIS

¶14 Appellant asserts nineteen (19) issues on appeal.[7] These include error by the trial court in not requiring more contemporaneous evidence of the transfer of the note and mortgage when allegedly Appellee's counsel and its loan servicer, ASC, did not know which entity had standing to enforce the note. Appellants argue the trial court committed reversible error by not requiring a valid assignment of mortgage prior to commencement of the foreclosure action. Essentially, Appellant is arguing Appellee did not have standing to bring the foreclosure action because there was a material issue of fact as to whether the Appellee was a person entitled to enforce the note at the time Appellee filed its amended petition. Standing is the dispositive issue in this case.

¶15 Appellee argues in its response to petition in error that at no time did appellant ever file an answer and no defenses have ever been asserted or preserved.[8] Appellee asserts that Appellants' nineteen (19) issues are either abandoned, expired or are in contravention of established law. Appellees acknowledge the only issues preserved for appeal are those raised by Appellants in pleadings or oral argument. In the opinion of the Appellee, the preserved issues are: 1) did Appellee provide sufficient evidence that it has standing to enforce the note and mortgage; 2) does negotiation of the note carry with it the security interest independent of a formal assignment; 3) if not, is the formal assignment in this matter effective; and 4) are the attorney's fees reasonable.

¶16 As previously identified, the dispositive issue is whether or not Appellee had standing at the time Appellee filed their first amended petition. We hold that the issue of standing as well as other material issues of fact remain that must be determined by the trial court. Therefore summary judgment was inappropriate.

¶17 This Court has previously held:

> Standing, as a jurisdictional question, may be correctly raised at any level of the judicial process or by the Court on its own motion. This Court has consistently held that standing to raise issues in a proceeding must be predicated on interest that is "direct, immediate and substantial." Standing determines whether the person is the proper party to request adjudication of a certain issue and does not decide the issue itself. The key element is whether the party whose standing is challenged has sufficient interest or stake in the outcome.

Matter of the Estate of Doan, 1986 OK 15, ¶7, 727 P.2d 574, 576. In *Hendrick v. Walters*, 1993 OK 162, ¶4, 865 P.2d 1232, 1234, this Court also held:

> Respondent challenges Petitioner's *standing* to bring the tendered issue. Standing refers to a person's legal right to seek relief in a judicial forum. *It may be raised as an issue at any stage of the judicial process by any party or by the court sua sponte.* (emphasis original)

¶18 Furthermore, in *Fent v. Contingency Review Board, 2007 OK 27, footnote 19, 163 P.3d 512, 519*, this Court stated "[s]tanding may be raised at any stage of the judicial process or by the court on its own motion." Additionally in *Fent*, this Court stated:

> Standing refers to a person's legal right to seek relief in a judicial forum. The three threshold criteria of standing are (1) a legally protected interest which must have been injured in fact- *i.e.*, suffered an injury which is actual, concrete and not conjectural in nature, (2) a causal nexus between the injury and the complained-of conduct, and (3) a likelihood, as opposed to mere speculation, that the injury is capable of being redressed by a favorable court decision. The doctrine of standing ensures a party has a personal stake in the outcome of a case and the parties are truly adverse.

Fent v. Contingency Review Board, 2007 OK 27, ¶7, 163 P.3d 512, 519-520. In essence, a plaintiff who has not suffered an injury attributable to the defendant lacks standing to bring a suit. And, thus, "standing [must] be determined as of the commencement of suit; . . ." *Lujan v. Defenders of Wildlife, 504 U.S. 555, 570, n.5, 112 S.Ct. 2130, 2142, 119 L.Ed. 351 (1992).*

¶19 To commence a foreclosure action in Oklahoma, a plaintiff must demonstrate it has a right to enforce the note and, absent a showing of ownership, the plaintiff lacks standing. *Gill v. First Nat. Bank & Trust Co. of Oklahoma City, 1945 OK 181, 159 P.2d 717.*[9] An assignment of the mortgage, however, is of no consequence because under Oklahoma law, "[p]roof of ownership of the note carried with it ownership of the mortgage security." *Engle v. Federal Nat. Mortg. Ass'n, 1956 OK 176, ¶7, 300 P.2d 997, 999*. Therefore, in Oklahoma it is not possible to bifurcate the security interest from the note." *BAC Home Loans Servicing, L.P. v. White, 2011 OK CIV APP 35, ¶ 10, 256 P.3d 1014, 1017.* Because the note is a negotiable instrument, it is subject to the requirements of the UCC. Thus, a foreclosing entity has the burden of proving it is a "person entitled to enforce an instrument" by showing it was "(i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 12A-3-309 or subsection (d) of Section 12A-3-418 of this title." 12A O.S. 2001 § 3-301.

¶20 To demonstrate you are the "holder" of the note you must prove you are in possession of the note and the note is either "payable to

bearer" (blank indorsement) or to an identified person that is the person in possession (special indorsement).[10] Therefore, both possession of the note and an indorsement on the note or attached allonge[11] are required in order for one to be a "holder" of the note.

¶21 To be a "nonholder in possession who has the rights of a holder" you must be in possession of a note that has not been indorsed either by special indorsement or blank indorsement. No negotiation has occurred because the person now in possession did not become a holder by lack of the note being indorsed as mentioned. Negotiation is the voluntary or involuntary transfer of an instrument by a person other than the issuer to a person who thereby becomes its holder. 12A O.S. 2001, § 3-201. Transfer occurs when the instrument is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument. 12A O.S. 2001, § 3-203. Delivery of the note would still have to occur even though there is no negotiation. Delivery is defined as the voluntary transfer of possession. 12A O.S. 2001, § 1-201(b)(15). The transferee would then be vested with any right of the transferor to enforce the note. 12A O.S. 2001, § 3-203(b). Some jurisdictions have held, without holder status and therefore the presumption of a right to enforce, the possessor of the note must demonstrate both the fact of the delivery and the purpose of the delivery of the note to the transferee in order to qualify as the person entitled to enforce. *In re Veal, 450 B.R. 897, 912 (B.A.P. 9th Cir. 2011*). See also, 12A O.S. 2001, § 3-203.

¶22 Appellants argue Appellee does not have standing to bring this foreclosure action. Appellee claimed in its first amended petition, by re-alleging all of the allegations in Wells Fargo's original petition, it was the present holder of the note and mortgage. Over a year later in Appellee's second motion for summary judgment, it refers to itself as the current holder and assignee of the mortgage. Not until the second motion for summary judgment did Appellee attach an undated allonge to the note. No other pleading or motion prior to this time contained an indorsement on the note. This allonge was signed by an assistant funding manager of the lender, MILA. Had this allonge been attached to Appellee's first amended petition there would not be an issue as to whether Appellee was the holder of the note upon commencement of its action. However, there still remains the issue of whether or not MILA had been in bankruptcy when the note was transferred and its authority to transfer the note. Therefore, we cannot determine whether Appellee was a holder of the note at the time it filed its first amended petition. This issue of fact must be resolved upon remand to the trial court. Further the assignment of a mortgage which is made effective by its own terms to a timeframe **prior** to the execution of the original note and mortgage, raises obvious issues of material fact as to the validity of the assignment and the activities of the Appellee.

¶23 The assignments purport to transfer not only the mortgage but also the note. However, these assignments are made by MERS, as nominee for MILA. Neither Oklahoma law nor the mortgage documents define the term "nominee." In the absence of a contractual definition, the parties leave the definition to judicial interpretation. Black's Law Dictionary (9th ed. 2009) defines a nominee as " [a] person designated to act in place of another usu[ally] in a very limited way." (9th ed. 2009). "This definition suggests that a nominee possesses few or no legally enforceable rights beyond those of a principal whom the nominee serves." *Landmark Nat. Bank v. Kesler, 289 Kan. 528, 216 P.3d 158, 166 (2009)*. By definition a "nominee" is substantially the same as the definition of an "agent."[12] The legal status of a nominee/agent, then, depends on the context of the relationship of the nominee/agent to its principal.

¶24 MERS is only the nominee of the lender for purposes of the mortgage. Arguably, MERS may be able to assign the mortgage as nominee of the lender, but there is no evidence of authority for MERS to indorse the note.

¶25 Although Appellee has argued it holds the note, the only evidence in the record supporting it was a holder of the note was the allonge which was presented over a year after Appellee filed its first amended petition. As shown, a party must have standing at the time it commences its action. *Deutsche Bank National Trust v. Brumbaugh, 2012 OK 3, ___P.3d___*. Because standing is the dispositive issue, we will not address the remaining issues on appeal. The determination of the remaining relevant issues must be made by the trial court on remand.

CONCLUSION

¶26 It is a fundamental precept of the law to expect a foreclosing party to actually be in possession of its claimed interest in the note, and

to have the proper supporting documentation in hand when filing suit, showing the history of the note, so that the defendant is duly apprised of the rights of the plaintiff. This is accomplished by showing the party is a holder of the instrument or a nonholder in possession of the instrument who has the rights of a holder, or a person not in possession of the instrument who is entitled to enforce the instrument pursuant to 12A O.S. 2001, § 3-309 or 12A O.S. 2001, § 3-418. Likewise, for the homeowners, absent adjudication on the underlying indebtedness, today's decisions to reverse the grant of a motion for summary judgment cannot cancel their obligation arising from an authenticated note, or insulate them from foreclosure proceedings based on proven delinquency. See, *U.S. Bank National Association v. Kimball, 27 A.3d 1087, 75 UCC Rep.Serv.2d 100, 2011 VT 81 (VT 2011)*; and *Indymac Bank, F.S.B. v. Yano-Horoski, 78 A.D.3d 895, 912 N.Y.S.2d 239 (2010).* This Court's decision in no way releases or exonerates the debt owed by the defendants on this home.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

¶27 CONCUR: TAYLOR, C.J., KAUGER, WATT, EDMONDSON, REIF, COMBS, JJ.

¶28 DISSENT: WINCHESTER (JOINS GURICH, J.), GURICH (BY SEPARATE WRITING), JJ.

¶29 RECUSED: COLBERT, V.C.J.

1. On April 15, 2011, Appellee filed a second motion for summary judgment with an attached affidavit. The affiant is an employee of Wells Fargo DBA America's Servicing Company and was dated November 16, 2010. It states that the appellant defaulted on installments **due July 1, 2009** and each and every month thereafter.

2. The original note was signed on May 10, 2005.

3. Appellants also challenge the authority of MILA to assign any interest by reason of the bankruptcy action in the Western District of Washington; challenge the signature on the assignment made by an attorney of the Appellees law firm; assert a federal law which prohibits transfers of securitized mortgages ninety days after closing; assert that ASC (Americas Servicing Company) a division of Wells Fargo breached a duty of good faith by offering a "special forbearance agreement", receiving a payment and returning a payment; assert the Uniform Retirement System for Justices and Judges holds assets which include securitized loans and possibly the loan subject to this action , objecting to a member of the system rendering a decision in the matter;

4. December 3, 2010, deposition of John Alexander "[so] at the time, we were getting behind on our payments. We were one month behind." December 3, 2010, deposition of Lisa Alexander, John's wife, "[We] were behind May and June. And in July, I called them to let them know I was going to make May, June and July payments, which was approximately July the 2nd. And they said that the company had already foreclosed."

5. Appellants objection and cross motion raised many of the same issues raised in the response to the first motion for summary judgment including but not limited to; disputing the authority of the attorney of record to sign as a vice president of MERS; Appellants had made three increased payments to ASC, a subsidiary to determine if Appellants could continue in their current payments; also asserting ASC intentionally delayed and harassed the Appellants forbearance agreement efforts and dropped the Appellants forbearance efforts in violation of the Home Affordable Modification Program (HAMP).

Appellees replied to the objection to their Summary judgment asserting their possession of the note and the assignment of the mortgage, notwithstanding the effective date stated in the assignment, notwithstanding the assignment of the note at a later date, minimizes the importance of the assignment of the mortgage. Appellee admits to no evidence to support the allegation of a loss of the mitigation effort and forbearance efforts.

6. Plaintiff's Motion to Settle Journal Entry and Application to Tax Costs and Attorney fees filed June 17, 2011.

7. (paraphrased) Did the trial court commit reversible error: 1) when applying the case law of local community banks being in possession of the original note and mortgage as proof of their standing to sue when a securitized mortgage trust portfolio is involved; 2) in not requiring more contemporaneous evidence of the transfer of note and mortgage in light of the loan servicer, ASC and plaintiff's counsel not knowing the real party in interest; 3) in not requiring plaintiff to have a valid assignment of mortgage prior to commencement of suit; 4) granting the earlier default judgment and failure to grant defendant's cross motion for summary judgment; 5) in granting substitution of parties without new summons being issued and served; 6) by granting summary judgment to plaintiff and not to defendants when pleadings state Wells Fargo was the holder of the note on July 23, 2009, and that date and October 6, 2009, the note and mortgage were transferred to US Bank NA when the assignment of mortgage, filed on August 13, 2009, purported to be effective March 1, 2005, seventy (70) days prior to date of note and mortgage; 7) in recognizing an assignment of real estate mortgage executed by an attorney whose last name is in the firm's name of plaintiff's counsel as an authorized party; 8) in acknowledging an assignment of real estate mortgage with a prior effective date; 9) in acknowledging a corrective assignment of mortgage only filed with the court in a reply to a cross motion for summary judgment on May 26, 2011; 10) in not requiring proof of plaintiff's loan servicer giving a reason for the unexplained discontinuation of the forbearance agreement, even after limited discovery responses, when their records show the payments were made; 11) in not requiring plaintiff to offer HAMP after or if plaintiff proves it is the real party in interest; 12) in not considering the effect of MILA's ongoing Chapter 11 bankruptcy on its authority to assign notes and mortgages; 13) in not considering the effect of plaintiff's own prospectus prohibiting transfers into the Trust after ninety (90) days; 14) in granting summary judgment in light of this ninety (90) day requirement when plaintiff's own counsel argues that the assignment of real estate mortgage also transferred the note which date is either August 13, 2009, or, according to the corrective assignment, August 18, 2010; 15) in not requiring more substantial proof than the accompanying affidavit that the file was in order, as both affidavits covered a file that contains an assignment of real estate mortgage bearing an effective date seventy (70) days prior to the actual execution of the mortgage; 16) in not considering whether the Trust's governing state law allows the trustee to waive the ninety (90) day transfer requirement; 17) by not finding that any Oklahoma court should recuse itself because the Uniform Retirement System for Justices and Judges has assets with Credit Suisse First Boston's HEAT pooled securitized loans; 18) granting attorney fees which would not have occurred but for plaintiff's own timeline pleading errors and admitted by virtue of corrective, defective assignments of real estate mortgage; 19) in awarding attorney fees that were the result of plaintiff's errors.

8. The order vacating the judgment did not require Appellants to file an answer. Rule 13 of the Rules of the District Courts of Oklahoma allows a motion for summary judgment to be filed "any time after the filing of the action." 12 O.S. Supp. 2002, ch.2, app. (Rule 13(a)). The rule only requires a defendant to file a "concise written statement of the material facts as to which a genuine issue exists and the reasons for denying the motion." 12 O.S. Supp. 2002, ch.2, app. (Rule 13(b)). It also requires the adverse party to "attach to the statement evidentiary material justifying the opposition to the motion." It appears Appellants substantially complied with this rule by their assertions in their counter motion for summary judgment.

9. This opinion occurred prior to the enactment of the Oklahoma UCC. It is, however, possible for the owner of the note not to be the person entitled to enforce the note if the owner is not in possession of the note. (See the *REPORT OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, APPLICATION OF THE UNIFORM COMMERCIAL CODE TO SELECTED ISSUES RELATING TO MORTGAGE NOTES (NOVEMBER 14, 2011)).*

10. 12A O.S. 2001, §§ 1-201(b)(21), 3-204 and 3-205.

11. According to Black's Law Dictionary (9th ed. 2009) an allonge is "[a] slip of paper sometimes attached to a negotiable instrument for

the purpose of receiving further indorsements when the original paper is filled with indorsements." See, 12A O.S. 2001, § 3-204(a). It should be noted that under 12A O.S. 2001, § 3-204(a) and its comments in paragraph 2, it is no longer necessary that an instrument be so covered with previous indorsements that additional space is required before an allonge may be used. An allonge, however, must still be affixed to the instrument.

12. Black's Law Dictionary defines "agent" as "[o]ne who is authorized to act for or in place of another; a representative." 9th ed. 2009.

GURICH, J., with whom WINCHESTER, J. joins dissenting:

¶1 I respectfully dissent. Although the majority in this case reverses summary judgment to resolve factual issues on remand, a careful look at the record reveals no issues of material fact remain, and the majority's reversal is based solely on the issue of standing. The record in this case indicates that after substituting the correct plaintiff, filing an amended petition, and filing a motion for summary judgment, which was denied by the trial court because issues of material fact remained, Plaintiff filed a second motion for summary judgment. Attached to Plaintiff's Second Motion for Summary Judgment was an indorsed-in-blank allonge, the mortgage, an assignment of mortgage, and an affidavit in support of the motion for summary judgment. Because the Plaintiff was the proper party to pursue the foreclosure and because the Plaintiff presented the proper documentation at summary judgment to prove such, the trial court was correct in granting summary judgment to plaintiff. I would affirm the trial court for the reasons stated in my dissenting opinions in Deutsche Bank National Trust Co. v. Matthews, 2012 OK 14, ___P.3d___ (Gurich, J., dissenting) and Bank of America, NA v. Kabba, 2012 OK 23, ___P.3d___ (Gurich, J., dissenting).[1]

1. Although I originally concurred in the majority opinion in Deutsche Bank National Trust v. Brumbaugh, 2012 OK 3, ___P.3d___, which the majority now cites as authority in this case, after further consideration, I disagree with the majority's analysis in that case, and my views on the issues in these cases are accurately reflected in J.P. Morgan Chase Bank N.A. v. Eldridge, 2012 OK 24, ___P.3d___ (Gurich, J., concurring in part and dissenting in part); Kabba, 2012 OK 23, ___P.3d___ (Gurich, J., dissenting); CPT Asset Backed Certificates, Series 2004-EC1 v. Kham, 2012 OK 22, ___P.3d___ (Gurich, J., dissenting); Deutsche Bank National Trust Co. v. Richardson, 2012 OK 15, ___P.3d___ (Gurich, J., concurring in part and dissenting in part); and Matthews, 2012 OK 14, ___P.3d___ (Gurich, J., dissenting).

2012 OK 44

STATE OF OKLAHOMA ex rel. Oklahoma Bar Association, Complainant, v. ANDREW RAYMOND TOWNSEND, Respondent.

OBAD #1809; SCBD #5783. May 8, 2012

ORIGINAL PROCEEDING FOR DISCIPLINE

¶0 The complainant, Oklahoma Bar Association (Bar Association), filed its original complaint against the respondent, Andrew Raymond Townsend (Townsend/attorney), under Rules 6 and 10, Rules Governing Disciplinary Proceedings, 5 O.S. 2011 Ch. 1, App. 1-A, alleging ten counts of professional misconduct including practicing law while incapacitated, ineffective communication with clients, neglect, and failure to respond to Bar Association inquiries. Without admitting the alleged charges, the attorney agreed to an order of interim suspension. Thereafter, Townsend filed a petition for reinstatement which was treated as a motion to lift the interim suspension. When the Bar Association objected to this characterization, they were ordered to proceed at a hearing to establish, by clear and convincing evidence, either the allegations of incapacity or misconduct. On allegations almost identical to those initially presented in the original complaint, the Bar Association proceeded under Rule 6. The trial panel recommended that costs be assessed against the attorney and that he receive a private reprimand or, in the alternative, a suspension retroactive to the effective date of the voluntary suspension. The Bar Association was ordered to file an amended complaint conforming to the evidence. It recommended that the attorney: be privately reprimanded; continue counseling for one year through Lawyers Helping Lawyers; and pay costs of the proceedings. The gravamen of each of the ten counts brought against the respondent revolves around neglect and the failure to adequately and punctually communicate with clients at a time when the attorney was experiencing depression and anxiety attacks associated with multiple stressors in both his professional and personal life. In consideration of the facts and upon *de novo* review, we hold that clear and convincing evidence supports reinstatement to the Bar Association, public censure, and the payment of costs of $1,193.91.

REINSTATEMENT GRANTED; DISCIPLINED BY PUBLIC REPRIMAND, AND COSTS IMPOSED.

Debbie L. Maddox, Assistant General Counsel, Oklahoma Bar Association, Oklahoma City, Oklahoma, for Complainant,

Andrew Raymond Townsend, Tulsa, Oklahoma, *Pro se*.

WATT, J.:

¶1 Originally, the Bar Association filed a complaint against the respondent under Rules 6, 6.2A,[1] and 10,[2] Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 1-A, charging the respondent with ten counts of professional misconduct. Although the parties agreed to the entrance of an order of interim suspension, Townsend did not admit the truth of the misconduct allegations.[3]

¶2 The hearing before the trial panel proceeded as a Rule 6 matter, any allegations of incapacity being dismissed.[4] During the hearing process, Townsend admitted: missing court dates resulting in rulings adverse to clients; failing to communicate; lack of diligence; and not returning files to clients in a timely manner.

¶3 In consideration of the facts and upon *de novo* review,[5] we determine that the clear and convincing evidence[6] demonstrates that: 1) Townsend engaged in misconduct warranting discipline; 2) the respondent is no longer under an incapacity which would preclude him from practicing law; and 3) the attorney's conduct will conform to the high standards required of the Bar Association. The attorney's misconduct warrants a public reprimand and the imposition of costs in the amount of $1,193.91.

FACTUAL AND PROCEDURAL BACKGROUND

¶4 Townsend was admitted to the practice of law in April of 1998. Ten years later, in early 2008, the Bar Association began receiving grievances regarding the attorney's: failure to communicate with clients; missing of court dates, resulting in the entrance of dismissals, summary adjudications, and award of attorney fees to opposing counsel; not returning files; refusing timely to refund unearned fees; and not completing or instigating promised legal representation. The exhibits from the hearing held on November 16, 2011, also reflect that Townsend did not respond timely to Bar Association inquiries regarding the allegations.

¶5 It is undisputed that during the same period that complaints were being received, Townsend was involved in significant personal and professional situations which resulted in his entering an extended period of debilitating depression and anxiety severe enough to bring on panic attacks. Factors contributing to the attorney's mental state included: a difficult divorce involving child custody issues, resulting in the attorney receiving an unsatisfactory visitation schedule; the suicide of a close friend for which, to some extent, Townsend thought himself responsible; an extended illness of an office mate increasing the attorney's work load; and an unplanned office split in which the partnering attorney took all the office furniture, the client files, the computer, had the office telephone number transferred, and drained all cash from bank accounts leaving Townsend with business-related bills and no resources to pay them.

¶6 The Bar Association filed its formal complaint on March 2, 2010. On March 25, 2010, this Court entered an agreed order of interim suspension, without the attorney's having admitted any incapacity limiting his ability to practice or the truth of the pending disciplinary charges. Pursuant to Rule 10.12, Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 1-A,[7] all documents were filed in a non-public docket maintained under the supervision of the Chief Justice.

¶7 On August 26, 2011, after having been suspended some twenty-two (22) months,[8] Townsend filed a petition for reinstatement in the office of the Clerk of the Supreme Court. An order issued from the Chief Justice on August 31, 2011, recasting the petition for reinstatement as a "motion to lift interim suspension." The order directed the Bar Association to set the matter for a hearing before the trial panel either on allegations that the attorney was personally incapable of practicing law or was subject to discipline. The Bar Association responded on September 12, 2012, objecting to the recasting based on due process concerns for Townsend and prior proceedings in similar causes. At the same time, the Bar Association took full responsibility for any failure in properly facilitating the matter and renewed a request that all proceedings remain confidential. An order issued by the Chief Justice on October 5, 2011, clarified that the burden of proof of either incapacity or misconduct lies with the Bar Association and again directed that the matter proceed either as a Rule 10[9] incompetency proceeding or as a Rule 6[10] disciplinary proceeding. In either case, the order provides that the burden of proof is on the Bar Association to establish the allegations by clear and convincing evidence.[11]

¶8 The record from the hearing before the trial panel on November 16, 2011 reflects that the Bar Association chose to proceed under Rule 6 and that Townsend was not claiming any disability and understood the consequenc-

es of the proceeding.[12] The Bar Association suggested a private reprimand along with the payment of costs as the appropriate discipline. Townsend agreed. After taking the matter under advisement before concluding the hearing, the trial panel recommended the same, but made the recommendation of a private reprimand contingent on the respondent maintaining monthly contact for a year with Lawyers Helping Lawyers.[13] Townsend indicated that he had no problem with the continued contact with his Lawyers Helping Lawyers advisor.[14] Nevertheless, the trial panel report, filed on January 17, 2012, does not contain the recommendation regarding continued counseling. Rather, it recommends: 1) the imposition of a private reprimand; 2) if any suspension be imposed, it run from the time of the voluntary interim suspension; and 3) the payment of costs.

¶9 The Bar Association filed its brief in chief on February 9, 2012. The briefing cycle was completed on March 9, 2012 with the Bar Association's notice that it would waive the filing of a reply brief as the respondent did not present timely an answer brief.

JURISDICTION AND STANDARD OF REVIEW

¶10 It is this Court's nondelegable, constitutional responsibility to regulate both the practice and the ethics, licensure, and discipline of the practitioners of the law. The duty is vested solely in this department of government.[15] Our determinations are made *de novo*.[16] We bear the ultimate responsibility for deciding whether misconduct has occurred and, if so, what discipline is warranted. Neither the finding of facts of the trial panel nor its view of the evidence or the credibility of witnesses bind this Court. The recommendation is merely advisory.[17] The same is true when the parties stipulate to misconduct and a recommendation for discipline.[18] Before this Court will discipline an errant attorney, misconduct must be demonstrated by clear and convincing evidence.[19] To make this determination, we must be presented with a record sufficient to permit an independent, on-the-record review for the crafting of appropriate discipline.[20] The record submitted is sufficient for this Court to make the required decisions.

Count I — McCluskey

¶11 McCluskey hired Townsend to represent him in a personal injury matter after being involved in a car accident. When settlement attempts failed, the attorney filed a lawsuit. Things appear to have proceeded routinely until December 4, 2008 when the cause was set for disposition regarding a trial date. Townsend did not appear and failed to respond to later filed motions or to inquiries from his client. In February of 2009, the cause was dismissed without prejudice. Although McCluskey was successful in obtaining new counsel, he was left with several outstanding medical bills causing him significant financial hardship. Townsend recognized McCluskey's complaints were valid and expressed remorse for the difficulties and frustrations he caused his client and the client's family. He acknowledged that his conduct did not meet professional standards by failing to appear at the scheduled hearing, not diligently prosecuting his client's case, neglecting to keep his client informed, and failing to respond to Bar inquiries in a timely fashion.

Count III — Brown/Fabela[21]

¶12 Fabela hired the respondent in an automobile negligence case. Townsend filed a lawsuit on behalf of the client in June of 2007. In September of the same year, the cause was dismissed without prejudice for failure to diligently prosecute, specifically, the defendant was not served. Fabela made numerous attempts to reach Townsend over a period of three years. When he did finally reach him, Townsend didn't inform the client of the dismissal. Finally, Fabela hired new counsel to prosecute the matter. On June 14, 2008, Fabela's grandmother, Betty Brown, filed the complaint on his behalf. Townsend explained that the lawsuit was essentially filed to preserve the statute of limitations and to facilitate settlement. He agreed that he did not move forward in the cause as he should have and did not pursue settlement negotiations.

Count IV: Comeaux[22]

¶13 On October 18, 2007, Comeaux hired Townsend to enter an appearance in an ongoing contract dispute. Approximately a month later, she paid him one thousand dollars ($1,000.00) as a retainer. Townsend did not enter an appearance in the cause or undertake any steps to settle the matter. After attempting to reach him on more than twenty (20) occasions without response, Comeaux filed a grievance on September 30, 2008. At the hearing, Townsend didn't really remember the specifics of his agreement with the client. After he received the grievance, he returned the retainer

and sent Comeaux an apology letter explaining his situation regarding the divorce, suicide, office breakup, depression, and anxiety. Earlier he had advised her to retain new counsel. Townsend was certain that he had received the grievance and that he did not respond in a timely manner.

Count V — Armington

¶14 Armington hired Townsend in November of 2007 and filed a grievance against him on January 21, 2009. Armington needed assistance in a personal injury case which the attorney took on a contingency fee basis. The client heard nothing from Townsend until January of 2008. Thereafter, Armington reached the attorney's former partner who supplied him with an additional phone number. Townsend contacted the client in August of 2008, telling him that he was preparing a settlement package which would be mailed to the insurance adjuster. Armington heard nothing else from the attorney. No settlement was ever pursued. Armington suffered significant hardship as a result of delays resulting in his inability to pay related medical bills. The attorney did not perform the work for which he was hired, misled his client regarding the progress of the case, and abandoned his client. When Townsend did finally respond to the Bar Association's inquiries, he indicated that although he had done some work in the cause, he was unable to complete the case due to his depression and anxiety issues. The attorney filed a lien release so that any settlement reached could be disbursed to his former client.

Count VI — Jones

¶15 Jones hired the respondent to complete a last will and testament and trust, paying him $1,125.00 on January 23, 2008. Jones heard nothing else from Townsend and filed a grievance with the Tulsa County Bar Association which forwarded the cause to the Bar Association on April 15, 2008. The Bar Association contacted the respondent's former partner. Guten explained that he had accidently taken some client files from Townsend's office and those belonging to Jones were included. Guten assisted Jones in executing the documents without charge. Townsend failed to communicate with his client, abandoned him, and retained a fee, a portion of which was unearned.

Count VII — Hayes Grievance

¶16 Hayes paid Townsend $150.00 to write a letter to the Oklahoma Medical Examiner's Office regarding her daughter's death. When she heard nothing back from him and could not contact him, she filed a complaint with the Tulsa County Bar Association on December 9, 2008 which was referred to the Bar Association. Working with the Bar Association, Townsend eventually sent a refund check and letter of apology to Hayes. Nevertheless, he failed to represent his client's interests, did not communicate with Hayes, did not do the work for which he was hired, and failed to return an unearned fee in a timely manner.

Count VIII — Loyd

¶17 In May of 2008, Townsend was successful in getting the parental rights of a minor child Loyd wanted to adopt terminated. He did not follow through and assist the Loyds in perfecting the adoption. When the couple was finally able to reach him in October of that year, he explained that he had family problems which were interfering with his law practice and referred them to a former law partner. Townsend did not forward the file to the attorney but did refund his retainer. The attorney failed to provide competent representation in a diligent manner or to communicate with his client in a timely fashion.

Count IX — Land

¶18 On April 3, 2008, Land hired Townsend to probate his wife's estate, paying him $1,500.00. Land became concerned when he heard nothing from the respondent and could not contact him. When he checked with the Court Clerk's Office in December, he was told no cause had been filed on his behalf. Land filed a complaint with the Tulsa County Bar Association which was forwarded to the Bar Association in March of 2009. Townsend took a fee from his client for which he apparently provided no services, failed to communicate, and abandoned the cause. The fee was ultimately refunded.

Count X — Martin

¶19 Martin hired Townsend to write a demand letter to a former employer in a matter involving the client's wrongful termination. The understanding was that if the demand was not met, the attorney would file suit. When his demands were ignored, Martin began trying, unsuccessfully, to contact the respondent. He

had left some particularly important, original documents in Townsend's possession. Martin hired new counsel who also was unable to retrieve the materials. Townsend failed to file anything on Land's behalf, did not return files in his keeping, and abandoned his client's interests.

¶20 a. Clear and convincing evidence was presented of the attorney's: lack of a current mental disability; professional misconduct; and and willingness to comply with the high standards required of the practitioners of the law in Oklahoma.[23]

¶21 There is no question that Townsend's transgressions violated multiple standards set out in the rules which govern the practice of law in Oklahoma.[24] It is also obvious that the respondent was under an incredible amount of stress.

¶22 Townsend has two sons. During the time of the misconduct, he was going through a difficult divorce resulting in time with the children being limited. He felt guilty for failing his sons. Originally, Townsend had three attorneys in his firm. One of the lawyers experienced an extended illness during which she was absent from the office, resulting in work loads being increased on the two remaining attorneys. Becoming frustrated with the situation, the second attorney left the practice, leaving Townsend responsible for his own clients and those of the remaining lawyer. To add insult to injury, the attorney for whom Townsend had been covering came in and took all the office furniture, files, computer, and other equipment, and drained the firm's operating accounts, leaving Townsend with bills but no assets. During this period, Townsend had already begun to withdraw and was spending most of his time locked in his apartment. One friend tried to call him every day over several weeks, but Townsend could not bring himself to pick up the phone. His guilt and withdrawal became worse when he was informed that the friend had committed suicide. Townsend began to have panic attacks whenever he attempted to go into his office or to answer phone calls.

¶23 The respondent presented proof from his licensed marriage and family therapist acting through Lawyers Helping Lawyers that when he came to him in November of 2008, he was suffering from acute depression and anxiety. At that time, the attorney was unable to deal with day-to-day activities of returning phone calls, going into the office, communicating with clients, or resolving work-related problems. He utilized alcohol as a crutch during this time period but did not present symptoms of dependence. On the day of the hearing, the therapist testified that he felt those issues had been resolved and that Townsend had acquired the skills, along with a system of support, to allow him to return to the practice of law without relapse.

¶24 The Bar Association investigator testified that she never felt that Townsend was simply ignoring inquiries regarding his misconduct. Rather, she always thought the misconduct was tied to a depressive mental illness caused by a situational event or events going on in his life during the critical time period. The investigator was pleased when Townsend willingly became involved with his therapist on her recommendation that he seek assistance dealing with his mental state through Lawyers Helping Lawyers. When she made inquiries of the complaining parties, many of them felt that Townsend should be allowed to return to the practice of law.[25] The same recommendation has been made by the Assistant General Counsel prosecuting the case and the trial panel.

¶25 Townsend has expressed true remorse for his actions. He has communicated apologies to all clients involved and has returned all fees related to the complaints, even where he may have been entitled to some form of recompense. He willingly participated in Lawyers Helping Lawyers and agreed to do the same in the future. An Assistant United States Attorney testified that Townsend was revered in the legal community. His mother, close friend, and therapist all opined that, with the experience of depression and anxiety, he has built up a system of support which should assist him in not returning to his formerly debilitating state of mind. The attorney has participated in continuing legal education seminars and stayed current on the law and legal developments. He is current on all Bar-related fees.

¶26 The factors this Court considers on reinstatement are: present moral fitness; consciousness of the wrongfulness of actions bringing disrepute on the profession; extent of rehabilitation; seriousness of the original misconduct; conduct subsequent to discipline; time elapsed since the original discipline; petitioner's character, maturity, and experience; and present competence in legal skills.[26] **The factors weighing most heavily when a suspension arises out of**

incapacity are: 1) the extent of rehabilitation of the affliction attributable to the incapacity; 2) the conduct subsequent to the suspension and treatment received for the condition; and 3) the time which has elapsed since the suspension.[27]

¶27 It has been in excess of two years since the agreed interim suspension was entered. Upon *de novo* review,[28] we find that clear and convincing evidence[29] demonstrates that: 1) Townsend engaged in misconduct warranting discipline; 2) respondent is no longer under an incapacity which would preclude him from practicing law; and 3) respondent's conduct will conform to the high standards required of the Bar Association.

¶28 b. The attorney's misconduct warrants public reprimand and the imposition of costs.

¶29 Before addressing the appropriate discipline to be imposed for Townsend's misconduct, we find it necessary to comment on the manner in which the Bar Association handled this cause. The Bar Association made promises to Townsend it had no authority to make. Townsend had every right under the disciplinary rules to expect that **as long as the matter remained simply a Rule 10 proceeding and this Court did not order otherwise**, all proceedings would remain confidential.[30] However, the Bar Association apparently guaranteed confidentiality throughout the disciplinary process without any authority for doing the same[31] under circumstances where Rule 10.11[32] and Rule 11.1,[33] construed together, specifically provide that a lawyer suspended because of personal incapacity shall[34] file a petition for reinstatement with the Clerk of the Supreme Court, a publicly accessible docket.[35]

¶30 **The Supreme Court created the Oklahoma Bar Association and delegated the duty to investigate grievances filed against Oklahoma lawyers to the Association's General Counsel. This Court promulgates the rules under which the Bar Association functions.**[36] **It is the official arm of the Court when acting on its behalf.**[37] **Every aspect of the Bar Association's adjudicative process is supervised by our *de novo* consideration.**[38]

¶31 This Court determines the appropriate discipline to be administered to preserve public confidence in the bar. Our responsibility is not to punish but to inquire into and gauge a lawyer's continued fitness to practice law, with a view to safeguarding the interest of the public, of the courts, and of the legal profession. Discipline is imposed to maintain these goals rather than as a punishment for the lawyer's misconduct.[39] Disciplinary action is also administered to deter the attorney from similar future conduct and to act as a restraining vehicle on others who might consider committing similar acts.[40] Discipline is fashioned to coincide with the discipline imposed upon other lawyers for like acts of professional misconduct.[41] Although this Court strives to be even-handed and fair in disciplinary matters, discipline must be decided on a case-by-case basis because each situation involves unique transgressions and mitigating factors.[42]

¶32 In similar causes involving attorneys determined to be incapable of practicing law, the breadth of discipline has been from public censure to suspensions of two years and one day.[43] Such suspensions are tantamount to disbarment in that the suspended lawyer must follow the same procedures for readmittance as would a disbarred attorney.[44]

¶33 Mitigating circumstances may be considered in the process of assessing the appropriate quantum of discipline.[45] When mental or physical conditions are presented as mitigating factors for assessment of one's culpability, there must be a causal relationship between the conditions and the professional misconduct.[46] Though emotional, psychological, or physical disability may serve to reduce the actor's ethical culpability, it will not immunize one from imposition of disciplinary measures that are necessary to protect the public.[47]

¶34 We are impressed with the Bar Association's investigator's tenacity in directing the attorney to a therapist through Lawyers' Helping Lawyers and with Townsend's willingness to seek and benefit from counseling sessions and appropriate medications. The majority of Townsend's wronged clients recommended that he be given a second chance. The attorney has repeatedly and sincerely expressed remorse for his actions.[48] Considering the attorney's misconduct, discipline imposed in similar causes, and the mitigating circumstances, we determine that the attorney should be disciplined by public reprimand. Townsend indicated to the trial panel that he would be happy to continue seeing his therapist through Lawyers Helping Lawyers.[49] We do not require the sessions as a condition of reinstatement. Nevertheless, we would suggest that those meet-

ings take place on a regular basis for twelve months following the date of this opinion.[50]

¶35 The attorney recognizes his responsibility to pay the fees and expenses of the investigation,[51] specifically agreeing to cover the costs of the original and **one copy of any transcripts**.[52] The Bar Association filed a motion to assess costs of $1,657.41. Included in that figure is transcript expense of $1,390.50, for an original and **two certified copies**.[53] Because Townsend is responsible for the costs of the original and only one copy, we determine that he should pay $927.00 of that expense.[54] Therefore, the attorney is hereby ordered to pay $1,193.91 for the costs of these proceedings as a prerequisite to reinstatement.

CONCLUSION

¶36 Rule 10 proceedings are confidential until this Court orders otherwise and a separate, non-public docket is maintained for that purpose under the supervision of the Chief Justice.[55] Here, the Rule 10 allegations were originally joined with the Rule 6 allegations but were dismissed at the time of the hearing before the trial panel. Although the Bar Association lacked the authority to make promises of blanket confidentiality in this matter, it did make such representations to Townsend. Therefore, in order that the respondent may be publicly reprimanded, we direct that confidentiality be suspended to the extent of publishing this opinion. The record and the transcripts shall remain on the non-public docket.[56]

¶37 Townsend stands publicly reprimanded. We additionally impose costs of $1,193.91 and encourage the respondent to consider continued contact with his therapist through Lawyers Helping Lawyers.

REINSTATEMENT GRANTED; DISCIPLINED BY PUBLIC REPRIMAND, AND COSTS IMPOSED.

TAYLOR, C.J., COLBERT, V.C.J., KAUGER, WATT, WINCHESTER, REIF, COMBS, GURICH, JJ. - concur

EDMONDSON, J. - concurs in part, dissents in part

1. Rule 6.2A, Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 1-A [Allowing for an emergency interim suspension where it appears that an attorney is personally incapable of practicing law and conduct poses an immediate threat of harm.].

2. Rule 10, Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 1-A [Suspension for personal incapacity to practice law.].

3. The original complaint was filed on March 2, 2010 pursuant to Rules 6, 6.2A, and 10, Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 1-A. Pursuant to this Court's order of February 16, 2012, a second complaint was filed conforming to the evidence presented at the November 16, 2011 hearing. The original complaint contained allegations of the violation of Rule 5.2, Rules Governing Disciplinary Proceedings, 5 O.S. 2001, Ch. 1, App. 1-A [Failure to respond fully and fairly to grievance.] and 10.1 [Practicing law while under an incapacity.], along with the allegations identical to those later raised in the amended complaint. The amended complaint was filed pursuant to Rule 6, Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 3-A. The allegations of the amended complaint encompass violations of the Rules of Professional Conduct, 5 O.S. 2011, Ch. 1, App. 3-A, specifically: Rule 1.1 [Competent representation, legal knowledge, skill, thoroughness, and reasonable preparation.]; Rule 1.3 [Diligence and promptness in representation.]; Rule 1.4 [Reasonable consultation with and prompt reply to client inquires.]; Rule 1.15 [Safekeeping of clients' property.]; Rule 1.16 [Declining or withdrawing from representation upon occurrence of mental or physical condition altering the lawyer's abilities to represent the client.]; and Rule 8.4 [Violation of Rules of Professional Conduct, engaging in conduct involving dishonesty, fraud, or misrepresentation, and engaging in conduct prejudicial to the administration of justice.]. A single allegation of violation of the Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 1-A, is alleged: Rule 1.3 [Commission of act contrary to prescribed standards of conduct.]. Although the amended complaint does not contain allegations of failure to respond, Rule 5.2, Rules Governing Disciplinary Proceedings, this note, supra, Townsend admitted in the hearing before the trial panel that he did not timely respond to grievance inquiries.

4. See, Transcript of Hearing before Trial Panel, November 16, 2011, at p. 9.

5. State *ex rel.* Oklahoma Bar Ass'n v. McCoy, 2010 OK 67, ¶2, 240 P.3d 675; State *ex rel.* Oklahoma Bar Ass'n v. Pacenza, 2006 OK 23, ¶2, 136 P.3d 616; State *ex rel.* Oklahoma Bar Ass'n v. Garrett, 2005 OK 91, ¶17, 127 P.3d 600.

6. Rule 11.4, Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 1-A; State *ex rel.* Oklahoma Bar Ass'n v. Munson, 2010 OK 27, ¶12, 236 P.3d 96.

7. Rule 10.12, Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 1-A providing:

"Except where disciplinary proceedings are involved (Rule 10.4), all proceedings under this Rule 10 shall remain confidential and shall not be a matter of public record, unless otherwise ordered by the Supreme Court. A separate, non-public docket and files shall be maintained for this purpose, under the supervision of the Chief Justice."

8. Transcript of Hearing, November 16, providing in pertinent part at pp. 9-10:

". . . MS. MADDOX: . . . Mr. Townsend's decision to self suspend is now I think we're looking at 22 months of time that has spent on bettering himself and his position. . . ."

9. Rule 10.1, Rules Governing Disciplinary Proceedings, see note 3, supra.

10. Rule 6.1, Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 1-A.

11. State *ex rel.* Oklahoma Bar Ass'n v. Whitebook, 2010 OK 72, ¶3, 242 P.3d 517.

12. See, Transcript of Hearing, November 16, 2001, Andrew Raymond Townsend testifying at p. 20.

13. See, Transcript of Hearing, November 16, 2011, providing in pertinent part at pp. 222-24.

14. Transcript of Hearing, November 16, 2011, providing in pertinent part at p. 225:

". . . MR. TOWNSEND: I'd be more than happy to meet with Chris Giles, who I've already been meeting with once a month, if that would be satisfactory.

MS. LOVING: Instead of Lawyers Helping Lawyers?

MR. TOWNSEND: Well, he was the counselor recommended to me through Lawyers Helping Lawyers and I mean, I could certainly continue to meet with him. . . ."

15. Title 5 O.S. 2011 §13; State *ex rel.* Oklahoma Bar Ass'n v. Farrant, 1994 OK 13, ¶13, 867 P.2d 1279; Tweedy v. Oklahoma Bar Ass'n, see note 38, infra.

16. State *ex rel.* Oklahoma Bar Ass'n v. Combs, 2008 OK 96, ¶11, 202 P.3d 330; State *ex rel.* Oklahoma Bar Ass'n v. Pacenza, see note 5, supra; State *ex rel.* Oklahoma Bar Ass'n v. Garrett, see note 5, supra.

17. Rule 6.15, Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 1-A; State *ex rel.* Oklahoma Bar Ass'n v. Besly, 2006 OK 18, ¶2, 136 P.3d 590; State *ex rel.* Oklahoma Bar Ass'n v. Taylor, 2003 OK 56, ¶2, 71 P.3d 18.

18. State *ex rel.* Oklahoma Bar Ass'n v. Combs, see note 16, supra; State *ex rel.* Oklahoma Bar Ass'n v. Besly, see note 17, supra; State *ex rel.* Oklahoma Bar Ass'n v. McGee, 2002 OK 32, ¶20, 48 P.3d 787.

19. State *ex rel.* Oklahoma Bar Ass'n v. Whitebrook, see note 11, supra; State *ex rel.* Oklahoma Bar Ass'n v. Rogers, 2006 OK 54, ¶9, 142 P.3d 428.

20. State *ex rel.* Oklahoma Bar Ass'n v. Schraeder, 2002 OK 51, ¶27, 51 P.3d 570; State *ex rel.* Oklahoma Bar Ass'n v. Perceful, 1990 OK 72, ¶5, 796 P.2d 627.

21. The trial panel found the evidence insufficient to sustain Count II - Pieper. We agree except to the extent that the attorney admitted failing to respond to Bar Association inquiries in violation of Rule 5.2, Rules Governing Disciplinary Proceedings, see note 3, supra.

22. Comeaux's name is misspelled throughout the hearing transcript as "Como."

23. Orders issued in this cause should not confuse the practicing bar as to reinstatement procedures where incapacity and misconduct are coupled. Just as is the case here, the attorney in State *ex rel.* Oklahoma Bar Ass'n v. Albert, 2007 OK 31, 163 P.3d 527, agreed to the entry of an order of interim suspension. Unlike Albert, Townsend did not admit misconduct or incapacity. Nevertheless, Townsend did seek the confidentiality afforded to respondents in disciplinary proceedings regarding the capacity to practice law. Rule 10.12, Rules Governing Disciplinary Proceedings, see note 7, supra. See also, respondent's Objection to Inclusion of Records in SCBD No. 5783 providing in pertinent part that "representations by counsel for the Oklahoma Bar Association were made that this matter would be held confidential and Respondent proceeded in this matter of good faith that the matter would remain confidential" and that "[t]he panel's ruling after hearing the evidence determined that the Respondent should not be subject to public censure. The filing of the record found in OBAD No. 1809 in the public record would countermand the spirit of the panel's ruling by, for all purposes, making the matter public. . . ." Albert made it clear that Rule 10.11, Rules Governing Disciplinary Proceedings, 5 O.S. 2011 Ch. 1, App. 1-A, directs that the procedures, insofar as they are applicable for resuming the practice of law after the removal of a personal incapacity, are the same procedures as those provided in Rule 11, following suspension upon disciplinary grounds.

24. See note 3, supra.

25. See, Transcript of Hearing, November 16, 2011, Cheryl Comeaux testifying in pertinent part at p 153 that the respondent deserved a second chance. Dorothy Brown wrote a letter dated November 14, 2011, in which she indicated that she thought Townsend deserved to have his license reinstated and that she would seek his services in the future. See, Complainant's Exhibit 88. Kenneth Land felt that the time off from the practice of law and participation with a therapist had been a good experience for Townsend and was not concerned that he would repeat the same mistakes. The same sort of statements were made by Nila Hayes, Erica Lloyd, and Landon Fabela. See, Transcript of Hearing, November 16, 2011, pp 199-200.

26. Matter of Reinstatement of Rhoads, 2005 OK 53, ¶3, 116 P.3d 187; Matter of Reinstatement of Gassaway, 2002 OK 48, ¶3, 48 P.3d 805; Matter of Reinstatement of Kamins, 1988 OK 32, ¶20, 752 P.2d 1125.

27. State *ex rel.* Oklahoma Bar Ass'n v. Albert, see note 23, supra.

28. State *ex rel.* Oklahoma Bar Ass'n v. McCoy, see note 5, supra; State *ex rel.* Oklahoma Bar Ass'n v. Pacenza, see note 5, supra; State *ex rel.* Oklahoma Bar Ass'n v. Garrett, see note 5, supra.

29. Rule 11.4, Rules Governing Disciplinary Proceedings, see note 6, supra; State *ex rel.* Oklahoma Bar Ass'n v. Munson, see note 6, supra.

30. Rule 10.12, Rules Governing Disciplinary Proceedings, see note 7, supra.

31. See, Complainant's Response Regarding January 18, 2012 Order, filed on February 26, 2012 providing in pertinent part:

". . . 3) Complainant represented to Respondent at the time Respondent consented to the interim suspension and Rule 20, RGDP, filings that all pleadings and associated records and exhibits would be kept confidential per Rule 10, RGDP.

4) Any procedural shortcomings in these proceedings are the fault of Complainant. Respondent should not be prejudiced by having sensitive mental health treatment information and other confidential records made public. . . ."

32. Rule 10.11, Rules Governing Disciplinary Proceedings, 5 O.S. 2011 Ch. 1, App. 1-A providing in pertinent part:

"(a) Procedures for reinstatement of a lawyer suspended because of personal incapacity to practice law shall be, insofar as applicable, the same as the procedures for reinstatement provided in Rule 11 following suspension upon disciplinary grounds. The petition shall be filed with the Clerk of the Supreme Court and the petitioner will be required to supply such supporting proof of personal capacity as may be necessary. . . ."

33. Rule 11.1, Rules Governing Disciplinary Proceedings, see note 53, infra.

34. The term "may" is ordinarily construed as permissive while "shall" is commonly considered to be mandatory. MLC Mort. Corp. v. Sun America Mort. Co., 2009 OK 37, fn. 17, 212 P.3d 1199; Osprey LLC v. Kelly-Moore Paint Co., Inc., 1999 OK 50, ¶14, 984 P.2d 194; Shea v. Shea, 1975 OK 90, ¶10, 537 P.2d 417.

35. See, Rule 10.11, Rules Governing Disciplinary proceedings, note 33, supra; Rule 11, Rules Governing Disciplinary Proceedings, note 53, infra. All briefs, motions, and other papers are filed with the Clerk of the Supreme Court. Rule 1.4, Supreme Court Rules, 12 O.S. 2011, Ch. 15, App. 1. Court dockets are also available online via the Oklahoma Supreme Court Network at www.oscn.net.

36. Preamble, Rules Creating and Controlling the Oklahoma Bar Association, 5 O.S. 2011, Ch. 1, App. 1 providing in pertinent part:

". . . The Supreme Court of Oklahoma does hereby create and continue an association of the members of the Bar of the State of Oklahoma to be known as the Oklahoma Bar Association, and promulgates the following rules for the government of the Association and the individual members thereof."

37. Section 1, Art. 1, Rules Creating and Controlling the Oklahoma Bar Association, 5 O.S. 2011, Ch. 1, App. 1 providing:

"The Oklahoma Bar Association is an official arm of this Court, when acting for and on behalf of this Court in the performance of its governmental powers and functions."

Tweedy v. Oklahoma Bar Ass'n, 1981 OK 12, ¶4, 624 P.2d 1049.

38. State *ex rel.* Oklahoma Bar Ass'n v. Whitworth, 2008 OK 22, ¶49, 183 P.3d 984; State *ex rel.* Oklahoma Bar Ass'n v. Bolton, see note 42, infra. Despite our concerns with the unauthorized promise of confidentiality made by the Bar Association, we are impressed with the integrity and empathy of the investigator, Dorothy Walos, in this cause and her interest in seeing that Townsend receive guidance through Lawyers Helping Lawyers. See, Transcript of Hearing, November 16, 2011, Andrew Raymond Townsend testifying in pertinent part at p. 50 and providing that "Dorothy, I think, did her best to try to prevent me from having to sit here today." See also, Transcript of Hearing, November 16, 2011, p.13, the Assistant General Counsel acknowledging that "Dorothy is the one to be credited with getting Mr. Townsend a very — a very paralyzed Mr. Townsend, to Lawyers Helping Lawyers and initiating something that might get him some help."

39. State *ex rel.* Oklahoma Bar Ass'n v. Phillips, 2002 OK 86, ¶21, 60 P.3d 1030; State *ex rel.* Oklahoma Bar Ass'n v. Bedford, 1997 OK 83, ¶18, 956 P.2d 148; State *ex rel.* Oklahoma Bar Ass'n v. English, 1993 OK 68, ¶12, 853 P.2d 173.

40. State *ex rel.* Oklahoma Bar Ass'n v. Pacenza, see note 5, supra; State *ex rel.* Oklahoma Bar Ass'n v. Badger, 1995 OK 113, ¶13, 912 P.3d 312; State *ex rel.* Oklahoma Bar Ass'n v. Hall, 1977 OK 117, ¶12, 567 P.2d 975.

41. State *ex rel.* Oklahoma Bar Ass'n v. Patterson, 2001 OK 51, ¶29, 28 P.3d 551; State *ex rel.* Oklahoma Bar Ass'n v. Eakin, 1995 OK 106, ¶0, 914 P.2d 644; State *ex rel.* Oklahoma Bar Ass'n v. Bolton, 1994 OK 53, ¶16, 880 P.2d 339.

42. State *ex rel.* Oklahoma Bar Ass'n v. Doris, 1999 OK 94, ¶38, 991 P.2d 1015; State *ex rel.* Oklahoma Bar Ass'n v. Rozin, 1991 OK 132, ¶10, 824 P.2d 1127.

43. State *ex rel.* Oklahoma Bar Ass'n v. McCoy, see note 5, supra [Suspension of two years and one day, with payment of costs, was warranted for attorney's misconduct including accepting cases while under a disability, lack of diligence, failure to communicate, failure to return unearned fees, filing of untimely responses to grievance inquiries, and conduct involving dishonesty, fraud, deceit, or misrepresentation.]; State *ex rel.* Oklahoma Bar Ass'n v. Beasley, 2006 OK 49, 142 P.3d 410 [Considering attorney's alcohol addition, attorney's failure to perform legal services, failure to communicate, and failure to respond to Bar Association investigations warranted suspension of two years and one day.]; State *ex rel.* Oklahoma Bar Ass'n v. Hummel, 2004 OK 30, 89 P.3d 1105 [Attorney subject to clinical depression suspended for one year for failure to communicate, failure to turn over client files, entering into settlement agreement without authority, and failure to return unearned funds where previously having received two public reprimands.]; State *ex rel.* Oklahoma Bar Ass'n v. Bolusky, 2001 OK 26, 23 P.3d 168 [Misrepresentation to three clients, failure to respond to Bar Association on multiple occasions, when accompanied by the stabilized condition of attorney's attention deficit disorder warranted suspension of two years and one day.]; State *ex rel.* Oklahoma Bar Ass'n v. Whitworth, see note 39, supra [Attorney violating rules relating to competence, reasonable diligence, keeping a client informed, and conduct prejudicial to administration of justice, while using drugs, warranted two-year suspension.]; State *ex rel.* Oklahoma Bar Ass'n v. Southern, 2000 OK 88, 15 P.3d 1 [Attorney disabled by untreated B12 disorder disciplined by public censure and imposition of probation for repeated neglect of clients and their cases and failure to cooperate in grievance process.]; State *ex rel.* Oklahoma Bar Ass'n v. Wright, 1997 OK 119, 957

P.2d 1174 [Despite evidence of depression, misconduct in nine estate matters, failure to act with reasonable diligence and promptness, failure to communicate with clients, charging unreasonable fees, and failure to respond to allegations and grievances filed by Bar Association warrant suspension for two years and one day.]; State *ex rel.* Oklahoma Bar Ass'n v. Donnelly, 1992 OK 164, 848 P.2d 543 [Public reprimand is appropriate sanction for lacking diligence and promptness in representing client, not keeping client informed, deceiving client, and not revealing alcoholism in previous disciplinary proceeding.].

44. Rule 11.1, Rules Governing Disciplinary Proceedings, see note 53, infra; State *ex rel.* Oklahoma Bar Ass'n v. Pacenza, see note 5, supra.

45. State *ex rel.* Oklahoma Bar Ass'n v. McCoy, see note 5, supra; State *ex rel*. Oklahoma Bar Ass'n v. Schraeder, see note 20, supra; State *ex rel*. Oklahoma Bar Ass'n v. Colston, 1989 OK 74, ¶20, 777 P.2d 920.

46. State *ex rel.* Oklahoma Bar Ass'n v. McCoy, see note 5, supra; State *ex rel*. Oklahoma Bar Ass'n v. Schraeder, see note 20, supra; State *ex rel*. Oklahoma Bar Ass'n v. Giger, 2001 OK 96, ¶15, 37 P.3d 856.

47. State *ex rel.* Oklahoma Bar Ass'n v. McCoy, see note 5, supra; State *ex rel*. Oklahoma Bar Ass'n v. Schraeder, see note 20, supra.

48. See, Transcript of Hearing, November 16, 2011, at p. 154.

49. Transcript of Hearing, November 16, 2011, Andrew Raymond Townsend testifying in pertinent part at p. 225:

". . . MR. TOWNSEND: I'd be more than happy to meet with Chris Giles, who I've already been meeting with once a month, if that would be satisfactory. . . . [Chris Giles] was the counselor recommended to me through Lawyers Helping Lawyers and I mean, I could certainly meet with him. . . ."

50. We do not make the meeting a condition of reinstatement as any relapse suffered by the respondent would make him subject to suspension. Nevertheless, we also view his agreement to continue with the sessions laudable. See, State *ex rel*. Oklahoma Bar Ass'n v. Albert, note 23, supra.

51. Rule 6.16, Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 1-A.

52. Rule 11.1, Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 1-A providing in pertinent part:

"(a) The applicant shall file an original and ten copies of a petition for reinstatement with the Clerk of the Supreme Court . . .

(c) The applicant shall pay a fee to cover the expenses of investigating and processing the application as determined by the Professional Responsibility Tribunal. In addition, the applicant shall pay the cost of the original and one copy of the transcript of any hearings held in connection with the application. . . ."

53. Complainant's Exhibit E, dated December 19, 2011, and attached to the Application to Assess Costs filed on January 17, 2012.

54. See, Rule 11.1, Rules Governing Disciplinary Proceedings, note 52, supra; Reinstatement of Moss, 1993 OK 16, ¶6, 848 P.2d 564.

55. Rule 10.12, Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 1-A, providing:

"Except where disciplinary proceedings are involved (Rule 10.4), all proceedings under this Rule 10 shall remain confidential and shall not be a matter of public record, unless otherwise ordered by the Supreme Court. A separate, non-public docket and files shall be maintained for this purpose, under the supervision of the Chief Justice."

State *ex rel.* Oklahoma Bar Ass'n v. McBride, 2007 OK 91, ¶32, 175 P.3d 379.

56. State *ex rel.* Oklahoma Bar Ass'n v. McBride, see note 55, supra.

OBA/CLE AND
OKLAHOMA ATTORNEYS MUTUAL INSURANCE COMPANY
PRESENT:

06 ★ 21 ★ 12

OBA Solo and Small Firm ★ Trial College ★

THE WILL OF FORTUNE: FROM PROBATE TO MALPRACTICE

PROGRAM PLANNERS/MODERATORS

PHIL FRAIM, OKLAHOMA ATTORNEYS MUTUAL INSURANCE, OKLAHOMA CITY
ALISON CAVE, OKLAHOMA ATTORNEYS MUTUAL INSURANCE, OKLAHOMA CITY
BILL BANDI, OKLAHOMA ATTORNEYS MUTUAL INSURANCE, OKLAHOMA CITY

TRIAL COLLEGE JUDGE

MICHAEL BURRAGE, WHITTEN BURRAGE LAW FIRM, OKLAHOMA CITY

MCLE
6 MCLE CREDIT 0 ETHICS

$125 EARLY-BIRD. At least 4 days prior to seminar
$150 LATE 4 days within seminar date


REGISTRATION - 7:30 A.M.
7:45
WELCOME
INCLUDES INTRODUCTIONS
PHIL FRAIM
1ST BREAK - 9 A.M.
9:15
FACT WITNESS EXAMINATION
WITNESS: ALISON CAVE
PLAINTIFF ATTORNEY: ALETIA TIMMONS
TIMMONS AND ASSOCIATES, OKLAHOMA CITY
DEFENDANT ATTORNEY: BETTY OUTHIER WILLIAMS
ATTORNEY AT LAW, MUSKOGEE
3:45
CLOSING STATEMENTS
PLAINTIFF ATTORNEY: GIL STEIDLEY
STEIDLEY & NEAL, PLLC, TULSA
DEFENDANT ATTORNEY: CHARLES ALDEN
ALDEN DABNEY, OKLAHOMA CITY
DON'T MISS THIS all-star CAST!
2ND BREAK - 3:30 P.M.
8
OPENING STATEMENT
PLAINTIFF ATTORNEY: MICHAEL HOGAN
ALLFORD, IVESTER, GREEN & HOGAN, MCALESTER
DEFENDANT ATTORNEY: JOE FARRIS
FELDMAN FRANDEN WOODARD & FARRIS, TULSA
LUNCH (INCLUDED IN REGISTRATION) 11:45
1 p.m.
EXPERT WITNESS EXAMINATION
PLAINTIFF EXPERT WITNESS: BILL BANDI
PLAINTIFF ATTORNEY: GEORGE CORBYN
CORBYN HAMPTON, OKLAHOMA CITY
DEFENDANT ATTORNEY: MURRAY ABOWITZ
ABOWITZ, TIMBERLAKE, DAHNKE & GISINGER, P.C., OKLAHOMA CITY
5 - WRAP UP
5:45 ADJOURN
REGISTER AT WWW.OKBAR.ORG/CLE

OBA Nominating Petitions

(See Article II and Article III of the OBA Bylaws)

OFFICERS

Vice President

Dietmar Caudle, Lawton

Nominating Petitions have been filed nominating Dietmar Caudle for election of Vice President of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2013. Fifty of the names thereon are set forth below:

A total of 78 signatures appear on the petitions.

Nominating Resolutions have been received from the following counties: Comanche, Cotton, Pottawatomie and Seminole

BOARD OF GOVERNORS

Supreme Court Judicial District No. 5

Sandee Coogan, Norman

Nominating Petitions have been filed nominating Sandee Coogan for election of Supreme Court Judicial District No. 5 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2013. Twenty-five of the names thereon are set forth below:

Peggy Stockwell, Richard Stevens, Michael Johnson, Jan Grant-Johnson, Daniel Sprouse, Gary A. Rife, Henry Herbst, Cheryl Clayton, Jan Meadows, Craig Sutter, Jim Drummond, Leland L. Shilling, Phil S. Hurst, David Swank, Rod Ring, Harold Heiple, Jama H. Pecore, Henry G. Ryan III, Don G. Pope, Alissa Hutter, Robert T. Rennie Jr., Dean Hart Jr., Holly Iker, Jose Gonzalez and Michael Ryan Rennie

A total of 51 signatures appear on the petitions.

You are not alone.

Men Helping Men.....

Oklahoma City • June 7, 2012

Time - 5:30-7 p.m.

Topic
Best Practices for Maintaining Personal Boundaries

Location
The Oil Center – West Building
2601 NW Expressway, Suite 108W
Oklahoma City, OK 73112

Tulsa • May 24, 2011

Time - 5:30-7 p.m.

Topic
The Challenges of Dealing with Difficult Clients

Location
The University of Tulsa College of Law
3120 East 4th Place, JRH 205
Tulsa, OK 74104

Women Helping Women.....

Oklahoma City • June 14, 2012

Time - 5:30-7 p.m.

Topic
Best Practices for Maintaining Personal Boundaries

Location
The Oil Center – West Building
2601 NW Expressway, Suite 108W
Oklahoma City, OK 73112

Tulsa • June 7, 2012

Time - 5:30-7 p.m.

Topic
Best Practices for Maintaining Personal Boundaries

Location
The University of Tulsa College of Law
3120 East 4th Place, JRH 205
Tulsa, OK 74104

Food and drink will be provided! Meetings are free and open to OBA members. Reservations are preferred (we want to have enough space and food for all.) For further information and to reserve your spot, please e-mail kimreber@cabainc.com.

LAWYERS HELPING LAWYERS ASSISTANCE PROGRAM

New Attorneys Take Oath

Board of Bar Examiners Chairperson, J. Ron Wright of Muskogee, announces that 106 applicants who took the Oklahoma Bar Examination on February 28-29, 2012 were admitted to the Oklahoma Bar Association on Thursday, April 26, 2012 or by proxy at a later date. Oklahoma Supreme Court Chief Justice Stephen W. Taylor administered the *Oath of Attorney* to the candidates at a swearing-in ceremony at the State Capitol. A total of 142 applicants took the examination.

Other members of the Oklahoma Board of Bar Examiners are Vice-Chairperson Loretta F. Radford, Tulsa; Monte Brown, McAlester; Tom A. Frailey, Chickasha; Stephanie C. Jones, Clinton; Bryan Morris, Ada; Roger Rinehart, El Reno; Donna L. Smith, Miami; and Scott E. Williams, Oklahoma City.

The new admittees are:

Oreoluwatola Oluwadunsin Adesina
Arya Affeldt Adibi
Heather Rosana Anderson
Benjamin Howard Bailey
Meredith Leigh Baker
Justin John Barth
Max Werner Blaser
Benjamin Judson Brown
Amber Kay Burton
Brittany Joyce Byers
Melanie Kay Christians
Tyler Robert Christians
Charles N Clarke
William Gregory Combs
James Nicholas Crews
Jacqueline Forsgren Cronkhite
Petra Lois Dashner
Kristen Diane Decker
Robert Scott Denton
William Herbert Deveraux Jr.
Christopher Morgan Dodd
Allen Nelson Doyel
Ryan Jean Ellis
Amanda Jo Essaili
Ben Huston Ezzell
James Lynn Franks
Johnathan Miles Gagnon
Amanda Elizabeth Garnand
Kimberly Golden Gore
Nicholas Eugene Grant
James Greenleaf
Lindsay Erin Grisamer
Steven Tyler Hardt
Bryce Patrick Harp
Joshua Kyle Hefner
Kelli Brooke Hilgenfeld
Kari Anne Hoffhines
Amber Dawn Howard Cornelius
Jacob Russell Lee Howell
Kyle Roger Hurst
Jerrick L. Irby
Steven Lamont Jaussi
Tanner Bryce Jones
Cassandra Mae Kabat
Mark William Keller
Annie Elizabeth Kellough
Rebecca J. King
Melissa Sue Kunz
Tracian Marie Laignel
Patrick Hayden Lane
Benjamin Michael Lepak
Kenneth Robert Massey
Angela D Mauch
Joy Renee Maxwell
Jonathon Wilson McCartney
Eric Thomas Meyers
Jordan Louis Miller
Nichole Rachele Moisant
Gregory Watson Morgan
Dustin Richard Murer
Brett Adam Murphy
Jenna Leigh Newcomer
Rebecca L Newman
Ryan John Patterson
James Wesley Scott Pebsworth
Lawrence Earlee Pecan III
Elizabeth Kathleen Pence
Melissa Jean Perez
Erh K. Perng

John T. Poling
David Alan Puckett
Thomas Price Purvis
Hillary Dawn Raubach
Charles Lee Reese V
Eric Lee Reynolds
Michelle Lynn Roberts
Colby Lee Robertson
Jason Anthony Sansone
Gwendolyn McKee Savitz
Patrick Robert Scott
Ethan Appleton Shaner
David Scott Shelton
Kaben Lynn Smallwood
Amanda Leigh Smith
Susana G. Sosa
Nicholas Lee Stafford
Jason David Sutton
Jill E. Swank
Ryan Kevin Swartwood
Andrew Richard Swartzberg
Devesh Taskar
Brice Adam Taylor
Ian Andrew Tennery
Dustin Gabbard Thomas
Kate Cordray Thompson
Eric Richard Thorsen
Tonya Lynn Thurman
Thomas Thang Tran
Christa Uhland
David Andrew Walk
Joshua Allen Walker
James E. Watzke
Sabre Nichole Weathers
Lawrence Michael Wheeler
Amy Elizabeth White
Robbi Jill Young

OKLAHOMA CHILD SUPPORT SERVICES,
a division of the Oklahoma Department of Human Services
Announcement 12-C046BU

ATTORNEY IV, TULSA OCSS II

OKLAHOMA CHILD SUPPORT SERVICES is seeking a full-time attorney for our Tulsa East Office located at 3840 South 103rd East Ave., Ste. 109, Tulsa, OK 74146. The position involves negotiation with other attorneys and customers as well as preparation and trial of cases in child support related hearings in district and administrative courts. In addition, the successful candidate will help establish partnership networks and participate in community outreach activities within the service area in an effort to educate others regarding our services and their beneficial impact on families. In depth knowledge of family law related to paternity establishment, child support and medical support matters is preferred. Preference may also be given to candidates who live in or are willing to relocate to the service area.

Active membership in the Oklahoma Bar Association is required. This position has alternate hiring levels. The beginning salary is at least $40,255.08 annually with an outstanding benefits package including health & dental insurance, paid leave & retirement. Interested individuals must send a cover letter noting announcement number **12-C046BU**, an OKDHS Application (Form 11PE012E), a resume, three reference letters, and a copy of current OBA card to: Department of Human Services, Human Resource Management Division, Box 25352, Oklahoma City, OK 73125 or email the same to jobs@okdhs.org. OKDHS Application (Form 11PE012E) may be found at http://www.okdhs.org/librabry/forms/hrmd. Applications must be received no earlier than 8 a.m. on May 11, 2012, and no later than 5 p.m. on May 31, 2012. For additional information about this job opportunity, please email Christina.Benson@okdhs.org.

THE STATE OF OKLAHOMA IS AN EQUAL OPPORTUNITY EMPLOYER

OKLAHOMA CHILD SUPPORT SERVICES,
a division of the Oklahoma Department of Human Services
Announcement 12-C055BU

Managing Attorney, Office of Impact Advocacy and Legal Outreach

OKLAHOMA CHILD SUPPORT SERVICES is seeking a full-time attorney to serve as its primary appellate advocate and to oversee the development of partnerships and collaborations within the legal community. The position will represent the division on appeals and in original proceedings, direct and coordinate the division's appellate activities, and coordinate statewide partnerships within the justice community through bar associations, F.L.S., and state judicial conference. This position will coordinate resource development programs through law schools, Legal Aid and pro bono programs, and coordinate legal training and community education programs statewide. This position will have statewide oversight of ADR projects, the court liaison program, law library and research resources. This position will be located at the Kelley Annex, 2409 N. Kelley Ave., Oklahoma City, OK 73111.

Active membership in the Oklahoma Bar Association is required. Five years of experience in the practice of law including four years as a child support enforcement attorney is preferred. The beginning salary is $61,571.52 annually with an outstanding benefits package including health, dental, life and disability insurance, paid leave and retirement. Interested individuals must send a cover letter noting announcement number **12-C055BU**, an OKDHS Application (Form 11PE012E), a resume, three reference letters, and a copy of current OBA card to: Department of Human Services, Human Resource Management Division, Box 25352, Oklahoma City, OK 73125 or email the same to jobs@okdhs.org. OKDHS Application (Form 11PE012E) may be found at www.okdhs.org/library/forms/hrmd/. Applications must be received no earlier than 8 a.m. on May 11, 2012, and no later than 5 p.m. on May 24, 2012. For additional information about this job opportunity, please email Christina.Benson@okdhs.org.

THE STATE OF OKLAHOMA IS AN EQUAL OPPORTUNITY EMPLOYER

2012 OK CIV APP 42

CITIFINANCIAL MORTGAGE COMPANY, INC., Plaintiff/Appellee, vs. RICKY L. CAREY, RHLONDA G. CAREY, JOHN DOE and MRS. JOHN DOE, as occupants of the premises, Defendants/Appellants.

Case No. 109,595. February 10, 2012

APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY, OKLAHOMA

HONORABLE TRACY SCHUMACHER, JUDGE

REVERSED AND REMANDED

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

J.R. Matthews, J.R. MATTHEWS & ASSOCIATES, LLC, Oklahoma City, Oklahoma, for Defendants/Appellants.

Kenneth L. Buettner, Presiding Judge:

¶1 Appellants/Defendants Ricky and Rhlonda Carey (the Careys) appeal from summary judgment granted in favor of Appellee/Plaintiff CitiFinancial Mortgage Co., Inc. (Citi) in a mortgage foreclosure action. The judge originally assigned the case did not memorialize his oral order granting summary judgment before he retired. The successor judge has no authority to enter judgment based on a predecessor's oral order when there is no record evidence that the predecessor actually ruled on the motion. Therefore, we reverse and remand for further proceedings.

¶2 Citi filed a petition to foreclose on real property against the Careys August 17, 2005. Counsel for the Careys withdrew in October 2007. Citi filed a motion for summary judgment November 9, 2010 and attached a Certificate of Mailing certifying that on November 3, 2010 a true and correct copy of the motion had been mailed to the Careys' address of record. A hearing on Citi's motion for summary judgment was set for January 26, 2011 before Judge Ring. Notice of hearing was mailed to the Careys November 19, 2010. The Careys never filed a response to Citi's motion for summary judgment. There is no minute order or other record of what happened on January 26, 2011, or the ruling of the court. Judge Ring later retired, and the case was reassigned to Judge Tracy Schumacher.

¶3 Current counsel for the Careys entered an appearance February 3, 2011, and the Careys requested discovery from Citi. On February 11, 2011, Citi filed a motion to strike discovery based on Judge Ring granting summary judgment in its favor at the hearing January 26, 2011. The Careys objected to Citi's motion to strike discovery. On April 25, 2011, Judge Schumacher heard arguments on the motion to strike discovery. Citi's position was that the Careys failed to respond to its motion for summary judgment or appear at the January 26, 2011 hearing. Citi explained to the court that at the hearing, Judge Ring granted summary judgment in favor of Citi but did not memorialize his ruling, and a court reporter was not present. The Careys' position was that they did not receive the motion for summary judgment or notice of hearing in the mail, and there was no court minute, summary order, or anything in the record indicating that there was a hearing January 26, 2011 or that Judge Ring granted Citi's motion for summary judgment.

¶4 At the conclusion of the April 25, 2011 hearing, Judge Schumacher granted Citi's motion to strike discovery. The trial court filed a summary order that "CT approves summary judgment as presented by counsel [for Citi] as true and correct though Judge Ring did not memorialize his ruling for 1-26-11." On May 2, 2011, Judge Schumacher filed a journal entry of judgment based on assurances by counsel of Judge Ring's January 26, 2011 oral ruling. The Careys appeal. In their Petition in Error, the Careys raise procedural due process issues and assert errors related to the trial court's process. The issue on appeal is whether it is proper for a successor judge to enter judgment based on a predecessor's oral ruling that was not documented in the record. We hold that the successor judge has no authority to enter judgment based on a predecessor's oral order granting summary judgment where there was no record evidence of such ruling.

¶5 The Supreme Court of Oklahoma adopted the rule "that in some cases where the trial of the cause on its merits has been fully completed, and there has been a valid decision of facts by the court, or by jury verdict with court approval, that the cause may be completed by formal entry of judgment by the successor judge." *City of Clinton v. Keen*, 1943 OK 165, 138 P.2d 104, 107-08 (holding that because the predecessor judge had not made findings of fact, the successor was without authority to enter judgment based on evidence heard by the predecessor); *see Power v. Sullivan*, 1993 OK CIV APP 14, 852 P.2d 790, 792 (holding that where the record contained detailed findings of fact and conclusions of law prepared by the predecessor, the successor had authority to enter judgment based upon the predecessor's findings). *City of Clinton* and its progeny suggest that without some documentation in the record of the predecessor's decision, the successor is without authority to enter judgment based on the predecessor's oral decision.[1] A New York appellate court addressed this issue in *National Recovery Systems v. Zemnovitch*, 672 N.Y.S.2d 911 (N.Y. App. Div. 1998). In *Zemnovitch*, the judge originally assigned a case orally granted summary judgment to the plaintiff but died before signing an order or memorializing his decision to grant the motion. *Id*. at 912. The court held, "We reject the plaintiff's claim that [the successor judge] should have given effect to the [predecessor's] alleged oral decision by making and signing an order based thereon. . . . The [predecessor's] alleged oral decision cannot be the basis for an order signed by another [judge]." *Id*.

¶6 REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

JOPLIN, V.C.J., and MITCHELL, J. (sitting by designation), concur.

1. In *Zander v. Zander*, 653 N.E.2d 440, the Appellate Court of Illinois permitted the successor to enter judgment based on a predecessor's oral pronouncements; however, in *Zander*, the predecessor's detailed findings of fact and oral orders were read into the record before the predecessor was removed from the bench. *Id*. at 440-42.

2012 OK CIV APP 41

IN THE MATTER OF L.M., AN ALLEGED DEPRIVED CHILD: REBECCA MIRELES and JAMES MOODY, Appellants, vs. THE STATE OF OKLAHOMA, Appellee.

Case No. 109,290. March 30, 2012

APPEAL FROM THE DISTRICT COURT OF BRYAN COUNTY, OKLAHOMA

HONORABLE ROCKY L. POWERS, TRIAL JUDGE

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

D. Michael Haggerty, II, HAGGERTY LAW OFFICE, PLLC, Durant, Oklahoma, for Appellant, Rebecca Mireles,

Whitney Paige Kerr, Durant, Oklahoma, for Appellant, James Moody,

Julie Cuesta Naifeh, District Attorney's Office, Durant, Oklahoma, for Appellee,

Mary Kay Nabors, Durant, Oklahoma, for Minor Child.

Wm. C. Hetherington, Jr., Judge:

¶1 In this consolidated appeal, the biological parents of L.M. appeal a trial court judgment terminating their parental rights based on separate jury verdicts finding: (1) Rebecca Mireles (Mother) has a mental illness, and (2) both James Moody (Father) and Mother have failed to correct the condition which led to L.M.'s deprived status. The termination order as to Mother is REVERSED and REMANDED for a new trial. Because the order is supported by clear and convincing evidence, it is AFFIRMED as to Father, but REMANDED to correct a deficiency in the termination order.

STANDARD OF REVIEW

¶2 "In parental termination cases, the State must show by clear and convincing evidence that the child's best interest is served by the termination of parental rights." *In re C.D.P.F,* 2010 OK 81, ¶5, 243 P.3d 21, 23. This standard of proof "balances the parents' fundamental freedom from family disruption with the state's duty to protect children within its borders." *Id.* Our review must find the presence of clear and convincing evidence to support the trial court's decision, which requires we canvass the record[1] to determine if the evidence is such that a fact finder could reasonably form a firm belief or conviction that the grounds for termination were proven. *Id*.

FACTS

Pre-Deprived Adjudication

¶3 According to testimony at trial, Mother and Father had been in an off and on relation-

ship for numerous years when L.M. was born August 8, 2005. They continued that relationship until June 1, 2007, when the trial court granted a protective order for Mother and L.M. and ordered Father "to have no contact . . . either in person or by telephone" with them until June 1, 2010. On July 5, 2007, the Department of Human Services (DHS) received its first referral of Mother's alleged substance abuse and slapping of L.M., who was almost two years old. After investigating, DHS recommended only preventative services for Mother because she and L.M. were living with the maternal grandmother.

¶4 On July 29, 2007, Mother, who had since moved with L.M. into a rental home, called the City of Durant Police Department to report a footprint inside her refrigerator. Upon arrival, the police found an unsanitary home with narrow trails between piles of trash and clothing, utilities shutoff from non-payment, spoiled food, cockroaches, and L.M. playing in the floor. When the Police Chief told Mother the suspected footprint was just a stain which needed to be cleaned like the rest of house, she became angry and "almost explosive." At that point, the Police Chief told Mother he was making a report to the DHS, and both officers left.

¶5 Later that day, a DHS investigator and caseworker went to Mother's home to initiate preventative services. They confirmed the home's condition, found some canned goods but no clean food preparation surface, and reported Mother looked ill, appeared to be over-medicated, and demonstrated "paranoid erratic behaviors." During the visit, Mother told the caseworker to leave, so she did. The investigator tried unsuccessfully to reason with Mother, concluded the child was not safe, and went outside to have the caseworker call authorities. Mother grabbed L.M. and tried to leave with him but her car stalled. When the police arrived, Mother handed L.M. to the caseworker and walked away. Because Father was currently in the Johnston County Jail, DHS obtained emergency custody of L.M.

¶6 On August 6, 2007, the Bryan County District Attorney filed a petition on behalf of the State of Oklahoma (State) against both parents, alleging L.M. was a deprived child because he "has been exposed to inadequate and dangerous shelter and has not been provided with adequate nutrition. That the mother's paranoid erratic behaviors is also placing the child is (sic) at risk of harm." One month later, DHS created an Individualized Service Plan (ISP or treatment plan), signed by both parents and filed in the deprived child proceeding October 2, 2007.

¶7 The "Condition(s) to be corrected" identified in the ISP were "[Father] and [Mother] mental stability and responsibility to maintain a safe and stable living environment. Both parents will address erratic and dangerous behaviors including domestic violence, and behavior outburst when they are frustrate[d]." The ISP list of "To Do's" ("ISP requirements") for Mother included:

> Complete mental health and substance abuse assessments, follow all recommendations for those services including individual, group and recovery counseling; Address coping skills, anger, outbursts, and L.M.'s emotional difficulty directly related to his high level of anxiety; Maintain sobriety, complete random drug screening; Seek medical attention from one service provider to verify Mother's need for numerous medications; Keep a safe home without physical or verbal fights when child is present, attend family violence counseling, parenting skills training, and provide a stable and safe home with working utilities, adequate space and food; Meet L.M.'s daily and basic needs while remaining mentally stable and no exposure to anyone abusing mood altering substances.

Father's ISP requirements were identical except for the one physician limitation and he needed to "follow through with services . . . in criminal court case" and "seek and maintain legal employment as needed to pay for fines and court cost[s]." The ISP allowed the parents bi-monthly visitation with L.M.

¶8 Each parent had court-appointed counsel on October 9, 2007, when they stipulated to the allegations in the deprived child petition.[2] An Adjudication and Disposition Order filed October 24, 2007, found L.M. was deprived because he lacked proper parental care and guardianship, lived in an unfit home, was exposed to inadequate and dangerous shelter, had not been provided adequate nutrition and "the mother's paranoid erratic behaviors had also placed him at risk of harm." The trial court ordered the parents to correct those conditions by following the treatment plan it expressly adopted as to each parent and warned their

failure to correct the conditions may result in termination of their parental rights.

Post-adjudication
Parents' First Progress Report

¶9 The ISP progress report submitted January 2008 stated Mother was making reasonable efforts to address her treatment plan and maintaining frequent contact with the child welfare worker. It also reported she has "numerous disabilities such as arthritis, bipolar disorder, post traumatic stress disorder and major depression," was now seeing only one physician, but had denied "having another domestic violence altercation with [Father]" which "can be verified [she] had [him] arrested at Shekinah Counseling Agency." The report stated Father had initiated counseling services, but was arrested November 20, 2007 and currently in Bryan County Jail "after being sentenced . . . for Domestic Violence involving [Mother], and would be transported to Lexington in custody of Department of Corrections (DOC)." It also reported Father "currently is not receiving services" because he was in jail, and "visitation has been ceased as a result of a standing court ordered (sic) not allowing contact until 2010."

¶10 Two letters from Shekinah Counseling Agency, both dated September 14, 2007, were part of the first ISP Progress Report. Father's evaluation disclosed anger management and substantial drug and alcohol abuse for which out-patient group counseling and parenting skills were recommended twice weekly for a minimum of 16 weeks. Mother's evaluation yielded *moderate* drug and alcohol abuse and positive tests for several prescription drugs with out-patient group counseling once weekly for sixteen weeks and random urinalysis testing recommended.

¶11 The parents appeared with their court-appointed counsel at the January 2008 Review Hearing. The trial court accepted DHS recommendations and report and in the "Additional Orders" section of its form order, wrote "[Father's counsel] moves for visitation w[ith] Father and a treatment plan to work while incarcerated. St[ate] objects. Request for visitation Denied. Exception allowed. Counsel Discharged."

Parents' Status March 2008 - March 2009

¶12 Mother's mental instability was the sole issue affecting her ability to make reasonable efforts between March 2008 to March 2009,[3] in which report, DHS found "Efforts to reunite has (sic) failed and [it] will be seeking termination." The reports for the same period noted Father is incarcerated and "not receiving services" and that L.M. was a happy toddler with the same foster family since October 2007, his language had improved, and Mother displayed him love and attention at the DHS-monitored weekly visitations. The *status quo* was maintained at each review hearing, none of which Mother missed.

Parents' Status May 2009 - October 2010

¶13 Father was released from prison May 9, 2009 and two days later reported to DHS, where his caseworker copied the treatment plan and "went through it with him step by step," explaining he "needed to begin it as soon as possible" because L.M. had been out of the home for a total of 22 months and DHS "was looking at termination." Father reported he was residing with L.M.'s maternal grandmother.

¶14 The June 2009 ISP Progress Report noted Father was "Non-compliant" under each plan requirement, "had failed to begin any services since his release" and "would not be able to see the child because a protective order is in effect until June 1, 2010 for [L.M.] and [Mother]." It further noted "Mother [is] still attempting to address issues on her court ordered ISP, but *her mental stability would be very detrimental to the child* if we were to place [L.M.] in her home" and "Efforts to Reunite Failed."

¶15 In September 2009, DHS requested termination of rights to both parents, explaining "[Mother] has several mental health issues that need to be addressed which is a major concern in her parenting abilities. As for [Father], he has not completed any services on the Court Ordered ISP plan."[4] At a review hearing, the trial court found that "reasonable efforts to reunite have failed" for both parents.

¶16 In November 2009, DHS reasserted its prior recommendation and requested no visitation with the parents, because (1) "[n]either parent has corrected the conditions which led to L.M.'s removal from their care and custody"; (2) Mother's "several mental health issues . . . is a concern in her parenting abilities"; and (3) Father "has not completed any services on the ISP plan." The report added "[Mother] has not completed services on her ISP at this [time] *due to her mental health status*" and Father was not living in an appropriate home for L.M. and still had not attended any domestic violence, par-

ent or substance abuse services. The trial court agreed with DHS at the review hearing and ceased visitation. He also *sua sponte* reappointed L.M.'s former CASA (court appointed special advocate) and the former attorneys for Mother and Father and confirmed its previous "failed efforts to reunite" finding.

¶17 The December 2009 review hearing was continued until January 2010, and one was held every sixty days thereafter through October 2010. All of the ISP progress reports indicated little change to Mother's mental status and that Father had made progress with some ISP requirements but none with others.

Termination Proceedings

¶18 State filed separate "Applications to Terminate" the parental rights to L.M. November 3, 2010. Its Application against Mother was based on "10A O.S. § 1-4-904(B)(5)," *i.e.,* she had "failed to correct the conditions that led to the finding of deprivation" although given over three months to do so, and "10A O.S. § 1-4-904(B)(13)," *i.e.*, she "has a *diagnosed behavioral health condition* which renders her incapable of adequately and appropriately exercising her parental rights, duties and responsibilities." Finally, the Application alleged "10A O.S. § 1-4-902(A)(1)," *i.e.*, "[t]he child has been in foster care for 15 of the last 22 months." Only § 1-4-904(B)(5) and § 1-4-902(A)(1) were alleged against Father.

¶19 At the review hearing held in November 2010, Mother and Father appeared with counsel and requested a jury trial, which was set for January 27, 2011. Three weeks before trial, Father's counsel filed numerous motions. The motion filed January 5, 2011 sought recusal of the assigned judge after Father's *in camera* request to disqualify had been declined. Father alleged the same judge presided and sentenced him to serve three years for violating the conditions of his four-year suspended sentence in CF-2006-6 (Domestic Abuse/Assault and Battery) by committing a second offense of domestic abuse , CF-2006-863, and other violations. The recusal motion further alleged "the listed witnesses in [Father's criminal] case . . .[and] . . .the facts in the criminal case will be a part of [State]'s case in chief in the case at bar." According to the record, the judge denied Father's motion the same day explaining he would not be the fact-finder because the case was set for jury trial.

¶20 On January 11, 2011, Father filed an appeal of the denial of his recusal motion to the Chief Judge of Bryan County and a motion to strike certain allegations within State's Application to Terminate. In the latter, Father argued, due to legislative amendments in 2009, § 1-4-904(B)(5) no longer required a finding that the condition which led to the adjudication of the child as deprived "is caused by or contributed to by acts or omissions of the parent," and the "ground to terminate" based on a child's foster care placement for 15 of the most recent 22 months had been *deleted* from § 1-4-904(B).

¶21 Father's recusal appeal was denied by order filed January 12, 2011. The next day Father's counsel moved to sever the parents' jury trial, arguing he and Mother had mutually antagonistic defenses and he might be double-teamed by her and State at a joint trial. At the January 25, 2011 hearing on Father's motions to strike and to sever the trial, State agreed to make Father's requested changes to the termination applications, counsel for both parents indicated they would not contest the amendments, and Father's severance request was denied.

Parents' Jury Trial

¶22 Two days before trial, State filed separate amended applications to terminate the parental rights of Mother and Father, making the agreed upon changes. The jury trial was held over two days, January 27-28, 2011, during which State presented testimony from 14 witnesses, including the police who made the July 2007 referral, DHS investigators and caseworkers, licensed professional counselors, L.M.'s maternal grandmother and his foster parents. All but one of State's exhibits were admitted into evidence, including the parents' ISP, the October 2007 Adjudication/Disposition Order, two letters from Mother's counselor, and one letter from Father's counselor.

¶23 The caseworkers all testified both parents had failed to correct the conditions during the separate periods they each were assigned to L.M.'s deprived child case. The testimony of the first caseworker who prepared the parents' treatment plan gave a very general description of Mother's condition, *i.e.* anxiety or a breakdown, "not focused on her getting better" and taking "numerous medications for health issues."

¶24 The second caseworker twice testified Mother "initiated services" on her treatment

plan "but never completed [any] due to her mental state" and "due to her mental capabilities she could not finish." She further testified based on her own observations, Mother "wasn't able to care for herself so — she wouldn't be able to care for her child." Her reason for recommending termination was, "It was 2009. The ISP plan was not getting done. Her mental stability, she couldn't even put a finger on her mental stability — of her problems that she needed to look at." This testimony was confirmed by the third caseworker, who testified "[w]ith Mother, there was a lot of mental health issues. Lots of reports of mental health concerns with her" and "notes of delusional thoughts."

¶25 Mother's counselor from April 2009 to mid-January 2010 testified Mother was currently suffering from back and heart problems and her "significant mood disorder with active symptoms" compromises her ability to care adequately for herself and her child and poses a risk of harm for herself and her child.[5] The counselor testified Mother had disclosed she was diagnosed with bipolar disorder as a teenager and that her recent psychological evaluation "presents a somewhat similar picture of bipolar I disorder with psychotic features." Father's counselor opined Father did not "show progress or commitment to change his life from before" and did not complete the anger management and substance abuse requirements.[6]

¶26 After State rested its case, each parent moved for directed verdict, both of which the trial court overruled. Counsel for the parents each gave a brief opening statement, and then rested. The child's attorney also rested. Following instructions to the jury and closing statements, the issues were submitted for decision by the jury.

¶27 By separate verdict forms, a unanimous jury found "by clear and convincing evidence" Mother's parental rights to L.M. should be terminated (1) "on the statutory ground that the parent failed to correct the conditions which led to the adjudication of the minor child even though she has been given over three months to do so" and (2) "on the statutory ground that the parent has a mental illness or mental deficiency." The unanimous jury's verdict against Father also found "by clear and convincing evidence" that his parental rights to L.M. should be terminated "on the statutory ground that the parent has not corrected the conditions which led to the adjudication of the minor child even though he has been given over three months to do so."

¶28 The trial court's "Journal Entry of Judgment Terminating The Parental Rights of Respondent Parents" filed March 22, 2011 states the jury returned its verdicts on January 28, 2011, and after quoting verbatim the three verdicts, ordered "the parental rights of [Mother] and [Father] be terminated as to [L.M.]" who is to remain in DHS custody. The parents[7] filed separate appeals from the trial court's judgment based on the jury's verdicts. By Order filed April 26, 2011, the Supreme Court consolidated their appeals pursuant to Okla.Sup.Ct.R. 1.27(d). Assignment to this Court followed.

ANALYSIS

Mother's Appeal

¶29 For reversal, Mother argues the trial court's failure to properly address her motion to proceed *pro se* violated her constitutional right to represent herself at the parental rights termination trial and there was insufficient evidence presented to the jury to justify termination of her parental rights. Because we agree with Mother's latter argument as discussed below, we need not reach her constitutional argument. *In the Matter of J.N.M.*, 1982 OK 153, ¶1, 655 P.2d 1032, 1033.[8]

Insufficiency of the Evidence

¶30 According to Mother, there is no evidence that allowing her "to retain her parental rights" would result in harm or threatened harm to L.M. After admitting "State did offer evidence showing a danger of harm to L.M.," she clarifies that "State's evidence, tracking the statutory language of 10A O.S. § 1-4-904(B)(13), only showed a danger to L.M. *if he were returned to Mother's custody*." (Emphasis in original.) She contends State did not prove or even allege L.M. was being harmed or in danger of harm "if the *status quo* were to remain in place or if Mother were granted visitation."

¶31 State argues it presented clear and convincing evidence of harm to L.M., noting also the § 1-4-904(B)(13) element is the only one with which Mother takes issue. Mother contends State's response ignores *Matter of Sherol A.S.*, 1978 OK 103, 581 P.2d 884, and other Oklahoma cases she cited for holding harm to the child must be proven to justify State's interference with a parent-child relationship. She argues, "given the constitutional nature of this

requirement" that "the legislature is incapable of removing or modifying it by statutory enactment" and her directed verdict motion should have been sustained because "State made no effort to prove L.M. would ever be harmed by the *status quo*."

Preliminary Issues

¶32 The problem revealed by the record and not acknowledged by either party is that the jury was not instructed on the amended statute, § 1-4-904(B)(13). Instead, the instruction sets out *verbatim* the elements of its predecessor, 10 O.S. 2001 § 7006-1.1(A)(13), which was amended and renumbered to § 1-4-904(B)(13) as part of the Legislature's substantial amendments to Title 10 and recodification of the Oklahoma Children's Code (OCC) under Title 10A, effective May 21, 2009.[9]

¶33 Mother's insufficiency of the evidence argument on appeal does not directly raise any error with the jury instruction as given. Nor did she challenge State's termination petition based on § 1-4-904, even after Father's motion to strike allegations from State's petition specifically addressed the amendments. At trial, Mother only challenged the sufficiency of the evidence for §1-4-904(B)(13)[10] and she did not object to the "proposed jury instructions," as corrected, or later to the trial court's "No. 18."[11] We find no on-the-record discussion about a *sua sponte* change to that instruction in the trial transcripts.

¶34 The trial court's duty is to state the law correctly. *Sellars v. McCullough*, 1989 OK 155, ¶9, 784 P.2d 1060, 1062. It is the parties' duty to assure that the instructions given accurately reflect the issues tendered by the evidence adduced at trial, and if not, make an objection complying with 12 O.S. 2001 § 578. Id. Appellate courts may, however, review a jury instruction that was neither properly preserved below nor addressed on appeal for "fundamental errors of law." *Sullivan v. Forty-Second West Corp.*, 1998 OK 48, ¶¶3-4, 961 P.2d 801, 802-803. Fundamental error "compromises the integrity of the proceeding to such a degree that *the [jury instruction] has a substantial effect on the rights of one or more of the parties*." (Emphasis added.) *Id.*, ¶7; *see also Quarles v. Panchal*, 2011 OK 13, ¶7, 250 P.3d 320, 322.

¶35 Jury Instruction No. 18, on its face, correctly states the law *prior* to May 21, 2009, *i.e.*, § 7006-1.1(A)(13), which authorized a termination of parental rights to a child upon "[a] finding that all of the following exist":

> (a) the child has been adjudicated deprived; and
>
> (b) custody of the child has been placed outside the home of a natural or adoptive parent, guardian or extended family member; and
>
> (c) the parent whose rights are sought to be terminated has a mental illness or mental deficiency, as defined by [43A O.S. § 6-201],[12] which renders the parent incapable of adequately and appropriately exercising parental rights, duties and responsibilities; and
>
> (d) the continuation of parental rights would result in harm or threatened harm to the child; and
>
> (e) the mental illness or mental deficiency of the parent is such that it will not respond to treatment, therapy or medication and, based on competent medical opinion, the condition will not substantially improve; and
>
> (f) termination of parental rights is in the best interests of the child.

Provided, a finding that a parent has a mental illness or mental deficiency shall not in and of itself deprive the parent of his or her parental rights.

¶36 State moved to terminate Mother's parental rights based on § 1-4-904(B)(13), which, since May 21, 2009, requires "[a] finding that all of the following exist":

> a. the parent has a diagnosed cognitive disorder, an extreme physical incapacity, or a medical condition, including behavioral health which renders the parent incapable of adequately and appropriately exercising parental rights, duties, and responsibilities within a reasonable time considering the age of the child, and
>
> b. allowing the parent to have custody would cause the child actual harm or harm in the near future.
>
> A parent's refusal or pattern of noncompliance of treatment, therapy, medication or assistance from outside the home can be used as evidence that the parent is incapable

> of adequately and appropriately exercising parental rights, duties, and responsibilities.
>
> A finding that a parent has a diagnosed cognitive disorder, an extreme physical incapacity, or a medical condition, including behavioral health or substance dependency shall not in and of itself deprive the parent of parental rights.

In addition, two § 7006-1.1(A)(13) elements,[13] *i.e.*, "the child has been adjudicated deprived either prior to or concurrently with a proceeding to terminate parental rights," and "termination is in the best interest of the child," apply to § 1-4-904(B)(13) and all other termination grounds under § 1-4-904(B).[14] *See* 10A O.S. 2011 § 1-4-904(A)(1)-(2).

¶37 Although § 7006-1.1(A)(13) was in effect when State commenced its deprived child proceeding against Mother in 2007, it had been superseded by § 1-4-904(B)(13) well over a year before the Application to terminate was filed November 3, 2010. Statutory amendments to other termination grounds, prior to and after the State had moved to terminate parental rights, have been addressed by five Oklahoma Court of Civil Appeals cases with varying results.

¶38 By published opinion, the Court in *Matter of J.C.*, 2010 OK CIV APP 138, n.2., 244 P.3d 793, 794, disagreed with the mother's argument her pre-May 21, 2009 stipulation to the deprived child petition required application of the former "failure to correct" ground, 10 O.S. 2001 § 7006-1.1(A)(5), finding the second amended petition to terminate her parental rights "was filed June 10, 2009, which is subsequent to the effective date of Title 10A [May 21, 2009]." The Oklahoma Court of Civil Appeals in the *Matter of T.M., A.M. & A.M.*, 2000 OK CIV APP 65, 6 P.3d 1087, and *Matter of A. G. & E.G.*, 2000 OK CIV APP 12, 996 P.2d 494, affirmed or found no fundamental error with the trial court's application of 10 O.S. Supp. 1998 § 7006-1.1(A)(15),[15] which newly enacted ground went into effect *after* the deprived child adjudications and *before* the motions to terminate were filed in each case.

¶39 The basis for *Matter of T.M. and Matter of A.G., id*., was the Legislature's *express* provision for retroactive application of that ground, the same interpretation reached by the Oklahoma Court of Civil Appeals in the *Matter of M.C. and N.C.*, 1999 OK CIV APP 128, 993 P.2d 137. Notwithstanding this interpretation, the latter Court reversed the termination order, finding § 7006-1.1(A)(15), as applied to its facts, had "a type of *ex post facto* effect forbidden by the Oklahoma Constitution [Art. 2, §15]," *i.e.*, a "punitive consequence that did not exist either at the time State initiated the deprived proceedings, or when State began its quest to terminate" and had changed the father's obligations and liabilities.[16] *Id*., ¶7-8.

¶40 Recently, another division of the Oklahoma Court of Civil Appeals in a published opinion, *Matter of P.W.W., L.M.W., N.W. & S.W.*, 2012 OK CIV APP 18, __ P.3d __, (mandate issued March 1, 2012), addressed the Legislature's "repeal"[17] of § 7006-1.1(A)(15), which became effective May 21, 2009, *i.e.,* after the 2007 adjudication order and prior to the November 2009 motion to terminate which had alleged two grounds, § 7006-1.1(A)(15) and § 7006-1.1(A)(5). The trial court instructed the jury solely on § 7006-1.1(A)(15), with no objection by Mother, so the Court in *P.W.W.* reviewed the instruction for fundamental error. Interpreting Art. 5, §54, Okl. Const., which provides the "repeal of a statute shall not . . . affect any accrued right, or penalty incurred, or proceedings begun by virtue of such repealed statute," the Court in *Matter of P.W.W.* found the termination proceeding was the "proceedings begun" by virtue of the repealed statute. Because State's motion to terminate was filed after §7006-1.1(A)(15)'s repeal, the Court found fundamental error based on the trial court's lack of authority to terminate parental rights on the repealed ground. The Court reversed the termination order for failure to give an instruction for the order's remaining basis, § 7006-1.1(A)(5).

¶41 The trial court here did not instruct on either a new or amended termination ground, but instead on the former version. Whether such action constitutes fundamental error is dependent on the same issue addressed in all five cases — which version governed State's termination proceeding. This question of law is reviewed *de novo*, without deference to the trial court's conclusion. *In re Adoption of Baby A*., 2006 OK CIV APP 24, ¶7, 131 P.3d 153, 155.

¶42 The general rule in Oklahoma is that statutes and amendments are to be construed to operate only prospectively unless the Legislature clearly expresses a contrary intent. *Welch v. Armer*, 1989 OK 117, ¶27, 776 P.2d 847, 850. Remedial or procedural statutes "which do not create, enlarge, diminish, or destroy *accrued or*

contractual rights — are generally held to operate retroactively and apply to pending proceedings (unless their operation would affect *substantive* rights)." *Cole v. Silverado Foods, Inc.*, 2003 OK 81, ¶8, 78 P.3d 542, 546. (Emphasis added.)

¶43 Unlike the termination ground considered in *Matter of T.M., Matter of A.G.*, and *Matter of M.C.*, *supra*, we find no legislative intent, express or necessarily implied, for retroactive application of § 1-4-904(B)(13). Under the general rule, operation of the amended statute would be prospective only, unless one of its exceptions applies. This determination requires a comparison of both versions to identify any changes to existing law, and if so, whether the changes are purely remedial or procedural, in which case the amended statute would operate retroactively. *American Airlines Inc. v. Crabb*, 2009 OK 68, ¶14-16, 221 P.3d 1289, 1292-93; *Welch*, 1989 OK 117, ¶¶ 21-26. If the changes are substantive, its operation is prospective only. *Id*.

¶44 Comparing § 7006-1.1(A)(13) to § 1-4-904(B)(13), we conclude there are significant changes in the amended version *other than* the broadening of its scope, *i.e.*, cognitive disorders, extreme physical incapacities and "medical conditions, including behavioral health"[18] (collectively, "conditions"). Relating to Mother's insufficiency of the evidence argument is the change in the element addressing the potential for "harm" to the child. Section 1-4-904(B)(13)(b) now provides "allowing the parent to have custody would cause the child actual harm or harm in the near future," but before May 21, 2009, § 7006-1.1(A)(13)(d) required "the *continuation of parental rights* would result in harm or threatened harm to the child."[19] (Emphasis added.)

¶45 Another significant change is the Legislature's deletion of § 7006-1.1(A)(13)(e), which required testimony or evidence from a physician, psychiatrist/psychologist, counselor or other qualified person that the parent's mental illness or deficiency "is such that it will not respond to treatment, therapy or medication and, based upon competent medical opinion, the condition will not substantially improve." This latter section was merged with § 7006-1.1(A)(13)(c), from which the statutory definition of mental illness or mental deficiency was deleted, into a single element, § 1-4-904(B)(13)(a). That section now requires a "diagnosis" for the listed conditions, without regard to the parent's prognosis, short-term or long-term. Like § 7006-1.1(A)(13)(c), the *conditions* listed in § 1-4-904(B)(13)(a) must still "render the parent incapable of adequately and appropriately exercising parental rights, duties and responsibilities." However, while this finding has an added qualification, "within a reasonable time considering the age of the child," it can now be proven with evidence of a parent's "refusal or pattern of non-compliance of treatment, therapy, medication or assistance from outside the home."[20] As a result, § 1-4-904(B)(13) provides a lesser evidentiary burden that is more subjective than its predecessor.

¶46 The history of § 7006-1.1(A)(13) demonstrates the significance of the changes to its elements, which are identical to those in 10 O.S. Supp. 1988 § 1130(8) — the first termination ground specific to parents with mental illness or deficiency.[21] The Legislature enacted § 1130(8) in response to *Matter of J.N.M.*, 1982 OK 153, 655 P.2d 1032, in which the Supreme Court reversed a termination order finding the 1981 version of § 1130 did not expressly provide for parental rights termination of mentally ill parents and proof of mental illness alone was inadequate to terminate parental rights. As enacted, §1130(8) addressed all of the Court's concerns, *e.g.*, no evidence on whether the parents' mental illness posed harm to the children or whether the mental illness was not treatable and long-term which would justify termination.

¶47 "Termination of parental rights is purely a creature of statute." *Matter of Christopher H.*, 1978 OK 50, ¶7, 577 P.2d 1292,1293. A "statute of creation" is one creating a right previously unknown to both common law as well as statutory law. *Trinity Broadcasting Corp. v. Leeco Oil Co.*, 1984 OK 80, ¶9, n. 8, 692 P.2d 1364, 1367. Section 1130(8), later renumbered to § 7006-1.1(A)(13) without any modifications to the six elements or the proviso, clearly meets that definition. While this new ground gave State the right or authority to terminate the parental rights of parents with a mental illness or deficiency upon the requisite proof of all of its elements, it also provided statutory protection for the parental rights of the same parents.[22] A statute of creation affects substantive rights and any amendment to such only operates prospectively.[23] *Trinity*, 1984 OK 80, ¶9.

¶48 We find no Oklahoma parental termination cases deciding whether substantive rights are affected by an *amended* ground's changes to the prior version's elements. However, we find two worker's compensation court cases instructive on this issue. In *American Airlines Inc. v.*

Crabb, 2009 OK 68, ¶14-16, 221 P.3d 1289, 1292-93, the Court found the addition of the phrase "major cause of the injury" in the amended statutory definition of "compensable injury" added a new element to the claim, intruded on substantive rights, and could not be applied retroactively. After-enacted legislation that "alters the elements of a claim or defense by imposition of new conditions affects the parties' substantive rights and liabilities." *King Manufacturing v. Meadows*, 2005 OK 78, ¶19, 127 P.3d 584, 590; *Welch*, 1989 OK 117, ¶¶27-28.

¶49 The Court in *Cole v. Silverado Food Inc.*, 2003 OK 81, ¶13, 78 P.3d 542, 548, similarly held the retroactive application of an amended statute of limitations affected the substantive rights of both parties in two ways. First, it made the employer's defense "much more extensive than it stood at the time the claim was brought." Second it affected the merits or "grounds or elements" of the employee's claim, since she would have to confront a "different defense." *Id.*, ¶14, n.27. Because the amended statute operated on "rights in existence," the Court in *Cole* held its terms are subject solely to prospective application." Id. Similar conclusions were reached about an amended adoption without consent statute in *Adoption of W.C.*, 938 N.E.2d 1052 (Ohio Ct.App. 12 Dst.,2010) and *VanBremen v. Geer,* 931 N.E.2d 650 (Ohio Ct. App. 5 Dst., 2010).[24]

¶50 As in *Crabb*, § 1-4-904(B)(13) adds new elements and its application to Mother's termination proceeding would have had the same effect as discussed in *Cole*, *i.e.*, it would have placed a *lesser evidentiary burden* on State to terminate Mother's parental rights and a *higher burden* on Mother in opposing termination, thereby affecting the parties' substantive rights. A substantive change which "alters the rights or obligations of a party cannot be viewed as solely a remedial or procedural change and cannot be retrospectively applied." *Sudbury v. Deterding*, 2001 OK 10, ¶19, 19 P.3d 856, 860. Therefore, as applied to this case, § 1-4-904(B)(13)'s operation is prospective only.

¶51 We also agree with the Court's decision in *Matter of P.W.W.* that "Art. 5, §54, is controlling" here on the issue before us. "Proceedings begun" under the meaning of Art. 5, §54 "refers to essential steps or measures to invoke, establish or vindicate a right." *Cole v. Silverado Foods, Inc.*, 2003 OK 81, ¶8, 78 P.3d 542, 546. This constitutional provision applies to repealed or amended statutes. *Cole*, ¶14; *Matter of A.W. & M.W.*, 2011 OK CIV APP 27, ¶9, n. 5, 250 P.3d 343, 347.[25] "Proceedings begun" in Art. 5, §54 "embraces *all of the statutory steps required by law* for the establishment and foreclosure of a statutory lien claim" and "the timely filing of a lien statement is a condition precedent to a foreclosure." *First National Bank of Pauls Valley v. Crudup*, 1982 OK 132, ¶6, 656 P.2d 914, 916. Relying on *Crudup*, the Court in *Cole* held the timely filing of a workers' compensation claim "establishes an initial step with the meaning of 'proceedings begun' in Art. 5, §54, [and] the terms of the statute in effect at the time the claim was filed are constitutionally shielded from invasion by after-enacted legislation." 2003 OK 81, ¶14.

¶52 The point at which we depart from *Matter of P.W.W.* is its assumption the Legislature intended the "repeal" of the statutory ground to be applied retroactively to the pending deprived child action and that for purposes of Art. 5, § 54, "proceedings begun" is State's filing of a motion or petition to terminate. Even if we were to agree the Legislature so intended (either expressly or impliedly), we conclude the filing of a petition to adjudicate a child as deprived is the initial and critical step within the meaning of "proceedings begun" in Art. 5, §54. Like the filing of a workers' compensation claim in *Cole*, a petition for adjudication commences State's *right* to intervene in a family unit to protect a child from harm and seek *relief, e.g.*, adjudication of the child as deprived, termination of parental rights, as permitted by 10A O.S. 2011 § 1-4-301(A)(2)(g), [formerly 10 O.S. 2001 § 7003-3.1(A)(2)(g)].

¶53 A deprived child petition filed by State is also a condition precedent (together with proof of harm to the child or a stipulation by the parents) to an order adjudicating the child as deprived. Thereafter, if reunification of the family is successful, State may dismiss the deprived action. However, if reunification of the family fails or is not an option, State's decision to pursue its remedy of terminating parental rights is dependent, under either § 7006-1.1(A)(13) or § 1-4-904(B)(13), on a prior deprived child adjudication. In that event, State's petition or motion to terminate parental rights is given the same case number as the deprived action, hence its description as "ancillary" to the deprived action, *see In re C.L.M.*, 2000 OK CIV APP 3, ¶12, 19 P.3d 888, 891, or one of its three "stages," *see In re G.G.*, 2004 OK CIV APP 71, ¶15, 97 P.3d 1155, 1156. The "[e]ntire proceeding from the filing of a peti-

tion to adjudicate deprived until the matter has been completed, either by termination of parental rights or by dismissal of the action constitutes a deprived action." *Matter of T.M., A.M. & A.M.*, 2000 OK CIV APP 65, ¶11, 6 P.3d 1087, 1092. Applying *Cole* and *Crudup*, we conclude "proceedings begun" under the facts of this case refers to the initial filing of State's petition to adjudicate L.M. as deprived. All of the subsequent statutory steps in a deprived child proceeding, including the petition or motion to terminate, are part of and ancillary to the deprived child proceeding. Under our interpretation, because § 7006-1.1(A)(13) was in effect at the time the petition to adjudicate was filed based on Mother's mental illness, its terms at that time are applicable to the subsequent termination proceeding and are unaffected by the intervening legislative amendment.

¶54 A parent's right to his child and family integrity is a fundamental constitutionally protected liberty interest that must be accorded the full panoply of procedural protections, as well as substantive protection under the due process clauses. *In re A.M. & R.W.*, 2000 OK 82, ¶8, 13 P.3d 484, 487; *Matter of J.N.M.*, 1982 OK 153, ¶9, 655 P.2d 1032, 1036; and *In re M.C. and N.C.*, 1999 OK CIV APP 128, ¶9, 993 P.2d 137, 140. We are also aware that Oklahoma courts have long held in deprived child proceedings that parental rights are *not absolute*, but are qualified by considerations affecting the welfare of children. *In re Harris*, 1966 OK 253, ¶0, 434 P.2d 477, 478; *In re Pulliam*, 1962 OK 56, ¶0, 369 P.2d 646, 647; *McNatt v. State*, 1958 OK 235, ¶0, 330 P.2d 600; *In re J.C.*, 2007 OK CIV APP 77, ¶5, 168 P.3d 784, 785. Therefore, the parents' rights must be balanced against the State's right to protect the rights of children who have an equally important right to a wholesome and safe environment. *In re J.C.*, 2007 OK CIV APP 77, 168 P.3d 784. However, the "paramount consideration in all proceedings within the [OCC] is the best interests of the child." 10 O.S. 2001 § 7001-1.2(B), now 10A O.S. 2011 § 1-1-102. This goal is best served by full compliance with the law. *A.E. v. State*, 1987 OK 76, ¶22, 743 P.2d 1041, 1048.

¶55 Keeping these principles in mind, § 7006-1.1(A)(13)'s statutory protection for a special class of parents with mental illness or mental deficiency applies here. This "protected condition" triggered L.M.'s removal from Mother's custody and his adjudication as a deprived child. Mother's mental illness remained the sole basis for the pending deprived action *and* was relied upon in State's application to terminate her parental rights. Because this statutory protection existed when the deprived action proceedings were begun, § 7006-1.1(A)(13)'s application is protected from extinguishment by the Legislature's 2009 amendments under Art. 5, §54 of the Oklahoma Constitution. Accordingly, we find no fundamental error with the trial court's instruction based on § 7006-1.1(A)(13).

Sufficiency of the Evidence
Termination Under § 7006-1.1(A)(13)

¶56 Having found § 7006-1.1(A)(13) governs Mother's termination proceedings, we next address her insufficiency of the evidence argument as it relates to harm to the child. Under this version, the question is whether there is clear and convincing evidence the "*continuation* of [Mother's] *parental rights* would result in harm or threatened harm to the child." We agree with Mother all of the evidence State presented demonstrated harm or threatened harm to L.M. if he were returned to her physical custody, and there is no dispute the evidence presented to the jury showed Mother's mental illness met the statutory definition as required by § 7006-1.1(A)(13)(c). However, whether there is clear and convincing evidence that *continuance* of her *parental rights* would result in harm or threatened harm to L.M., under the specific facts of this case, cannot properly be evaluated or understood without first determining whether State carried its requisite burden to show Mother's condition was long-term and not treatable, as essentially required under § 7006-1.1(A)(13)(e).

¶57 While performing our appellate duty to "canvass the record to determine whether the evidence is such that a fact-finder could reasonably form a firm belief or conviction that the grounds for termination were proven," we find clear and convincing evidence of Mother's "history of severe mental illness" and of her disclosure she had been diagnosed with "bipolar disorder as a teenager." There is also testimony Mother "agreed to and signed the treatment plan that lists her diagnosis as schizophrenia," has *current* symptoms of depression and anxiety, *inter alia*, and she had yet to resolve any of the originally identified risk factors through counseling with three counselors since 2007.

¶58 However, review of the entire record reveals there is no testimony or evidence Mother's mental illness *will not respond* to medication or other treatment or therapy. More importantly, the record lacks competent medical opinion that Mother's mental illness *will not substantially improve*. Without clear and convincing evidence for all six of § 7006-1.1(A)(13)'s findings, the judgment terminating Mother's parental rights based on this statutory ground must be reversed.

Sufficiency of the Evidence for Termination Under § 7006-1.1(A)(5)

¶59 Because the jury also found Mother's parental rights should be terminated based on her failure to correct the conditions which led to L.M.'s deprived child status, our remaining duty is to decide whether there is clear and convincing evidence to support the trial court's judgment based on this ground. Like the mental illness instruction, the jury was not instructed on the amended ground, 10A O.S. Supp. 2009 § 1-9-904(B)(5), but instead its predecessor, 10 O.S. 2001 § 7006-1.1(A)(5) which, prior to May 21, 2009, allowed a trial court to terminate the rights of a parent to a child based on "[a] finding that":

> (a) the child has been adjudicated to be deprived, and
>
> (b) such condition is caused by or contributed to by acts or omissions of the parent, and
>
> (c) termination of parental rights is in the best interests of the child, and
>
> (d) the parent has failed to show that the condition which led to the adjudication of a child deprived has been corrected although the parent has been given not less than the time specified by [§]7003-5.5 of this title to correct the condition.[26]

The "uncorrected condition" to which § 7006-1.1(A)(5)(d) refers necessarily means a condition the nature of which is subject to correction by the parent's efforts, *see In re C.R.T.*, 2003 OK CIV APP 29, ¶16, 66 P.3d 1004, 1009, and without any change to this element in § 1-4-904(b)(5), that interpretation is unaffected. Consequently, we need not address which version governs here, because neither are applicable.

¶60 The Court of Civil Appeals in C.R.T. reversed an order terminating parental rights, finding the jury should not have been instructed under both § 7006-1.1(A)(5) and § 7006-1.1(A)(13), because the latter termination ground applies to a specific condition and controls over the more general ground. *Id.*, ¶18. The Court found § 7006-1.1(A)(13) "deals with a different form of 'condition,' one requiring medical, psychiatric and psychological intervention, or a combination thereof, because the condition is essentially *outside the control of the parent*." (Emphasis added.) *Id.*, ¶18. Under its interpretation, the Court further found § 7006-1.1(A)(13) "contemplates a person's *inability to correct the condition*" because its language deals "with contingencies where the condition *does not respond to treatment through no fault of the person* and medical opinion concludes that *the condition will not substantially improve.*" (Emphasis added.) *Id*.

¶61 As in *C.R.T.*, there is no dispute in this case: (a) Mother suffers from a mental condition of the nature contemplated by § 7006-1.1(A)(13); (b) the condition to be corrected is mental illness, which was the basis for the deprived child adjudication and remained Mother's problem to the time of trial; (c) the record as a whole and the evidence at trial shows the alleged failure to correct the mental condition "follows and flows directly from the condition itself"; and (d) the deprived child case "began and was handled as a mental health problem and remained so through trial." More importantly, this record has no evidence or testimony from which a jury could find Mother failed to correct a condition which was in her ability to control.

¶62 Like the Court in *C.R.T.*, we conclude § 7006-1.1(A)(13) applied to the specific facts of this case and the trial court erred in allowing the State to also proceed to terminate Mother's parental rights under § 7006-1.1(A)(5) and to instruct the jury on that same ground. The trial court's order terminating Mother's parental rights is REVERSED and REMANDED for a new trial.

Father's Appeal

¶63 For reversal, Father alleges three errors with trial court's pretrial rulings, *i.e.*, denying his request for court-appointed counsel, refusing to recuse, and denying severance of the parents' jury trials. The errors he claims were made during the trial include admitting prejudicial evidence, rejecting his proposed jury instructions, and failing to direct a verdict in his favor because there was insufficient evi-

dence presented to the jury to support termination of his parental rights. Lastly, Father argues he had ineffective assistance of counsel.

Pretrial Rulings

Father's Requests for Court Appointed Counsel

¶64 Father contends the trial court did not afford him his constitutional right to assistance of counsel by denying his three separate applications for re-appointment of court-appointed counsel and "despite knowing Father was having issues completing the ISP and receiving services" while incarcerated. He also argues the trial court's refusal to reappoint counsel "is particularly troubling in light of Father's inability to effectively read, write or communicate with others."

¶65 Father submitted his first "Application for Appointed Counsel and Affidavit of Inability to Employ Counsel" (Application of Counsel) dated January 10, 2008. During his incarceration, he submitted a second Application for Counsel dated May 19, 2008. A month after his release at the June 9, 2009 Review Hearing, Father submitted his third Application for Counsel. The trial court apparently denied all three of his Applications for Counsel.[27]

¶66 The first part of Father's argument fails to consider all three denials occurred after the deprived child adjudication in response to Applications filed one week before, during and one month after his incarceration. Despite earlier DHS findings and termination requests, that was not a possible remedy until the trial court finally ordered that "Reasonable efforts to reunite have failed" in September 2009. *See* 10 O.S. Supp. 2007 § 7003-3.7(A). Two months later, the trial court *sua sponte* appointed Father and Mother counsel. As a result, he was represented a full year *prior* to the filing of State's application to terminate Father's parental rights in November 2010.

¶67 The record confirms the trial court denied Father's request for a treatment plan he could work while incarcerated, but he cites no authority holding such is required. Further, Father gives no record cite to support his allegations of the trial court's *knowledge* of his alleged issues with "receiving services" or communicating with DHS. Our review of the entire record reveals the trial court's first notice of Father's inability to read or write and his "limited capacity to communicate" was the ISP Progress Report filed by DHS October 8, 2010, at which time Father had been represented by counsel for 11 months. Moreover, there is no indication any person, other than Father, completed and signed each "Application for Appointed Counsel and Affidavit of Inability to Employ Counsel." We conclude Father has not demonstrated any constitutional or statutory infirmities in this regard. *See Matter of D.D.F.*, 1990 OK 89, 801 P.2d 703.

Court's Refusal to Recuse

¶68 Father argues the trial judge was required to recuse under Rule 2.11(A)(6)(d) of the Code of Judicial Conduct,[28] claiming he could not be impartial because he had previously acted as the trial judge in two criminal cases with Father involving "a number of the same facts and witnesses" which State indicated might be called at the termination hearing. He claims the trial court's inability to "separate the cases appropriately in his own mind" is established by the trial court's entry of an order limiting the *voir dire* time of the parties at the termination trial which referred to Father as the "Defendant" three different times.

¶69 However, according to the order of the District Judge of the 19th Judicial District, the trial court's involvement with Father's criminal cases included accepting his waiver of preliminary hearing, his stipulation to the State's application to revoke, and sentencing Father pursuant to a negotiated plea agreement. We agree with the District Judge's opinion no reasonable person would question the trial judge's impartiality based on those actions.[29] Considering this, the timing of Father's motion to recuse, and that the jury would be the fact-finder at the termination hearing, we find Father's argument without merit.

Trial Court's Denial of Father's motion to sever the trial

¶70 Father argues on appeal that he and Mother should have been granted separate trials, claiming they had opposing and inherently antagonistic defenses because he was sentenced to prison due to Mother's domestic abuse charges and the protective orders she was awarded against him. He further claims State's termination case against him went far beyond the allegations in the application to terminate his parental rights to L.M.

¶71 At the hearing, the trial court clarified with Father's counsel the basis of the severance motion as "the factual basis for criminal charg-

es against your client . . . is, also, alleged as a basis for State's motion to terminate Father's parental rights." Thereafter, Father's counsel repeated his position that Mother may decide to assist the District Attorney and "double up" against his client. The trial court concluded the latter could occur whether the trials were separate or together, and because the jury would receive instructions and verdict forms, separate as to each parent and as to each ground alleged, he denied Father's motion, finding nothing prejudicial about a single trial for the parents.

¶72 According to the cases Father cites as authority, a defendant is "double teamed" or placed in a "two against one" situation to his detriment when *court appointed counsel for a child victim* actively participates in the trial beyond limits provided by statute,[30] *i.e.*, taking an adversarial role against the defendant. *Cooper v. State*, 1996 OK CR 38, 922 P.2d 1217; *In re J.D.D.*, 2010 OK CIV APP 102, 241 P.3d 691. "Mutually antagonistic defenses occur when each defendant attempts to exculpate himself and inculpate the co-defendant." *Spunaugle v. State*, 1997 OK CR 47, ¶23, 946 P.2d 246, 251(overruled on other grounds). Defenses are antagonistic when "to believe one is to disbelieve the other." *Id*. "Severance is also required when the State introduces the confession of a non-testifying co-defendant which inculpates another co-defendant." *Id*., ¶25. The decision to sever a trial between co-defendants or a trial between parties in a civil action is left to the sound discretion of the trial court. *Id; Herbert v. Wagg*, 1910 OK 334, ¶4, 117 P. 209, 212.

¶73 Father's arguments fails for two reasons. First, his "double teaming" argument in favor of severance addresses Mother's court appointed attorney in this proceeding, not L.M.'s attorney. Second, Father's alleged failure to correct the condition which led to L.M.'s adjudication is the sole ground for termination of his parental rights. Father has failed to demonstrate not only the potential for a "two against one" situation but also how Mother's potential testimony at a termination trial, joint or severed, about the domestic violence criminal charges she filed against him could inculpate Father on that termination ground, the successful completion for which he is solely responsible. Equally important, Father has failed to show any prejudice or injustice resulting from the joinder of the parents' trial. *See* 12 O.S. Supp. 2004 § 2020(D); *All American Bus Lines v. Saxon*, 1946 OK 199, ¶23, 172 P.2d 424, 428; *Spunaugle*, ¶22. We find no abuse of discretion with the denial of Father's motion to sever.

Rulings During Trial

Preliminary Issue

¶74 State moved for termination of Father's parental rights to L.M. based solely on his failure to correct the conditions which led to L.M.'s deprived status adjudication, relying on 10A O.S. Supp. 2009 § 1-4-904(B)(5). However, the trial court's jury instruction listed the elements of its predecessor, 10 O.S. 2001 § 7006-1.1(A)(5). To avoid repetition, we find applicable here our analysis under Mother's appeal concerning fundamental error and retroactive application of amended statutory grounds in deprived child proceedings. Based on our review of § 1-4-904(B)(5) we conclude it also affects the parties' substantive rights.

¶75 Prior to May 21, 2009, § 7006-1.1(A)(5) required "[a] finding that: (a) the child has been adjudicated to be deprived, (b) such condition is caused by or contributed to by acts or omissions of the parent, (c) termination of parental rights is in the best interests of the child, and (d) the parent has failed to show that the condition which led to the adjudication of a child deprived has been corrected although the parent has been given not less than three months.[31] This clear and unambiguous ground for termination has been interpreted by Oklahoma courts for decades.

¶76 On and after May 21, 2009, § 1-4-904(B)(5) requires "[a] finding that: (a) the parent has failed to correct the condition which led to the deprived adjudication of the child, and (b) the parent has been given at least three (3) months to correct the condition."[32] Absent from § 1-4-904(B)(5) is the element, "such condition is *caused by* or *contributed to* by acts or omissions of the parent," which was added by the Legislature in 1977 and authorized termination of parental rights *only if* a parent has failed to correct the particular condition(s) for which that parent's acts or omissions was either the sole cause or a contributing cause. (Emphasis added.) *In re L.G.*, 1993 OK CIV APP 162, ¶7, 864 P.2d 1301, 1303.

¶77 Deleting this element removed a statutory protection afforded to Father which existed when the deprived child proceeding was initiated against him. Had amended § 1-4-904(B)(5) been applied, State's evidentiary bur-

den would have been decreased and Father's defense in opposing termination would have been increased, thereby affecting the parties' substantive rights. As a result, § 7006-1.1(A)(5)'s application is protected by Art. 5, § 54, the jury was so instructed, and we conclude the trial court correctly applied this version of the termination ground to the facts of this case.

Sufficiency of the Evidence Supporting Termination Under 10 O.S. 2001 § 7006-1.1(A)(5)

¶78 Father cites to three Oklahoma cases for the proposition that without proof of actual or imminent harm to the child, there is no justification for permanent severance of the parent's rights based on: (1) a parent's inability to have physical custody of a child, *Matter of Baby Girl Williams*, 1979 OK 150, ¶10, 602 P.2d 1036; (2) poor, uneducated parents with a dirty house and dirty children, *Matter of Sherol A.S.*, 1978 OK 103, 581 P.2d 884, and (3) incarceration of a parent, *Matter of A.K.*, 2008 OK CIV APP 104, 198 P.3d 415.

¶79 According to Father, there was "insufficient evidence" to justify termination of his parental rights, because there was no testimony or evidence of any harm to L.M. at the time he was removed from Mother's custody. He contends State's evidence only established Mother's house was dirty and there was no obvious food, while the only other witness who saw the child testified the child appeared dirty but not malnourished.

¶80 The record confirms Father's argument the scant testimony about L.M's lethargy and medical issues did not arise until several months after the child had been removed from the parent's care. However, this does not mean there was no evidence of harm or threatened harm, especially considering the undisputed evidence that L.M. was developmentally behind for his age.

¶81 Father also contends State's witnesses all confirmed Father was an inmate in the Johnston County Jail when L.M. was removed from Mother's home and there is no testimony Father knew about the conditions of her home or failed to act on the conditions leading to the deprived finding. Taken as a whole, Father's argument questions whether State carried its burden to prove by clear and convincing evidence that Father's acts or omissions caused or contributed to the conditions leading to L.M.'s adjudication.

¶82 Our research yields only one Oklahoma case applying this element to similar facts. The Court in *In re L.G.*, 1993 OK CIV APP 162, 864 P.2d 1301, held termination of Mr. Garrion's parental rights was not justified under the circumstances or authorized by 10 O.S. 1991 § 1130 (§ 7006-1.1(A)(5)'s predecessor). The Court observed it was undisputed that the child had been removed from the home and custody of the mother due to her neglect and abuse and that Mr. Garrion did not reside there. As pertinent here, the Court found "[t]he only detrimental condition caused by or contributed to by Mr. Garrion that formed the basis of the 'deprived adjudication' was domestic violence against the natural mother in the presence of the child." (Emphasis in original.) *Id.*, ¶7. Because it was undisputed no further violence between the parents had occurred in the child's presence after the State's intervention, the Court concluded "*[T]he correction of this sole detrimental condition was achieved*. By the express provisions of 10 O.S. 1991 § 1130 (A)(3), termination was authorized only in the event Mr. Garrion failed to correct *this particular condition and contributing cause* of W.G.'s deprived status." (Emphasis added.)

¶83 It is undisputed in this record that prior to the first DHS referral, Mother had obtained the 2007 Protective Order against Father and that he was incarcerated for unknown reasons when L.M. was removed from Mother's home. State presented no evidence Father had been living in Mother's home or had visited there any time prior to the adjudication, or that he knew about Mother's past or current mental health issues and the effect of the numerous prescriptions she was taking for physical and mental conditions. Similar to *L.G.*, Father here was not residing with Mother and L.M. at the time he was removed from the home *due to* Father's domestic violence against Mother. "Domestic violence" was clearly identified as one of the conditions to be corrected on the treatment plan he signed in October 2007. Unlike in *L.G.* where the correction of the condition had been achieved, there was another incident of domestic violence in November 2007 between Father and Mother at counseling they were both attending, which was a partial cause for his subsequent three-year incarceration. The jury also heard several caseworkers and Father's counselor testify he had not corrected his anger and domestic abuse issues since his release from jail.

¶84 This same evidence defeats Father's remaining argument that the testimony established, even though he did not complete the plan, he made sincere and exhaustive efforts to do so, relying on *Matter of J.L.*, 1978 OK 37, 578 P.2d 349. The Supreme Court in *J.L.* reversed the termination order where the evidence "as a whole" showed "sincere and extensive efforts to change the conditions leading to the child's adjudication." *Id.* at ¶16. The evidence in this case clearly does not make the same showing.

¶85 There is clear and convincing evidence to support the judgment that Father failed to correct the conditions which led to the deprived adjudication. However, the judgment fails to make the required finding under § 7006-1.1(A)(5) that "termination of parental rights is in the best interests of the child." Because the jury was clearly instructed on that element, we presume the jury properly followed the instructions as a whole and its verdict terminating Father's parental rights necessarily embodied that finding. *Matter of T.R.W.*, 1985 OK 99, 722 P.2d 1197, 1203. However, given this "fundamental deficiency," the judgment must be remanded to the trial court, not for a new trial, but with instructions to enter a proper final order correcting the error. *Matter of Children M.B.*, 2010 OK CIV APP 41, ¶11, 232 P.3d 927, 931 and *Matter of E.G.*, 2010 OK CIV APP 34, ¶11, 231 P.3d 785, 789.

Evidentiary and Other Rulings

¶86 Father alleges the trial court erred by admitting State's Exhibit No. 7, a copy of the 2007 Protective Order against him and "allowing discussion of the permanent protective order entered in Case No. PO-2010-106"(2010 Protective Order).[33] We find no error with either of the rulings.

¶87 Error may not be predicated upon a ruling which admits evidence unless a substantial right of a party is affected and a *timely objection* appears of record, stating the *specific* ground of objection if such ground was not apparent from the context. 12 O.S. 2011 § 2104(A)(1). When the trial court asked if there were any objections to admissions of State's Exhibits No. 6 or 7, Father responded, "[n]o objection to 6. On 7, subject to our previous arguments."

¶88 The trial transcript reveals the "previous arguments" involved the 2010 Protective Order, which is not part of Exhibit No. 7. Only the 2007 Protective Order is marked "Exhibit No. 7," to which there was no specific objection. Without such, Father has failed to preserve for our review any error with the admission of State's Exhibit No. 7.[34] *Matter of A.W. and M.W.*, 2011 OK CIV APP 27, 250 P.3d 343.

¶89 The "previous arguments" occurred on the second day of trial, beginning with Father's objection to State's proposed admission of "a certified copy of the 2010 Protective Order," which Father explained to the trial court had been granted by another trial judge under the Protection From Domestic Abuse Act, 22 O.S. § 60 *et seq*. After arguing that judge lacked jurisdiction over the child due to the pending termination action and the protective order lacked an expiration date as required by statute, Father stated his objection "would go to the enforceability of the order."

¶90 A lengthy discussion of his objections followed, revealing Father had filed a "motion to recall or dismiss" the 2010 Protective Order "as to the child" which motion was still pending with the other judge. The trial court agreed with State that the protective order was "still in effect" and refused "to rule on whether [that protective order] was void or not," explaining Father could either accept State's proffered stipulation or the 2010 Protective Order would be admitted. I*n lieu of the admission of the certified copy*, Father stipulated to State's announcement the 2010 Protective Order "was filed by [Mother] on behalf of herself and [L.M.] on July 12, 2010," and "on July 30, 2010 a final order of protection [was] entered and remains in place at this point in time." After presenting additional witnesses, State moved to admit "Exhibit No. 7" *and* announced the parties' stipulation regarding the 2010 Protective Order. Father responded as described above, Mother's counsel approved, and the trial court admitted the exhibit and also accepted the parties' stipulation.

¶91 On appeal, Father does not contend State's "discussion" of the 2010 Protective Order went beyond the parties' stipulation. Instead, he argues (1) the same objections regarding "enforceability" he raised below and (2) the "discussion" about the 2010 Protective Order was *not relevant* to State's application to terminate his rights and its "usefulness . . . clearly did not outweigh the prejudicial impact on [his] case."

¶92 The trial transcript discloses Father did not object to that order based on irrelevancy or, even if relevant, that its probative value would

be outweighed by the danger of unfair prejudice. Consequently, he failed to preserve this argument concerning the 2010 Protective Order. *Interest of A.W. and M.W., id.*

¶93 Father did, however, preserve his "enforceability" argument which the trial court declined to decide. He argues the 2010 Protective Order should not have been admitted because (1) the trial judge lacked jurisdiction since the juvenile court already had custody of the child and (2) the order is contrary to several statutes.

¶94 The statutes he relied upon at trial are part of the Protection from Domestic Abuse Act (the Act), specifically 22 O.S. Supp. 2009 § 60.4(I)(1) and § 60.4(G)(1).[35] Section 60.4(I)(1) of the Act unambiguously precludes a protective order issued under the Act from affecting "title to real property or purport to grant the parties a divorce or otherwise purport to determine" numerous issues, including visitation and child custody or "any other like relief obtainable under Title 43." Title 43 has no application to the proceedings brought under the OCC.

¶95 Father also argues the 2010 Protective Order was filed "without an expiration date" contrary to § 60.4(G). This section mandates that a protective order issued under the Act "shall be for a fixed period not to exceed a period of three (3) years unless extended, modified, vacated or rescinded upon motion by either party." Nothing in the record establishes this deficiency, since Father agreed to the specific oral stipulation, which provides only the date the protective order was issued. He did not make an offer of proof regarding the expiration date, and absent a record showing otherwise, this court presumes the trial court did not err. *Hamid v. Sew Original*, 1982 OK 46, 645 P.2d 496.

¶96 Concerning the trial court's refusal to decide if the protective order was void, § 60.4(G)(3) of the Act provides "[u]pon the filing of a motion by either party to modify, extend, or vacate a protective order, a hearing shall be scheduled and notice given to the parties. At the hearing, the *issuing* court may take such action as is necessary under the circumstances." (Emphasis added.) Clearly, only the judge who issued the 2010 Protective Order had authority to decide its validity. We find no error with the trial court's acceptance of the parties' stipulation that the 2010 Protective Order "remains in place."

Jury Instructions

¶97 It is the trial court's duty to instruct upon the decisive issues of the case as supported by the pleadings and evidence introduced. *Matter of S.C.*, 1992 OK CIV APP 40, ¶5, 830 P.2d 200, 202. The tests on review of instructions given or refused are whether there is a probability that the jurors were misled and reached a different conclusion than they would have reached but for the questioned instruction, or whether there was excluded from consideration a proper issue of the case. *Id.*

¶98 Father alleges the trial court erred by rejecting three of his proposed jury instructions, the first two of which are addressed together. Father's proposed instruction No. 16 would have informed the jury that parents should not be held to the same standard of proof as that carried by State. His proposed instruction No. 17 would have informed the jury they were not required to terminate his parental rights if they found he had made sincere and extensive efforts and had shown substantial changes concerning the conditions creating L.M.'s deprived status.

¶99 Father's argument fails to consider after State rested and the trial court denied the parents' demurrers, he also rested. By doing so, he voluntarily chose to allow the jury to hear only State's evidence, thereby taking a risk as to whether the jury believed State met its burden of proof by clear and convincing evidence. Had Father testified or presented witnesses and/or evidence about his alleged sincere efforts and substantial changes toward correcting the condition, we would agree both proposed instructions should have been given. However, having previously concluded State proved by clear and convincing evidence that he failed to correct the condition, we find no error with the rejection of Father's proposed instructions. *See Matter of M.A.*, 1992 OK CIV APP 61, ¶24, 832 P.2d 437.

¶100 Father's proposed instruction No. 4 would have informed the jury they should not terminate the parental rights of a parent unless there were specific standards clearly prescribed for the parent and the parent was given a reasonable opportunity to comply with the prescribed standards. This argument fails to consider the jury was given State's Exhibit No. 2, a copy of the treatment plan detailing the conditions to be corrected and his requirements DHS believed would help him to correct the conditions, which

he signed in October 2007. One of the caseworkers testified treatment plans are written at a first grade level while another testified he had explained it to him again when he was released from prison in May 2009. We find no error with the trial court's refusal to give Father's proposed instruction No. 4.

Ineffective Assistance of Counsel

¶101 To prove ineffective assistance of counsel in termination proceedings, a parent must show the attorney's performance was deficient and prejudiced the parent's defense. *Matter of S.S.*, 2004 OK CIV APP 33, ¶11, 90 P.3d 571, 575. "The reviewing court must look at the proceedings as a whole, and 'there is a strong presumption that counsel's performance falls within the wide range of professional assistance.'" *Id.* (quoting *In re R.S.*, 2002 OK CIV APP 90, ¶16, 56 P.3d 381, 384).

¶102 Father's first argument is premised on his court-appointed counsel's failure *to file a discovery request*, resulting in State's "surprise" introduction of the 2007 Protective Order *and* the discussion of the 2010 Protective Order. He claims such failure prevented an opportunity (1) to pursue a motion *in limine* or other motion to block "the original, wrongfully-entered order" from being presented or discussed at the jury trial, and/or (2) to have the "wrongfully-entered order" vacated.

¶103 We first note Father's "wrongfully-entered order" argument, both below and on appeal, was limited to the 2010 Protective Order, about which the record establishes only that his counsel's motion to vacate had been pending with the issuing judge for some unknown time *before* the termination hearing. Thus, at least to the 2010 Protective Order, the record does not establish any surprise of its existence. However, even if Father's counsel had made a discovery request, learned State intended to admit it, and thereafter filed a pre-trial *in limine* or other motion to block its admission, there is no guarantee the trial court would have sustained the motion, considering its potential relevancy to Father's failure to correct the condition of domestic violence against Mother. Moreover, even if the trial court had denied the pre-trial motion, such ruling is preliminary only. Father has not demonstrated his trial attorney's alleged failure to discover prejudiced his defense.

¶104 Father's second argument is premised on his court-appointed counsel's failure to object at the trial to the admission of the 2007 Protective Order for lack of relevance. "A trial court has discretion in deciding whether proffered evidence is relevant and, if so, whether it should be admitted." *Myers v. Missouri Pacific R. Co.*, 2002 OK 60, ¶36, 52 P.3d 1014, 1033. We assume the trial court's acceptance of the parties' stipulation implies it had decided even the limited discussion of the 2010 Protective Order was relevant to the issue on continued domestic abuse. Therefore, it seems evident the 2007 Protective Order would have been admitted *even if* Father's trial counsel had made a timely relevancy objection. "While it may have been better practice for [Father's] trial counsel to have raised the objection in controversy, we do not find that failure affected the outcome of the proceedings." *In re R.S.*, 2002 OK CIV APP 90, ¶20, 56 P.3d 381, 384. The finding in *R.S.* clearly applies here.

CONCLUSION

¶105 The order terminating Mother's parental rights is REVERSED AND REMANDED FOR A NEW TRIAL. This opinion does not affect DHS foster care placement, which is its sole purview and responsibility. As to Father, the order of termination is AFFIRMED, but REMANDED to correct a deficiency in the termination order.

BELL, P.J., and MITCHELL, J., concur.

1. We did not review Petitioner's Exhibit No. 1, included in the exhibit envelope from the January 27-28, 2011 jury trial, because its admission was rejected.

2. After L.M. was removed from Mother's custody in July, his first foster family kept him for two months. The record includes a two-page letter filed October 9, 2007, which Mother, Father and L.M.'s paternal and maternal grandmothers had signed on September 14, 2007, complaining that during their August visit, L.M. had a burn on his wrist, a bruise on his cheek, did not appear to be eating, and had been placed on a "nerve depressant." L.M. was subsequently transferred to a second foster family with whom he resided throughout these proceedings. At trial his foster mother testified L.M. "was a little bit withdrawn" upon his arrival, a month later they weaned him off of the medication and "he came alive."

3. In each report, DHS requested longer periods between reviews to allow her "to gain mental stability," described as "confused thinking and depression . . . verbally and emotionally overwhelmed . . . at times she demonstrates delusional situations."

4. The report stated Mother "continues delusional thinking," was still "on medication for several different disabilities and her mental health," she "truly loves her child but is unable to meet his needs due to her mental health issues," and a new psychological evaluation had identified "sixteen risk factors," e.g., due to "severity of [Mother's] mental health she continues to pose a risk of harm to herself and her child." The report noted Father and several others still lived together, he had only two mental health appointments since his release, he canceled his follow-up appointment "due to not having a ride," and had "not worked any domestic violence, parenting or substance abuse services."

5. State's Exhibits included two letters from Mother's counselor. The May 29, 2009 letter explained she had been working with Mother since April 24, 2009 and from five sessions reported Mother was not addressing the risks outlined in her psychological evaluation, not developing coping skills, and her moods vacillated between depressed

and manic states with no awareness of the change. In her opinion "[Mother] has a history of severe mental illness with sustained paranoid ideation, flight of ideas, poor emotional regulation, depression, anxiety, unpredictable behavior, lack of ability to establish appropriate boundaries, and feelings of insecurity. She continues to pose a risk of harm to herself and her child if he should be returned to the home." The September 9, 2009 letter was identical except for her report that Mother "has shown an increased pattern of instability."

6. State admitted a letter from Father's counselor dated June 7, 2010, reporting he had a low level of drug abuse, signs of definite alcoholism, anger issues and high hostility level, limited capacity to communicate and an impaired reasoning ability. The counselor opined Father is not capable of maintaining any kind safe environment or care for a child, is not self-sufficient, and has not been able to abstain from alcohol.

7. Father's appellate court-appointed attorney did not represent him below.

8. "When, as here, legal relief clearly is affordable upon alternative grounds, consideration of constitutional challenges is inappropriate in light of [this Court's] self-erected 'prudential bar' of restraint. Constitutional questions should not be reached in advance of strict necessity." *Reimers v. State ex rel. Department of Corrections*, 2011 OK CIV APP 83, ¶29, 257 P.3d 416, 421 (quoting *Russell v. Board of County Commissioners of Carter County, Oklahoma*, 1997 OK 80, ¶32, 952 P.2d 492, 504).

9. As relevant here, the Legislature deleted one of § 7006-1.1(A)'s fifteen grounds for termination and moved the amended fourteen "legal grounds" to a newly added section B. Section 1-4-904(A) now provides "[a] court *shall not* terminate the rights of a parent to a child unless: (1) the child has been adjudicated to be deprived either prior to or concurrently with a proceeding to terminate parental rights; and (2) termination of parental rights is in the best interest of the child." (Emphasis added.)

10. When moving for directed verdict at the close of State's case in chief, Mother's counsel referred to "the statute which appears in the amended complaint" and "10A, [§]1-4-904" when arguing there was *no evidence* "Mother had been diagnosed with a cognitive disorder" and that "actual harm or harm would occur in the near future if her *parental rights* were *not terminated*."

11. The transcripts reveal each parent's counsel and State acknowledged receipt of copies of the trial court's "proposed instructions" and after agreeing to some minor changes, no further objections were made. In the presence of the parties, the trial court numbered the instructions, announcing each corresponding Oklahoma Uniform Jury Instruction (OUJI) number, and relevant here, he stated "Number 18 is [OUJI] 3.18." Our research shows "OUJI No. 3.18" is from the "Oklahoma Jury Instructions-Juvenile" approved March 28, 2005, which lists the elements of § 7006-1.1(A)(13). *See In re Oklahoma Uniform Jury Instructions for Juvenile Cases*, 2005 OK 12, 116 P.3d 119, 153 ("Mental Illness or Mental Deficiency"). New jury instructions based on the 2009 amendments to § 1-4-904 were approved by the OUJI-Juvenile committee March 19, 2010, modified several times with final modification January 21, 2011, and adopted by the Supreme Court April 18, 2011. *See* http://www.oscn.net/forms/lawlibrary/Juvenile-2011/adobe/Chapter03.pdf. Therefore, when the jury trial in this case was held January 27-28, 2011, the available OUJI-juvenile for termination proceedings still had the § 7006-1.1(A) termination grounds. We assume 12 O.S. 2011 § 577.2's requirement to use OUJI when applicable in civil cases "giving due consideration to the facts and the prevailing law" would also apply to the special statutory proceeding involved here.

12. 43A O.S. Supp. 2005 § 6-201(f) and (g) provides:

"Mental illness" shall mean mental disease to such extent that a person so afflicted requires care and treatment for his own welfare, or the welfare of others, or of the community.

"Mental deficiency" shall mean mental deficiency as defined by appropriate clinical authorities to such extent that a person so afflicted is incapable of managing himself and his affairs, but shall not include mental illness as defined herein.

We note for the record the jury was also given an instruction with these definitions.

13. The same elements were previously found under § 7006-1.1(A)(5), failure to correct the conditions, and § 7006-1.1(A)(12), incarceration of a parent.

14. The current OUJI-Juvenile, Chapter 3, Grounds for Termination -Introductory Note, explains these two elements have been added to all grounds § 1-4-904(B).

15. Section 7006-1.1(A)(15) authorized termination when the child has been in foster care for 15 out of the most recent 22 months. When the Legislature amended § 7006-1.1, effective May 21, 2009, § 7006-1.1(A)(15)'s text was deleted and replaced with the new text now found in §1-4-904(B)(14).

16. The Court in *T.M.* found the facts in *Matter of M.C. and N.C.* distinguishable. First, § 7006-1.1(A)(15) became effective after the filing of the first termination petition for failure to correct, the trial of which ended in a mistrial, and the father had only two weeks notice before the retrial that the new ground had been added. Second, when the father asserted his right to a jury trial, his children had only been in foster care 12 months and the only reason the requisite 15 months under the new ground was satisfied was due to the court's delay in scheduling his trial. The Court in *T.M.* found the mother was given reasonable notice and that her children had been in foster care 15 months *prior* to the motion to terminate so her asserted right to a jury trial did not contribute to satisfaction of the statutory period in foster care.

17. We find no express repeal of § 7006-1.1(A)(15). However, the Legislature's amendment of § 7006-1.1(A) and renumbering it as § 1-4-904(B), as part of its recodification of the OCC, without § 7006-1.1(A)(15) included as a legal ground, may be viewed as an *implied* repeal by an amendatory act. *Hendrick v. Walters*, 1993 OK 162, ¶13, 865 P.2d 1232, 1240; *Lankford v. Menefee*, 1914 OK 651,¶3-4, 145 P. 375, 376-377.

18. Only the term "behavioral health" is defined by 10A O.S. Supp. 2009 § 1-1-105(6). When used in OCC, the term means "mental health, substance abuse or co-occurring mental health and substance abuse diagnoses, and the continuum of mental health, substance abuse or co-occurring mental health and substance abuse treatment."

19. "Custody" is not specifically defined under the OCC, but 10A O.S. 2011 § 1-4-906(A) and its predecessors have long identified the "right to custody" as just one of several, specific "parental rights" in an existing parent-child relationship. *See also Matter of Catlett*, 1975 OK 161, ¶4, 543 P.2d 552, 554.

20. It is clear from the newly-added paragraph and the statutory definition of "behavioral health" that § 1-4-904(B)(13) resulted from the Legislature's merger of § 7006-1.1(A)(13) with § 7006-1.1(A)(14), which allowed termination based on a parent's *resisted* treatment for their abusive and chronic use of drugs or alcohol.

21. *Matter of L.S.*, 1990 OK CIV APP 94, 805 P.2d 120; *see also Matter of C.R.T.*, 2003 OK CIV APP 29, ¶30, 66 P.3d 1004, 1010 (holding "the Legislature singled out the mental health 'condition' for special treatment in [§ 7006-1.1(A)(13)]" and "has thereby created a special provision controlling over the more general provision of [10 O.S. Supp. 2000 § 7006-1.1(A)(5)]," *i.e.*, failure to correct conditions leading to a deprived adjudication.

22. The Legislature's authority to protect parents with mental illnesses or deficiencies evolves from the same doctrine most generally applied to Oklahoma children, *i.e.*, the doctrine of *parens patriae*. This doctrine is defined as "the inherent power and authority of a Legislature of a state to provide protection of the person and property of persons *non sui juris* such as minors, insane and incompetent persons." *Matter of Baby Girl L.*, 2002 OK 9, n.8, 51 P.3d 544, 562.

23. When a statutory "requirement reflects an important state policy . . . the express recognition of that policy cannot be considered procedural rather than substantive." *In re Eden* F., 741A.2d 873, 887 (Conn. 1999) (the Court held the amended statute affected substantive rights of the parties by providing *additional statutory protection* for any parent contesting a parental rights termination action and placing the burden on the state to take appropriate measures designed to secure reunification of parent and child.)

24. The Court in *Adoption of W.C.* adopted the analysis of the Court in *VanBremen* which relied on Ohio's constitutional retroactivity clause and held the revised adoption without consent statute was substantive and did not operate retroactively, because the state's legislative body did not expressly provide for such and it "places a lesser burden on the petitioner who seeks to adopt the child without the consent of the natural parent and conversely places a higher burden on the natural parent who opposes the petition."

25. The Court in *Matter of A.W.* explained in fn. 5 that § 1-4-904 had gone into effect *after* the jury trial began but nevertheless considered Art. 5, §54 and found the changes in the law did not affect the pending proceeding, the "failure to correct" ground upon which the jury based its verdict was available under the superceded and the amended version, and there was "no fundamental error in the district court's instruction of the jury based on the law in effect at the time the trial proceedings began (§ 7006-1.1(A)).

26. Section 7003-5.5(I)(1) provided, "If reasonable efforts are required for the return of the child to the child's home, the court shall allow the parent of the child not less than three (3) months to correct conditions which led to the adjudication of the child as a deprived child prior to terminating the parental rights of the parent." This provision is now found at 10A O.S. 2011 § 1-4-707(C)(2).

27. We say "apparently" because Father's 1/10/08 Application has on top of the first page a handwritten note, "D. Mike Haggerty, I already appointed" and underneath it, "Discharged 1/8/08" and "Jail 1/16/08." Similarly, the 5/19/08 Application has only a handwritten

note, "Jail 5/20/08" and "Not eligible at this time, case set for review only 5/20/08," and the handwritten note at the top of the 6/09/09 Application says, "Nothing pending 7-9-09." The notes on these Applications are neither signed nor initialed, and the record reflects no minute or order denying the requests. Because State does not dispute Father's claims in his Brief in Chief that the trial court denied the Applications, we treat their admissions as curing a deficient appellate record. *House of Realty, Inc. v. City of Midwest City*, 2004 OK 97, ¶6, 109 P.3d 314, 317. We note for the record all three Applications are listed in the Amended Index as "Not Filed." Father did not file a designation of record, and neither Mother nor State designated the Applications for inclusion, so it is unclear why they are part of the appellate record certified by the Bryan County Court Clerk. However, we may review facts appearing of record which are *certified by the clerk* of the tribunal below. *Id*.

28. Rule 2.11(A)(6)(d) provides a trial judge should disqualify if he or she "previously presided as a judge over the matter in another court or in any adjudicatory capacity."

29. The District Judge opined "even assuming the facts of either of [Father's] cases are partly the basis for the termination proceeding in the instant case . . . no reasonable person can suggest that [Judge Powers'] impartiality might reasonably be questioned based on his acceptance of a stipulation to the State's application to revoke suspended sentence and based on his imposition of a sentence pursuant to a negotiated plea agreement."

30. The language limiting the participation of court appointed counsel for a child victim in a criminal case, 21 O.S. Supp.1992 § 846(G)(1), was discussed in *Cooper*. As noted by the Court in *J.D.D.*, the identical statutory language was later adopted under the OCC as 10 O.S. Supp. 1998 § 7003-3.7 and is now found at 10A O.S. 2011 § 1-4-306(A)(2)(c).

31. Because Father chose not to present any of his own evidence or testimony after State rested, we need not decide here whether the Legislature's 2009 amendment to § 1-4-904(B)(5), now requiring a finding "the parent has *failed to correct* the condition" changes the long-standing shifting of the burden of evidence or persuasion that originated with pre-1975 versions of 10 O.S. § 1130(c). Section 1130(c), which applied to "a parent who is entitled to custody" . . . [and] "has *failed to show* that the condition . . . has been corrected," was unchanged until the Legislature's amendment to § 7006-1.1(A)(5). (Emphasis added.)

32. See *fn 9* for the two § 1-4-904(A) elements.

33. Father also refers to the 2010 Protective Order as the "permanent protective order."

34. Even if Father's specific objections regarding the 2010 Protective Order could somehow be construed to also apply to the 2007 Protective Order, this court would find no error with its admission. The jury heard considerable testimony about the 2007 Protective Order the first day of trial, without objection by Father, and some of the testimony was elicited by Father's counsel during cross-examination. A party may not complain about admission of evidence over his objection, where other evidence of the same tenor was admitted without objection. *In re F.B.*, 1999 OK CIV APP 96, 990 P.2d 309.

35. The other statutes Father raises for the first time do not support his argument. Title 10A O.S. 2011 §1-4-706(A)(3) simply allows a juvenile court during the pendency of a deprived action to modify any order regarding child support, visitation or legal custody in any other administrative or district court proceeding.

2012 OK CIV APP 40

In the Matter of G.C., L.B., A.B., Alleged Deprived Children. DRS. GREG AND DEBORAH SAUL, Husband and Wife, Appellants, v. THE STATE OF OKLAHOMA, Appellee.

Case No. 107,435. November 18, 2011

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE ROGER STUART, TRIAL JUDGE

STAY DISSOLVED, APPEAL DISMISSED

Julie M. Fulton, Stacey Wiebelt, Oklahoma City, Oklahoma, for Appellants

David W. Prater, OKLAHOMA COUNTY DISTRICT ATTORNEY, Lori Dewey, John Joseph Dewey, ASSISTANT DISTRICT ATTORNEYS, OKLAHOMA COUNTY, Oklahoma City, Oklahoma, for Appellee

William R. McKinney, ASSISTANT PUBLIC DEFENDER, Oklahoma County, Oklahoma City, Oklahoma, for Minor Children

JERRY L. GOODMAN, PRESIDING JUDGE:

¶1 Drs. Greg and Deborah Saul (collectively "Sauls") appeal from the trial court's January 3, 2010, order overruling the Sauls' objection to the State of Oklahoma, the Department of Human Services' (DHS), notice of removal of minor children from out-of-home placement.[1] Based upon our review of the facts and applicable law, we dismiss the appeal.

FACTS AND PROCEDURAL HISTORY

¶2 The minor children, LB, AB, and GC, were removed from their mother's care on September 26, 2008, when AB tested positive at birth for methamphetamine and amphetamines. The children were adjudicated deprived and placed in a shelter. LB and AB were ultimately placed in the Sauls' foster home on or about December 5, 2008. GC was placed in a shelter, a foster home, and subsequently a shelter where he remained until February 10, 2009, when he was placed with Shannon Becktold (Becktold).[2] Becktold offered to take all three (3) children at this time. DHS did not transfer LB and AB to Becktold, however, because her current living situation could not accommodate three (3) children and GC's and LB's permanency plan was to reunify and transfer them to live with LB's father, John Bartley (Bartley), who was currently married to the mother.[3] Bartley resided in Mississippi with LB's siblings and GC and AB's half-siblings, DB and JB.

¶ 3 On July 9, 2009, DHS provided the Sauls with a notice of childrens' removal from out-of-home placement, providing LB and AB would be removed from their home on July 16, 2009, to be placed with GC in Becktold's home. The Sauls filed an objection on July 13, 2009. At the conclusion of the hearing on the Sauls' objection, the trial court issued its decision in court, finding the Sauls' objection should be denied

and LB and AB should be removed and transferred to Becktold's home. The court stated:

> The kids need to be together. And the foster family has to support the kids being together. Because through all this process of uncertainty, the only thing that we can give them, hopefully, is each other … and I feel so sorry of the attachment [sic] that has grown between you and these children, that that is at risk. I am so sorry that you have had to go through this whole process. I am so sorry that DHS didn't come the first day and say, "Will you take all three kids?" And you could have decided then, one way or the other, and then have gone on. But instead, in their cumbersome, slow way, they place this beautiful child with you. And you became — and you fell in love with the child, like anybody would.
>
> [I]n fact, it is consistent with the children's permanency plan for them all three to be together. And the Court does find that it is in the best interest of the children to be together in Ms. Becktold [sic] … [GC] is the most fragile child … if you look at the counselor's report, states that he would be severely damaged if moved from the current placement. … It's in their best interest to be together, number one, first and foremost. That has been a plan that DHS has had. … And that [GC] is the most emotionally fragile of the children.

¶4 The Sauls appealed. While the appeal was pending, the Sauls filed a motion for emergency Interim Stay in the Oklahoma Supreme Court, which the Court granted on August 24, 2009. The order provides, in part:

> [Sauls'] motion for emergency interim stay is granted for the purpose of maintaining status quo until further order of this Court. All parties are directed to file simultaneous briefs…

On December 7, 2009, the Supreme Court issued an order providing the interim stay was to remain in place pending the appeal or further order of the Court.

¶5 On April 23, 2010, while the appeal was pending before the Oklahoma Court of Civil Appeals (COCA), DHS removed LB and AB from the Sauls' home and placed them with GC in Becktold's home pending an investigation of sexual abuse of another minor by Greg Saul. The Sauls filed an objection to the notice of children's removal on April 27, 2010. DHS concluded their investigation and found no abuse as to AB, LB, or GC. In addition, DHS concluded: "[T]he threat of harm as to Deborah Saul is unsubstantiated. However, it is concerning that Ms. Saul was made aware of this incident shortly after AG left Oklahoma, but did not make a report to DHS as required." The record on appeal does not include DHS's specific conclusion as to Greg Saul's culpability. Moreover, the record does not include any of the documents filed by the parties or the trial court's orders issued while the appeal has been pending before this Court.

¶6 On July 19, 2010, Deborah Saul, individually (hereinafter "Dr. Saul"), filed an amended objection to notice of child's removal.[4] DHS subsequently closed the Sauls' home as a foster home based upon their findings in the investigation. Dr. Saul filed a request for fair hearing of foster home closing.

¶7 On December 6, 2010, COCA issued a show cause order directing the parties to file a final appealable order or show cause why the appeal should not be dismissed as premature. An amended petition in error with a final appealable order was filed with the Court on January 3, 2011.

¶8 On December 14, 2010, however, the minor children's attorney filed a motion to dismiss the appeal, asserting the factual basis for the appeal had changed and had rendered the appeal moot. Dr. Saul responded, asserting the current appeal was not moot because her foster home remained open pending resolution of the fair hearing below. She further sought to strike or dismiss the motion to dismiss, asserting the motion failed to comply with Oklahoma Supreme Court Rules.

¶9 On February 10, 2011, the minor children's attorney filed an amended motion to dismiss the appeal, again asserting the appeal was moot. The motion states several review hearings had been held before the trial court where evidence was presented that the minor children were thriving in their current placement with Becktold, were bonding with each other, and were confused about their visits with Dr. Saul. A Court Appointed Special Advocate (CASA) testified these visits even caused fear and regression in the minor children. The childrens' counselor also testified the visitations caused the children stress and their behavior was disruptive and defiant following

visitations. He concluded the visits did not seem to be therapeutically beneficial to the children's stability and security. Dr. Saul responded, again asserting the appeal was not moot because her foster home remained open pending the resolution of the fair hearing below. Following a review hearing in October of 2011, the trial court ultimately canceled Dr. Saul's visitation with the minor children.

¶10 On February 24, 2011, this Court issued a show cause order directing the parties to respond to Dr. Saul's motion to strike or dismiss the minor children's motion to dismiss. The minor children's attorney responded, reiterating his prior assertions. On March 1, 2011, DHS also filed a motion to dismiss, asserting the appeal should be dismissed because the appeal was not expedited pursuant to the Children's Code.

¶11 On February 17, March 12, April 18, and May 11, 2011, an administrative hearing office held hearings on the closing of Dr. Saul's home as a foster home. An order affirming DHS's decision to close the home was issued on June 27, 2011. The order provides in part:

> Ms. Saul's failure to report the suspected sexual intercourse in her home between her husband and sixteen year old AG is an inexcusable breach of contract. It indicates Ms. Saul placed her own need to be a foster parent above the needs of her foster children. She hid the event from [DHS], thereby exposing her foster children to the chaos of her home, the departure of Mr. Saul, and no doubt, her own emotional difficulties. Ms. Saul's breach of this contract provision (mandating reporting of "suspected abuse") is proven by clear and convincing evidence.

Dr. Saul has appealed the decision.

¶12 On October, 3, 2011, this Court issued another show cause order directing the parties to provide the Court with an update on the status of the events occurring in the trial court during the pendency of the appeal. The parties complied.

STANDARD OF REVIEW

¶13 Court supervision over custody and welfare of children is equitable in nature, and the findings and judgment of the trial court will not be set aside unless clearly against the weight of the evidence. *In re: D.R.*, 2001 OK CIV APP 21, 9, 20 P.3d 166, 167 (citing *In re C.O.*, 1993 OK CIV APP 64, 19, 856 P.2d 290, 296).

ANALYSIS

¶14 Initially, this Court must address the contention that the current appeal should be dismissed as moot because of the actions and events occurring during the pendency of the appeal.

¶15 In the present case, the Oklahoma Supreme Court issued a stay directing the parties to preserve the status quo pending appeal.[5] Dr. Saul asserts DHS removed the minor children from her home in direct contravention to the stay. Neither DHS nor the minor children's attorney have responded to Dr. Saul's assertion. Rather, they assert the factual basis for this appeal has changed and rendered the appeal moot and that the best interests of the minor children direct that the children should remain in their current placement with Becktold. After our review of the after-occurring events, we agree with DHS and the minor children's attorney that the current appeal is moot and should be dismissed.[6]

¶16 Ordinarily, if a motion for stay is granted, the stay remains in effect until the stay is dissolved or pending final disposition of the appeal. The effect of a stay pending appellate review is preventive in nature. The stay preserves the status quo pending appellate review and generally suspends the power of the lower court to issue or modify orders.

¶17 In the present case, the Oklahoma Supreme Court issued the stay, intending custody of the minor children remain with Dr. Saul pending appeal. Pursuant to applicable case and statutory law, however, a trial court retains jurisdiction during the pendency of an appeal to issue or modify an order in the best interest of a deprived child. The district court's continuing authority over children adjudicated deprived is implicit in the scheme of the Children's Code. "Custody orders are entered and periodically reviewed by the court guided by the 'best interest of the child' standard." *Colclazier v. Colclazier*, 1997 OK 134, 10, 950 P.2d 824, 828.

> Any decree or order made pursuant to the provisions of the Oklahoma Children's Code may be modified by the court at any time; provided, however, that an order terminating parental rights shall not be modified.

10A O.S.2001 and Supp. 2009, § 1-4-814. The paramount consideration in all proceedings concerning a child, whether a custody matter or deprived proceeding, is always the health, safety, and best interest of the minor child. 10A O.S.2009, § 1-1-102.

> Courts have a duty to guard with jealous care the interest of minors and to protect infants' rights. The state also has an interest in a child's welfare and a responsibility to protect a child's interest. Under the Oklahoma Children's Code, the paramount consideration in all proceedings concerning a child alleged or found to be deprived is the health, safety and best interest of the child. [*See* 10 O.S.2001, § 7001-1.2] The purposes of laws relating to deprived children are to secure the permanency, care, health, safety and welfare of children and to preserve family ties whenever possible.

Skrapka v. Bonner, 2008 OK 30, 17, 187 P.3d 202, 210-11.

¶18 Furthermore, nothing contained in the Children's Code shall prevent a court from immediately assuming custody of a child and ordering whatever action may be necessary to protect the children's health, safety, or welfare. 10A O.S. Supp. 2009, § 1-4-207. Once jurisdiction has been obtained over a child who is or is alleged to be deprived, the trial court may issue any temporary order or grant any interlocutory relief authorized by the Code in an emergency. 10A O.S. Supp. 2009, § 1-4-101(A)(2).

¶19 In *Kahre v. Kahre*, 1995 OK 133, 916 P.2d 1355, the Oklahoma Supreme Court addressed a trial court's power to change custody orders during an appeal. Notably, the Oklahoma Supreme Court had issued a stay, providing enforcement of the trial court's order awarding custody of the parties' minor children to the mother was stayed pending the appeal. While the appeal was pending, however, the father repeatedly violated the trial court's orders and absconded with the children, resulting in the trial court entering an order placing custody of the children with the mother.

¶20 On appeal, the Court rejected an argument that the trial court exceeded its jurisdiction, stating nothing in its order staying the trial court's permanent custody order pending appeal prohibited the trial court from entering interim orders made in the best interest of the children. *Id*. at ¶49, at 1365. See *Jones v. Jones*, 1980 OK 85, 612 P.2d 266 (any necessary change in custody is deemed ancillary to the appeal and "lies within the concurrent and coordinate cognizance of the district court.") Admittedly *Kahre* involved a custody matter; nevertheless, we find it analogous and applicable in the instant matter.

¶21 While a trial court retains limited authority pending appeal pursuant to the Children's Code to modify or enter an interim order made in the best interest of the minor children, DHS most certainly does not retain such authority and may not act in direct violation of a Supreme Court stay. Such prohibition is not absolute, however. If an emergency situation concerning the minor children occurs in which the best interest of the children is no longer served by observing the stay, DHS's actions in violating the stay may be deemed necessary, and thus not subject to sanction. If this situation occurs, DHS shall notify the Supreme Court, the trial court, and all parties of the emergency and its' proposed actions at least contemporaneous with, if not prior to, such violation as well as establish that its' actions are done in furtherance of the limited purpose of protecting the minor children's best interest.

¶ 22 Accordingly, after thoroughly reviewing the record in this case, we find the record supports DHS's actions in removing the minor children from the Sauls' home and that the current appeal is moot and should be dismissed. An emergency situation had clearly arisen requiring a change in placement pending appeal, *i.e.*, an investigation of sexual abuse by Greg Saul of another minor in the home. In addition, the record on appeal provides Dr. Saul's home has been closed as a foster resource and it is in the best interest of the minor children that they remain in Becktold's placement.

¶23 Nevertheless, we note DHS failed to notify the Court that an emergency had occurred and that it was acting in contravention to the stay. Such action is unacceptable. DHS's failure to notify the Court of its actions until required to do so by show cause order resulted in this Court's expenditure of unnecessary and wasted resources and a delay in resolving the appeal. In the future, such impermissible conduct by DHS will result in sanctions.[7]

¶24 **STAY DISSOLVED, APPEAL DISMISSED.**

RAPP, J., concurs; THORNBRUGH, J., concurs specially.

THORNBRUGH, J., specially concurring:

¶1 I concur with the majority opinion but write separately to emphasize that DHS's actions in this case were indefensible and warrant sanctions. I would impose sanctions on DHS at this time.

1. See footnote 4.

2. The Sauls and Becktold were deemed kinship foster parents by DHS. Becktold was deemed a kinship foster parent because her father dated the grandmother of the minor children. The Sauls were deemed kinship foster parents because of their relationship with AB's paternal grandparents. *See* 10A O.S.2009, § 1-1-105(40), which provides: "'Kinship relation' or "kinship relationship" means relatives, stepparents, or other responsible adults who have a bond or tie with a child and/or to whom has been ascribed a family relationship role with the child's parents or the child. "

3. Bartley is GC's step-father. An Interstate Compact on the Placement of Children (ICPC) request was sent to Mississippi in October of 2008 for placement of LB and GC with Bartley. The ICPC was subsequently denied because Bartley was unemployed. A second ICPC request was issued on March 17, 2009, after Bartley became employed which was also denied.

GC's father is Sonny Lee Ennis. State is seeking to terminate Ennis' parental rights on the basis of abandonment.

The permanency plan for AB is adoption. Monty Stanton is AB's biological father. He relinquished his parental rights on May 14, 2008.

4. Dr. Saul's response notes she has filed for divorce from Greg Saul and is seeking return placement of the minor children individually. Though the record suggests the parties are seeking divorce, no pleading amending Greg Saul as an appellant has been filed with this Court. Accordingly, he remains a party to the appeal.

5. 12 O.S.2001 and Supp. 2009, § 990.4(C) provides both the trial and appellate court may stay or suspend, pending appeal, the enforcement of any provision in a judgment, decree or final order in a juvenile matter.; Rule 1.15, Rules of the Supreme Court of Oklahoma, 12 O.S.2001, Ch.15, App. 1.

6. While appellate scrutiny is generally confined strictly to the record of proceedings below, a well-recognized exception allows an appellate tribunal to consider only those after-occurring facts, transpiring during the pendency of an appeal, which adversely affect the reviewing court's capacity to administer effective relief. *See Lawrence v. Cleveland County Home Loan Auth.*, 1981 OK 28, 626 P.2d 314; *Brown Investment Co. v. Hickox*, 1962 OK 61, 369 P.2d 807; *Carlton v. State Farm Mutual Automobile Ins. Co.*, 1957 OK 75, 309 P.2d 286. By affidavit attached to a dismissal motion the movant may apprise this Court of any material midappeal development that affects the Court's cognizance of the case. *Tulsa Tribune v. Oklahoma Tax Com'n, Okl.*, 1989 OK 13, 768 P.2d 891 (Opala, V.C.J., dissenting). In the present case, counsel for DHS and the minor children tendered extra-record facts solely for the purpose of providing support for their motions to dismiss the appeal for mootness by affidavit attached to the dismissal motions.

7. Dr. Saul's Motion to Strike and/or Motion to Dismiss is denied.

NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT OF GARY BRUCE FRALEY, SCBD #5845 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 Gary Bruce Fraley 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 10:00 a.m. on **Tuesday, June 5, 2012**. Any person wishing to appear should contact Gina Hendryx, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152, telephone (405) 416-7007.

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NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT OF HA THI THU DO, SCBD #5846 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 Ha Thi Thu Do 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 10:00 a.m. on **Tuesday, June 12, 2012**. Any person wishing to appear should contact Gina Hendryx, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152, telephone (405) 416-7007.

PROFESSIONAL RESPONSIBILITY TRIBUNAL

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Friday, April 20, 2012

F-2011-663 — Appellant James Noble Dunn was convicted in a non-jury trial with Trafficking in Illegal Drugs (Count I); Possession of a Controlled Dangerous Substance Without a Tax Stamp Affixed (Count II) and Possession of Marijuana (Count III), in the District Court of Tulsa County, Case No. CF-2007-2031. The trial court sentenced Appellant to imprisonment for fifteen (15) years in Count I, five (5) years in Count II and one year in Count III. All sentences were ordered to run concurrently to each other. It is from this judgment and sentence that Appellant appeals. AFFIRMED. Opinion by: Lumpkin, J.; A. Johnson, P.J., concur; Lewis, V.P.J., concur; C. Johnson, J., concur; Smith, J., concur.

Monday, April 23, 2012

RE-2011-0257 — Appellant, Rodney Don Hefner, pled *nolo contendere* on February 8, 2011, to Count 1 – Aggravated Assault and Battery and Count 2 – Attempted Indecent Exposure in the District Court of Tillman County, Case No. CF-2009-89. On Count 1 he was sentenced to five years with all but the first 167 days suspended and he was sentenced to five years on Count 2, all suspended, with rules and conditions of probation. Appellant was fined $400.00 on each count. The sentences were ordered to run consecutively. On February 11, 2011, the State filed a motion to revoke Appellant's suspended sentences. Following a revocation hearing March 30, 2011, the Honorable Richard B. Darby, District Judge, revoked the balance of Appellant's suspended sentences. Appellant appeals from the revocation of his suspended sentences. The revocation of Appellant's suspended sentences is AFFIRMED. Opinion by: A. Johnson, P.J.; Lewis, V.P.J., concur; Lumpkin, J., concur; C. Johnson, J., concur.

F-2010-876 — Sebastian Alex Smith, Appellant, was tried by jury for the crime of Larceny of Merchandise from a Retailer, Third Offense in Case No. CF-2008-5604 in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment four and one half years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Sebastian Alex Smith has perfected his appeal. The Judgment and Sentence of the district court is AFFIRMED. Opinion by: A. Johnson, P.J.; Lewis, V.P.J., concurs; Lumpkin, J., concurs; C. Johnson, J., concurs; Smith, J., concurs.

Tuesday, April 24, 2012

C-2011-844 — Steven Brad Potter, Petitioner, entered a negotiated plea of *nolo contendere* for the crimes of Unlawful Possession of Drug Paraphernalia (Count 2) and Unlawful Possession of Methamphetamine, After Former Conviction of a Felony (Count 3) in Case No. CF-2011-29A in the District Court of Delaware County. The Honorable Barry V. Denney accepted Potter's plea and sentenced him to one year in the county jail and a $100 fine on Count 2 and five years imprisonment and a $500 fine on Count 3. Judge Denny ordered Potter's sentences on Counts 2 and 3 to be served concurrently with each other, but consecutive to his sentence in CF-2010-235. The district court held a hearing on Potter's motion to withdraw his plea and denied the motion. Potter now appeals the district court's order and asks this Court to issue a Writ of Certiorari allowing him either to have a new hearing on his motion to withdraw plea with conflict-free counsel, or to withdraw his plea and proceed to trial. The Petition for Writ of Certiorari is DENIED. The Judgment and Sentence of the district court is AFFIRMED. Opinion by: A. Johnson, P.J.; Lewis, V.P.J., concurs; Lumpkin, J., concurs; C. Johnson, J., concurs; Smith, J., concurs.

F-2011-210 — Henry Matthew Hickman, Appellant, was tried by jury for the crime of Lewd Molestation of a Minor, After Conviction of Two or More Felonies, in Case No. CF-2007-275, in the District Court of Pontotoc County. The jury returned a verdict of guilty and recommended as punishment twenty years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Henry Matthew Hickman has perfected his appeal. AFFIRMED. Opinion by: C. Johnson, J.; A.

Johnson, P.J., Concurs; Lewis, V.P.J., Concurs; Lumpkin, J., Concurs; Smith, J., Concurs.

Thursday, April 26, 2012

F-2011-479 — Martrell D. Polin, Appellant, was tried by jury for the crimes of Robbery With a Firearm (Counts I, II, and III), and False Declaration to a Pawnbroker (Count IV), all after former conviction of two or more felonies in Case No. CF-2009-2615, in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment twenty (20) years imprisonment on each of Counts I, II, and III, and four (4) years imprisonment on Count IV, all to run concurrently. The trial court sentenced accordingly. From this judgment and sentence Martrell D. Polin has perfected his appeal. AFFIRMED. Opinion by: Smith, J.; A. Johnson, P.J., Concur; Lewis, V.P.J., Concur; Lumpkin, J., Concur in Results; C. Johnson, J., Concur.

F-2011-205 — Amos O. Adetula, Jr., Appellant, was tried by jury for the crimes of Second Degree Murder (Count I), Assault and Battery with a Deadly Weapon (Count II) in Case No. CF-2009-113, in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment twenty-five (25) years imprisonment and $5,000 fine on Count I and ten (10) years imprisonment and a $5,000 fine on Count II. The trial court sentenced accordingly. From this judgment and sentence Amos O. Adetula, Jr. has perfected his appeal. The Judgment and Sentence of the District Court of Tulsa is AFFIRMED. The APPLICATION FOR EVIDENTIARY HEARING is DENIED. Opinion by: Smith, J.; A. Johnson, P.J., Concur; Lewis, V.P.J., Concur in Results; Lumpkin, J., Concur in Results; C. Johnson, J., Concur.

F-2011-107 — Richard Wayne Conway, Appellant, was tried by jury for the crime of Malice Aforethought First Degree Murder in Case No. CF-2009-410, in the District Court of Woodward County. The jury returned a verdict of guilty and recommended as punishment life imprisonment with the possibility of parole. The trial court sentenced accordingly. From this judgment and sentence Richard Wayne Conway has perfected his appeal. AFFIRMED Opinion by: Smith, J.; A. Johnson, P.J., Concur; Lewis, V.P.J., Concur; Lumpkin, J., Concur in Results; C. Johnson, J., Concur.

RE-2010-578 — In the District Court of Oklahoma County, the Honorable Ray C. Elliott, District Judge, on January 8, 2007, sentenced Appellant, Kenyuata Raschel Dawkins, to a term of five (5) years imprisonment for Possession of a Controlled Dangerous Substance (Phencyclidine) in Case No. CF-2002-7021, and to terms of five (5) years imprisonment on each of three counts of Assault with a Dangerous Weapon in Case No. CF-2003-602. Judge Elliott ordered all four sentences to be served concurrently and suspended their execution under terms of probation. On October 30, 2007, in Case No. CF-2007-1658, the Honorable D. Fred Doak, Special Judge, sentenced Appellant to terms of seven (7) years imprisonment on two additional counts of Assault with a Dangerous Weapon and ordered those two terms to be served concurrently with each other but suspended their execution under terms of probation. On April 29, 2010, Judge Elliott found Appellant had violated her probation and revoked the suspension orders in each of Appellant's cases in full. Appellant appeals the final orders of revocation. AFFIRMED. Opinion by: Smith, J; A. Johnson, P.J., Concur; Lewis, V.P.J., Concur; Lumpkin, J., Concur in Results; C. Johnson, J., Concur.

RE-2011-346 — Katherine Nicole Buck, Appellant, appeals from the revocation in full of her concurrent suspended sentences totaling thirty years, by the Honorable Robert G. Haney, District Judge, in Case Nos. CF-2006-426A, CF-2007-135A, and CF-2008-126 in the District Court of Delaware County. On July 21, 2008, Appellant stipulated to violations of probation and her deferred judgments and sentencing were accelerated in Case Nos. CF-2006-426A and CF-2007-135A. She was convicted of Endeavoring to Distribute Controlled Dangerous Substance and sentenced to a term of thirty years in Case No. CF-2006-426A. She was convicted of Kidnapping for Extortion and sentenced to a term of ten years in Case No. CF-2007-135A. The sentences were suspended upon successful completion of the Drug and Alcohol Program, and ordered to run concurrently with each other and with her sentence in Case No. CF-2008-126. In Case No. CF-2008-126, Appellant entered a plea of guilty and was convicted and sentenced on Count 1: Felony Value – False Pretenses/Bogus Check/Con Game, ten (10) years; Count 2: Distribution of Controlled Substance, thirty (30) years; Count 3: Unlawful Possession of Drug Paraphernalia, one (1) year; and Count 4: Resisting an Officer, one (1) year, with all sentences suspended upon successful completion of the Drug and Alcohol Program, and the sentences ordered to

run concurrently with each other and with her sentences in Case Nos. CF-2006-426A and CF-2007-135A. On March 31, 2011, the State filed applications to revoke Appellant's suspended sentences in all three cases alleging she violated probation (1) by twice being charged with Driving While License Suspended; (2) by being $400.00 in arrears on payment of probation fees; (3) by testing positive on three occasions for methamphetamine and/or amphetamine; (4) by failing to attend drug treatment program as directed; (5) by failing to provide verification of employment; (6) twice failing to report for urinalysis testing as directed; and (7) by being charged in Ottawa County District Court Case No. CF-2010-414 with the new crimes of Count 1: Manufacture of Controlled Dangerous Substance — Methamphetamine and/or Amphetamine, AFCF; and Count 2: Possession of Controlled Dangerous Substance — Methamphetamine, AFCF. On April 21, 2011, the hearing on the applications to revoke was held before Judge Haney. Appellant stipulated to all of the alleged violations of probation. After hearing evidence and arguments on sentencing, Judge Haney revoked in full Appellant's concurrent suspended sentences totaling thirty (30) years. The revocation in full of Appellant's concurrent suspended sentences totaling thirty (30) years in Case Nos. CF-2006-426A, CF-2007-135A, and CF-2008-126 in the District Court of Delaware County is AFFIRMED. Opinion by: A. Johnson, P.J.; Lewis, V.P.J., concurs; Lumpkin, J., concurs in results; C. Johnson, J., concurs; Smith, J., concurs.

F-2010-914 — Elgret Lorenzo Burdex, Appellant, was tried by jury for the crime of Uttering a Forged Instrument, After Former Conviction of Two or More Felonies in Case No. CF-2008-49 in the District Court of Caddo County. The jury returned a verdict of guilty and recommended as punishment life imprisonment. The trial court sentenced accordingly. From this judgment and sentence Elgret Lorenzo Burdex has perfected his appeal. The Judgment of the district court is AFFIRMED. The matter is REMANDED to the district court to MODIFY Burdex's sentence from life imprisonment to twenty years imprisonment. Opinion by: A. Johnson, P.J.; Lewis, V.P.J., concurs in results; Lumpkin, J., concurs in part and dissents in part; C. Johnson, J., concurs; Smith, J., concurs.

Monday, April 30, 2012

F-2011-449 — Appellant David Lee Stevenson was tried by jury and convicted of Shooting with Intent to Kill, After Former Conviction of Two or More Felonies (Count I) and Felonious Possession of a Firearm, After Former Conviction of a Felony (Count II) in the District Court of Tulsa County, Case No. CF-2010-3620. The jury recommended as punishment forty (40) years imprisonment and a $5,000.00 fine in Count I and ten years (10) imprisonment and a $5,000.00 fine in Count II. The trial court sentenced accordingly, ordering the sentences to run consecutively. It is from this judgment and sentence that Appellant appeals. AFFIRMED. Opinion by: Lumpkin, J.; A. Johnson, P.J., concur in result; Lewis, V.P.J., concur in result; C. Johnson, J., concur in result; Smith, J., concur.

Tuesday, May 1, 2012

F-2011-0575 — On September 30, 2010, Appellant, Gina Ann Bromlow, pled guilty in Beckham County District Court Case No. CF-2010-158 to Count 1 – Possession of Controlled Substance and Count 2 – Unlawful Possession of Drug Paraphernalia. Pursuant to the plea agreement, Appellant was diverted to the Beckham County Drug Court with the agreement that should she fail to complete the Drug Court Treatment Program, she would be sentenced to ten years imprisonment and a $500.00 fine on Count 1 and one year in the County Jail on Count 2. On January 5, 2011, the State filed an application to terminate Appellant from the Drug Court Program alleging Appellant violated the rules and conditions of Drug Court. At the hearing on the State's application held February 25, 2011, the Honorable F. Pat Versteeg, Associate District Judge, granted the State's motion to terminate Appellant from the Drug Court program. He sentenced Appellant, as agreed, with credit for time served. Judge Versteeg ran the sentences concurrently. Appellant did not timely appeal from her termination from Drug Court, but was granted an appeal out of time by this Court on June 22, 2011, Case No. PC 2011-0496. Appellant appeals from the termination from Drug Court. Appellant's termination from Drug Court is AFFIRMED. Opinion by: A. Johnson, P.J.; Lewis, V.P.J., concur; Lumpkin, J., concur; Johnson, J., concur; Smith, J., concur.

F-2011-164 — Isaiah C. Hamburger, Appellant, was tried by jury for the crime of Lewd Acts with a Child in Case No. CF-2009-1406, in the District Court of Cleveland County. The jury returned a verdict of guilty and recommended as punishment thirty-three (33) years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Isaiah

C. Hamburger has perfected his appeal. AFFIRMED. Opinion by: Smith, J.; A. Johnson, P.J., Concur; Lewis, V.P.J., Concur; Lumpkin, J., Concur in Results; C. Johnson, J., Concur.

F-2011-198 — Skyler James Neill, Appellant, was tried by jury for the crimes of Second Degree Robbery, After Conviction of Two or More Felonies, in Case No. CF-2010-823; and Robbery with a Dangerous Weapon, After Conviction of Two Felonies, and Assault and Battery, in Case No. CF-2010-949, in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment twenty years imprisonment for Second Degree Robbery, twenty-seven years imprisonment for Robbery with a Dangerous Weapon, and ninety days for Assault and Battery. The Honorable Kurt G. Glassco, District Judge, sentenced Appellant accordingly, ordering the two felony sentences to be served consecutively to each other. From this judgment and sentence Skyler James Neill has perfected his appeal. The Judgment and Sentence of the district court is AFFIRMED. However, the case is REMANDED to the district court for correction of the Judgment and Sentence *nunc pro tunc*, to reflect that Appellant was convicted by a jury after pleas of not guilty. Opinion by: C. Johnson, J.; A. Johnson, P.J., Concurs; Lewis, V.P.J., Concurs; Lumpkin, J., Concurs; Smith, J., Concurs.

Wednesday, May 2, 2012

F-2010-867 — On May 18, 2009, Appellant entered a guilty plea to the charges of Distribution of a Controlled Dangerous Substance within 2,000 Feet of a child care facility in Custer County Case No. CF-2007-296 and Conspiracy to Deliver a Controlled Dangerous Substance in Custer County Case No. CF-2007-313. Appellant's sentencing was deferred pending completion of the Washita County Drug Court Program. On May 14, 2010, the State filed an Amended Application to Terminate Appellant from Drug Court participation. On May 17, 2010, Appellant's participation in Drug Court was terminated and he was sentenced according to the terms of his plea agreement. From this judgment and sentence Appellant appeals. Appellant's Drug Court termination is AFFIRMED. Opinion by: Lewis, V.P.J.; A. Johnson, P.J., Concurs; Lumpkin, J., Concurs; C. Johnson, J., Concurs; Smith, J., Concurs;

F-2011-126 — Kendrick Arnez Moore, Appellant, was tried by jury and found guilty of Count 1, trafficking in illegal drugs, in violation of 63 O.S.Supp.2007, § 2-415; Count 3, possession of a firearm after former conviction of a felony, in violation of 21 O.S.Supp.2007, § 1283; Count 4, eluding a police officer, in violation of 21 O.S.2001, § 540A; Count 5, shooting with intent to kill, in violation of 21 O.S.Supp.2007, § 652(A); Count 6, possession of a firearm in the commission of a felony, in violation of 21 O.S.Supp.2007, § 1287; and Count 8, possession of a controlled dangerous substance without tax stamp affixed, in violation of 68 O.S.2001, § 450.1, in the District Court of Tulsa County, Case No. CF-2008-5782. The jury sentenced Appellant to twenty (20) years imprisonment in Count 1; five (5) years imprisonment in Count 3; three (3) years imprisonment in Count 4; twenty-five (25) years imprisonment in Count 5; four (4) years imprisonment in Count 6; and one (1) year imprisonment in Count 8. The Honorable Dana L. Kuehn, Associate District Judge, pronounced judgment and sentence accordingly. From this judgment and sentence, Kendrick Arnez Moore has perfected his appeal. AFFIRMED. Opinion by: Lewis, V.P.J.; A. Johnson, P.J., Concurs; Lumpkin, J., Concurs; C. Johnson, J., Concurs; Smith, J., Concurs.

RE-2011-0450 and RE-2011-0451 — On June 11, 2008, Appellant, Stephanie Anjanette Jackson, pled *nolo contendere* in Tulsa County District Court Case No. CF-1995-1288 (Appeal No. RE 2011-0450) to Uttering Two or More Bogus Checks Exceeding $50.00, a felony. She was sentenced to five years, all suspended, with rules and conditions of probation. Appellant was also fined $100.00, assessed fees and costs and ordered to pay restitution in the amount of $3,144.93. Appellant also pled *nolo contendere* on June 11, 2008, in Tulsa County District Court Case No. CF-2008-381 (Appeal No. RE 2011-0451) to Possession of Stolen Vehicle. In this case she was sentenced to five years, all suspended with rules and conditions of probation. She was also fined $250.00, assessed fees and costs and ordered to pay restitution in the amount of $8,254.38. The sentences were ordered to run concurrently. The State filed a motion to revoke Appellant's suspended sentence in District Court Case No. CF-2008-381 on October 24, 2008, and in District Court Case No. CF-1995-1288 on December 19, 2008. Following a revocation hearing on May 16, 2011, for both cases, the Honorable Tom C. Gillert, District Judge, revoked Appellant's suspended sentences in full. Judge Gillert ordered the sentences to run concurrently. Appellant appeals from the revocation of her suspended sentences. The revocation of Appel-

lant's suspended sentences is AFFIRMED. Opinion by: Lewis, V.P.J.; A. Johnson, P.J., concurs; Lumpkin, J., concurs; C. Johnson, J., concurs; Smith, J., concurs.

F-2010-1117 — Dustin Dewayne Bristow, Appellant, was tried by jury and found guilty of indecent exposure (Counts 1 and 2), in violation of 21 O.S.Supp.2002, § 1021; lewd or indecent proposals or acts to a child (Counts 3 and 5), in violation of 21 O.S.Supp.2002, § 1123; and lewd molestation (Count 4), in violation of 21 O.S.Supp.2002, § 1123; in the District Court of Pittsburg County, Case No. CF-2009-54. The jury sentenced Appellant to five (5) years imprisonment on Counts 1 and 2; ten (10) years imprisonment on Count 3, and twenty (20) years imprisonment on Counts 4 and 5. The Hon. Thomas M. Bartheld, District Judge pronounced judgment and sentence accordingly, ordering that Counts 1, 2, and 3 be served concurrently and Counts 4 and 5 be served concurrently, but consecutively to Counts 1-3. From this judgment and sentence, Dustin Dewayne Bristow has perfected his appeal. AFFIRMED. Opinion by: Lewis, V.P.J.; A. Johnson, P.J., Concurs; Lumpkin, J., Concurs; C. Johnson, J., Concurs; Smith, J., Concurs.

F-2011-0125 — On May 28, 2009, Appellant, Travis Dean Dorsey, pled *nolo contendere* in Pontotoc County District Court Case No. CF-2008-306 to Unlawful Possession of Controlled Drug With Intent to Distribute Within 2000 Feet of a Public School. Pursuant to the plea agreement, Appellant was diverted to the Pontotoc County Drug Court with the agreement that should he fail to complete the Drug Court Treatment Program, he would be sentenced to fifteen years imprisonment. On January 13, 2011, the State filed an application to terminate Appellant from the Drug Court Program. Following a hearing February 16, 2011, the Honorable Thomas S. Landrith, District Judge, found Appellant failed to comply with the Drug Court Performance Contract and granted the State's motion to terminate Appellant from the Drug Court program. Judge Landrith sentenced Appellant, as agreed, to fifteen years, with credit for time served. Appellant appeals from the termination from Drug Court. Appellant's termination from Drug Court is AFFIRMED. Opinion by: Lewis, V.P.J.; A.Johnson, P.J., Concurs; Lumpkin, J., Concurs; Johnson, J., Concurs; Smith, J., Concurs.

PCD-2012-261 — Clarence Rozell Goode, Jr., was convicted of three counts of first degree murder, in violation of 21 O.S.Supp.2004, § 701.7, and one count of first degree burglary, in violation of 21 O.S.2001, § 1431, in Tulsa County District Court case number CF-2005-3904, before the Honorable Tom C. Gillert, District Judge. The jury assessed punishment at death on each of the three first degree murder convictions, after finding the existence, in each of the three murders, of the two alleged aggravating circumstances: (1) the defendant knowingly created a great risk of death to more than one person; and (2) there exists a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. 21 O.S.2001, § 701.12 (2) and (7). The jury assessed twenty (20) years imprisonment and a $10,000 fine on the first degree burglary count. Judge Gillert formally sentenced Goode in accordance with the jury verdict on January 7, 2008. Thereafter, Goode filed a direct appeal of his convictions and sentences, which were affirmed by this Court in *Goode v. State*, 2010 OK CR 10, 236 P.3d 671. Goode's original application for post-conviction relief was denied by unpublished Opinion on September 7, 2010. Goode filed a subsequent application for post-conviction relief, which was denied on September 28, 2010. Opinion by: Lewis, V.P.J.; A. Johnson, P.J., Concurs; Lumpkin, J., Concurs; C. Johnson, J., Concurs; Smith, J., Concurs.

F-2011-255 — Brandi Rebecca Milligan, Appellant, was tried by jury for the crime of Shooting with Intent to Kill, in Case No. CF-2009-729, in the District Court of Cleveland County. The jury returned a verdict of guilty and recommended as punishment twenty-five years imprisonment. The Honorable Rod D. Ring, District Judge sentenced her in accordance with the jury's recommendation, but suspended the last seven years of the sentence. From this judgment and sentence Brandi Rebecca Milligan has perfected her appeal. AFFIRMED. Opinion by: C. Johnson, J.; A. Johnson, P.J., Concurs; Lewis, V.P.J., Concurs; Lumpkin, J., Concurs in Results; Smith, J., Concurs.

F-2011-432 — Appellant Jamane Kamale Stubblefield was charged conjointly with Mike Murillo and Bernard Brown with First Degree Burglary (Count I) and First Degree Felony Murder (Count II), in the District Court of Carter County, Case No. CF-2010-218. The cases were severed and Appellant was tried in a non-jury trial. He was convicted as charged and sentenced to imprisonment for ten (10)

years in Count I and life in Count II, with the sentences running consecutively. It is from this judgment and sentence that Appellant appeals. AFFIRMED. Opinion by: Lumpkin, J.; A. Johnson, P.J., concur; Lewis, V.P.J., concur; C. Johnson, J., concur; Smith, J., concur.

C-2011-791 — Petitioner Joshua David Slinkard was charged in the District Court of Tulsa County, Case No. CF-2011-504, with seven (7) counts of Child Sexual Abuse, one count of Lewd Molestation of a Child Under Sixteen and one count of Possession of Child Pornography. On July 25, 2011, Petitioner entered negotiated pleas of guilty to all charges. The Honorable Kurt G. Glassco, District Judge, accepted the pleas and sentenced Petitioner to thirty (30) years imprisonment for each of the sexual abuse counts and the molestation count and twenty (20) years imprisonment on the child pornography count. The sentences were ordered to run concurrently. On July 29, 2011, Petitioner filed an Application to Withdraw Guilty Plea. At a hearing held on August 30, 2011, the trial court denied the application to withdraw guilty plea. It is that denial which is the subject of this appeal. The order of the district court denying Petitioner's motion to withdraw plea of guilty is AFFIRMED. Opinion by: Lumpkin, J.; A. Johnson, P.J., concur; Lewis, J., V.P.J., concur; C. Johnson, J., concur; Smith, J., concur.

F-2011-531 — Appellant, Donald Ray Stovall, was tried by jury and convicted of Obtaining Money by False Pretenses, in the District Court of Stephens County Case Number CF-2010-47B. The jury recommended as punishment imprisonment for eight (8) years and a fine in the amount of $5,000.00. The trial court sentenced accordingly and ordered Appellant to pay restitution in the amount of $30,000.00. It is from this judgment and sentence that Appellant appeals. AFFIRMED. Opinion by: Lumpkin, J.; A. Johnson, P.J., concur; Lewis, V.P.J., concur; C. Johnson, J., concur; Smith, J., concur.

Thursday, May 3, 2012

F-2010-1224 — Lorenzo Aguirre Franco, Sr., Appellant, was tried by jury for the crimes of Conspiracy of Traffic in Aggravated Quantities of Methamphetamine (Count I) and Unlawful Use of Communication Facility (Count II) in Case No. CF-2009-118, in the District Court of Caddo County. The jury returned a verdict of guilty and recommended as punishment Fifteen (15) years imprisonment on Count I and five (5) years imprisonment on Count II, with the counts to run consecutively. The trial court sentenced accordingly. From this judgment and sentence Lorenzo Aguirre Franco, Sr. has perfected his appeal. AFFIRMED. Opinion by: Smith, J.; A. Johnson, P.J., Concur; Lewis, V.P.J., Concur; Lumpkin, J., Concur in Results; C. Johnson, J., Concur.

F-2010-918 — On April 1, 2009, in the District Court of Beckham County, Case No. CF-2009-67, Christopher Jason Rogers, Appellant, entered pleas of guilty to Count 1-Attempt to Manufacture Methamphetamine and Count 2-Conspiracy to Manufacture a Controlled Dangerous Substance (Methamphetamine). The Honorable Doug Haught, Associate District Judge, delayed sentencing pending Appellant's completion of the Beckham County Drug Court Program. On September 22, 2010, The Honorable Donna Dirickson, Special Judge, terminated Appellant from Drug Court and sentenced him to a concurrent term of twenty (20) years imprisonment on each count. Appellant appeals the final order of termination. AFFIRMED. Opinion by: Lumpkin, J.; A. Johnson, P.J., concur; Lewis, V.P.J.:, concur; C. Johnson, J., concur; Smith, J., concur in result.

Monday, May 7, 2012

C-2011-755 — Petitioner Kendall Ladon Roland was charged in the District Court of Tulsa County, Case No. CF-2010-168 with Felony Murder (Count I), Attempted Robbery with a Firearm (Count II) and First Degree Burglary (Count III), After Former Conviction of a Felony. As a result of plea negotiations, Count III, First Degree Burglary was dismissed, and Petitioner pled guilty to a reduced charge of Second Degree Murder (Count I) and Attempted Armed Robbery (Count II). The Honorable William C. Kellough, District Judge, accepted the pleas on February 21, 2011, and sentenced Petitioner to imprisonment for thirty (30) years and twenty (20) years, respectively. The sentences were ordered to run concurrently. On February 24, 2011, Petitioner filed a Motion to Withdraw Guilty Plea. At a hearing held on March 31, 2011, the trial court denied the motion to withdraw guilty plea. It is that denial which is the subject of this appeal. The order of the district court denying Petitioner's motion to withdraw plea of guilty is AFFIRMED. Opinion by: Lumpkin, J.; A. Johnson, P.J., concur; Lewis, J., V.P.J., concur in result; C. Johnson, J., concur; Smith, J., concur.

COURT OF CIVIL APPEALS
(Division No. 1)
Thursday, April 19, 2012

107,982 — Jess Isbell and Carolyn Isbell, Husband and Wife, Plaintiffs/Appellees, vs. Char-Dan Properties, Inc., an Oklahoma corporation, and Charles Cheek, an individual, Defendants/Appellants. Appeal from the District Court of Delaware County, Oklahoma. Honorable Barry Denney, Judge. Defendants seek review of the trial court's order denying their Motion for New Trial after entry of judgment on a jury's verdict for Plaintiffs on their claims for breach of contract and breach of the warranty of title. Defendants conveyed the lots to Plaintiffs by Joint Tenancy Warranty Deed which assured Plaintiffs the property was conveyed "free, clear and discharged of and from all former grants, charges, taxes, judgments, mortgages and other liens and incumbrances of whatever nature," and Defendants are not excused from their obligations under the warranty of title provision because Plaintiffs either knew or should have known of the existence of other charges against the property. We cannot say the trial court abused its discretion in granting Plaintiffs' motion in limine, or in denying Defendants' motion in limine. We likewise cannot say the trial court abused its discretion in excluding the testimony of defense witnesses for violation of the Rule of Sequestration. The trial court did not abuse it discretion in granting a directed verdict on the breach of warranty claim. The trial court properly instructed on the issue of damages for breach of warranty and the jury properly awarded damages in the amount of the purchase price. Under the facts and circumstances of this case, we cannot say the trial court's award is so grossly excessive as to constitute an abuse of its discretion. The trial court did not err in awarding costs and expenses. AFFIRMED. Opinion by Joplin, V.C.J.; Buettner, P.J., and Mitchell, J. (sitting by designation), concur.

108,354 — In Re the Marriage of Cross: Brandon Keith Cross, Petitioner/Appellant/Counter-Appellee, vs. Bobbi Jo Cross, Respondent/Appellee/Counter-Appellant. Appeal from the District Court of Garvin County, Oklahoma. Honorable John A. Blake, Judge. Petitioner/Appellant/Counter-Appellant, Brandon Cross (Father) seeks review of the trial court's decree of dissolution of marriage, in which custody of Petitioner's minor child was awarded to Respondent/Appellee/Counter-Appellant, Bobbi Jo Cross (Mother). On appeal, Father complains Mother should not have been awarded custody of the couple's young son and doing so was contrary to the weight of the evidence and not in the child's best interests. In her own appeal, Mother seeks review of the trial court's child support award, which directed Father to begin child support payments one month after the parties' son enters school. At the time the court entered the decree, the couple's son was three years old and had not yet started school. The trial court's custody and child support decisions will not be overturned on appeal absent an abuse of discretion. Father argued awarding custody to Mother was against the child's best interests, because his daycare choice was academically superior to hers and she permitted the child to be around firearms. Mother addressed the firearm safety issues at her childhood home and there was no evidence Father's daycare setting was superior to Mother's daycare options. Father failed to demonstrate the court acted against the child's best interests, as Mother was an engaged and attentive parent, who responded to safety concerns quickly and reasonably. Father argued he should have been awarded joint custody when his sole custody request was denied. Father did not request joint custody, nor did he file a joint custody plan pursuant to 43 O.S. Supp.2009 109(C). There was also evidence that the parents did not communicate effectively for purposes of co-parenting the child. Father did not demonstrate that awarding sole custody to Mother was an abuse of discretion. Father argued the court failed to engage in a *Gibbons v Gibbons*, 1968 OK 77, 442 P.2d 482 analysis, when it awarded custody of the child to Mother. This case involved an initial custody determination, so that analysis under *Gibbons* regarding change of custody does not apply. In her counter appeal, Mother argues she should receive child support during the shared physical custody period predating the child's start of school. This was a deviation from the child support guidelines without the findings of fact that are required under 43 O.S. Supp.2009 §118(B). The trial court did err in failing to follow §118(B). The trial court's custody determination, awarding sole custody of the minor child to Mother, is AFFIRMED. The trial court's delayed award of child support is REVERSED and the cause REMANDED for the trial court to implement the child support guidelines or provide specific findings of fact supporting a deviation from the child support guidelines, as the statute requires. This cause is AFFIRMED IN PART, REVERSED IN PART and REMANDED. AFFIRMED IN

PART, REVERSED IN PART AND REMANDED. Opinion by Joplin, V.C.J.; Buettner, P.J., and Mitchell, J. (sitting by designation), concur.

Friday, April 27, 2012

107,321 — Cynthia Shaffer, Plaintiff/Appellee, vs. Philip K. Chapman, Defendant/Appellant. Appeal from the District Court of Pottawatomie County, Oklahoma. Honorable Dawson Engle, Trial Judge. Appellant (Chapman) seeks review of the trial court's entry of a Victim's Protective Order [VPO] prohibiting him from contacting, threatening, stalking or harassing Appellee (Shaffer). Appellee failed to file an answer brief. The cause was submitted for disposition on Appellant's Brief only. Appellant contends the trial court's issuance of the VPO is not supported by the evidence. Because the record presents nothing for the Court of Civil Appeals to review, the order is affirmed. AFFIRMED. Opinion by Joplin, V.C.J.; Buettner, P.J., and Mitchell, J. (sitting by designation), concur.

108,471 — Debbie Garner, Personal Representative of the Estate of Kenneth Warren Matthews, Deceased, Plaintiff/Appellee, vs. Kenneth W. "Butch" Matthews, Defendant/Appellant, and Kenneth W. "Butch" Matthews, Personal Representative of the Estate of Mary Matthews, Deceased, Intervenor. Appeal from the District Court of Seminole County, Oklahoma. Honorable Gary Snow, Judge. Defendant seeks review of the trial court's post-judgment order granting attorney's fees to Plaintiff in her action to recover real property belonging to Father's estate. Plaintiff was entitled to an award of attorney's fees under 12 O.S. §1141.5. We discern no fatal variance between Plaintiff's pre-litigation demand and relief actually granted. We hold Defendant's appointment as operator posed no bar to his execution of the curative conveyance. We further discern no abuse of discretion by the trial court in the amount awarded. AFFIRMED. Opinion by Joplin, V.C.J.; Buettner, P.J., and Mitchell, J. (sitting by designation), concur.

109,417 — In Re The Marriage of Price: James Ray Price, Petitioner/Appellee, vs. Terra Leann Martin, formerly known as Terra Leann Price, Respondent/Appellant. Appeal from the District Court of Major County, Oklahoma. Honorable Timothy D. Haworth, Judge. Respondent/Appellant Terra Leann Martin (Wife) appeals the Decree of Dissolution of Marriage and the division of marital property. Wife has failed to supply a record that supports reversal. Therefore, we affirmed. AFFIRMED. Opinion by Buettner, P.J.; Joplin, V.C.J., and Mitchell, J. (sitting by designation), concur.

109,897 — Ronald Ray Williams, Plaintiff/Appellant, vs. Bixby Independent School District, Defendant/Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Linda G. Morrissey, Judge. Plaintiff/Appellant Ronald Ray Williams (Williams) appeals from the trial court's order granting Defendant/Appellee Bixby Independent School District (School) summary judgment. After *de novo* review, we hold that Williams's negligence claim is barred by the statute of limitations, pursuant to 51 O.S.2001 § 157(A)-(B), and School is entitled to judgment as a matter of law. We affirm. AFFIRMED. Opinion by Buettner, P.J.; Joplin, V.C.J., and Mitchell, J. (sitting by designation), concur.

Thursday, May 3, 2012

108,061 — In the Matter of the Estate of Carl N. Rice, Deceased: Peggy Sturm, Petitioner/Appellant, vs. Rick Rice and Mike Rice, Respondents/Appellees. Appeal from the District Court of Okmulgee County, Oklahoma. Honorable Duane a. Woodliff, Judge. Appellant, Peggy Sturm, seeks review of the trial court's denial of her motion for new trial. Sturm sought relief from the trial court's order and judgment, which determined she was the common law wife of the decedent, but did not set aside as invalid an agreement Sturm signed in which she agreed decedent's two sons could be appointed co-personal representatives of decedent's estate and agreed to assign and convey all right, title and interest Sturm had in decedent's estate to the sons in equal shares. On appeal, Sturm insists she became the common law wife of decedent in 1991, not 2006, as found by the trial court. She also claims the assignment of her interest in the estate was not supported by sufficient consideration. And the agreement was procured through undue influence and fraud. We review this matter of equitable cognizance and will not disturb the trial court's judgment unless it is clearly against the weight of the evidence. *See Head v. McCracken*, 2004 OK 84, ¶2, 102 P.3d 670, 673-74; *Phillips v. Phillips*, 1964 OK 214, 395 P.2d 803, 805. Carl Rice, the decedent, passed away unexpectedly on March 9, 2009. He died intestate. Decedent's putative heirs consisted of his two sons from his first marriage, Rick and Mike Rice, and his

widow and common law wife, Peggy Sturm. On March 17, 2009, Sturm signed an agreement which relinquished any right she might have to be appointed the personal representative of decedent's estate and conveyed her right, title and interest in the estate to decedent's sons in equal shares. Sturm says Rick Rice, decedent's eldest son, deceived her and took advantage of their confidential relationship in order to procure the agreement. The evidence was conflicting. Sturm alleged Rice did not tell her the agreement contained anything relating to relinquishing estate assets, only telling her of the personal representative waiver. Rice denied he misrepresented any aspect of the agreement and a number of other witnesses testified that Sturm acknowledged decedent's wish to have his sons inherit his estate and his desire to build Sturm a home on her own land. Rice also testified that Sturm requested changes to the original draft of the agreement; the changes were incorporated into the verison Sturm signed on March 17, 2009. The weight of the evidence shows Sturm knew what she was doing when she signed the agreement and was not deceived. Sturm also argues there was no consideration, as she did not realize as much value in the building of her home as she would have from decedent's estate. Honoring decedent's wishes to let his sons inherit or avoiding litigation are both elements of consideration that have support in this record. These are especially common forms of consideration in family settlements. Finally, Sturm argues the trial court erred in not attributing sufficient length to her common law marriage, when the court said the marriage began in 2006 and not 1991 as Sturm insists. The trial court determined she waived her right to decedent's estate. As a result, any argument about the length of the marriage is no longer necessary for the resolution of the issues presented in this case. The decision of the trial court is AFFIRMED. Opinion by JOPLIN, V.C.J.; BUETTNER, P.J., and BELL, J. (sitting by designation), concur.

108,942 — Garvin Wesley Wood, Petitioner, vs. Matrix Service Company, Insurance Company of The State of Pennsylvania, and The Workers' Compensation Court, Respondents. Proceeding to Review an Order of The Workers' Compensation Court. Honorable Bob Lake Grove, Judge. Claimant seeks review of the trial court's order denying his request for vocational rehabilitation. In this proceeding, Claimant challenges the trial court's judgment as unsupported by competent evidence. In the present case, Employer offered the report of its examining physician, Dr. Gillock, who discerned nine percent (9%) permanent partial impairment to Claimant's left leg, and determined Claimant was capable of returning to the duties of his previous employment. Claimant's examining physician recommended vocational rehabilitation. Claimant's treating physician found he had reached maximum medical improvement and released him to return to work without restriction, but Claimant never returned to work for Employer. Claimant testified that he had been convicted of more than one felony crime, but couldn't remember exactly how many. Claimant also testified he had been employed in various occupations previous to his work with Employer, but did not know whether he could find other employment. Having observed his demeanor and heard his testimony on the witness stand, the trial court determined Claimant was not a credible witness, and that, given his lack of credibility, his own testimony did not support his request for vocational rehabilitation. Certainly, two other physicians determined Claimant was fit to return to work for Employer without restrictions. SUSTAINED. Opinion by Joplin, V.C.J.; Buettner, P.J., and Bell, J. (sitting by designation), concur.

(Division No. 2)
Wednesday, April 18, 2012

107,854 — Samantha Million, Plaintiff/Appellant, vs. Jay Scott Million, Defendant/Appellee. Appeal from order of the District Court of Cleveland County, Hon. William C. Hetherington, Jr., Trial Judge. Plaintiff appeals a judgment of the district court entered in favor of Defendant after trial to the court. In this case of alleged childhood sexual abuse, there is substantial evidence that, prior to attaining the age of majority, Plaintiff had repressed her memory of the abuse. We find Plaintiff's claims were not barred by the statute of limitations in effect when 12 O.S. § 95(6) was enacted in 1992. The version of that statute in effect when Plaintiff filed this suit provides the applicable limitations period in this case. Therefore Plaintiff had two years to file suit from the time she did discover or reasonably should have discovered her injury, and that her injury was caused by the alleged abuse. We find the district court erred in applying the wrong legal standard to find Plaintiff's claim was barred by the statute of limitations, and reverse the ruling on this issue. Further, it was error to

exclude from evidence a tape recording of Plaintiff and Defendant's 2006 telephone conversation. Finally, there is evidence in this record independent of Plaintiff's testimony to meet the requirement for corroborating evidence in section 95(A)(6). The case is remanded for retrial on the merits of Plaintiff's claims. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division II by Fischer, C.J.; Barnes, P.J., and Wiseman, J., concur.

109,453 — In the Matter of the Adoption of Baby Boy M. Stephen Joseph Rossi and Melanie Renee Rossi, Appellants, vs. Jeremy Guinn, Appellee, and Cherokee Nation, Intervenor. Appeal from an order of the District Court of Pawnee County, Hon. Matthew D. Henry, Trial Judge, finding that a minor child, HAM, was not eligible for adoption without the consent of his biological father, Jeremy Cole Guinn. The primary issue on appeal is whether the trial court erred in concluding that the Rossis failed to provide clear and convincing evidence that Guinn's consent was not necessary to proceed with the adoption of HAM. The circumstances surrounding Guinn's failure to provide financial support during the pregnancy include (1) his age—he was still in high school during the pregnancy; (2) Meister's failure to notify him about the pregnancy until eight weeks before the baby was born, despite Guinn's direct inquiry about the pregnancy months earlier; and (3) their agreement that a DNA test would be done but no one notified him when the baby was born. The circumstances surrounding his failure to exercise parental rights after HAM was born include (1) the fact no one notified him of the birth, (2) the Rossis took the baby to Bartlesville the day after he was born, and (3) the Rossis then returned with the baby to Georgia. Although in isolation any one of these factors may not take Guinn outside the reach of the exception to consent found in 10 O.S.2011 § 7505-4.2(C)(1), the trial court considered all of the circumstances before reaching its conclusion. We conclude the record supports the trial court's decision, and we find no trial court error in its conclusion that the Rossis failed to show by clear and convincing evidence that the child was eligible for adoption without Guinn's consent. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Wiseman, J.; Fischer, C.J., and Barnes, P.J., concur.

109,001 — Elohim, Inc., Plaintiff/Appellee, v. Josiah Stone, Defendant/Appellant. Appeal from an Order of the District Court of Adair County, Hon. Terry H. McBride, Trial Judge. Defendant appeals the trial court's order denying his motion to vacate. This is a companion appeal to Appeal No. 109,002, which this Court also decides this date. We summarily affirm the trial court's order pursuant to Okla.Sup.Ct.R. 1.202(a) and (d), 12 O.S.2001, ch. 15, app. 1, because there are no reversible errors of law and (1) the appeal is without merit because Defendant has failed to raise any arguments in his Brief-in-Chief, and (2) the findings of the trial court in the order adequately explain the decision. SUMMARILY AFFIRMED UNDER RULE 1.202(a) and (d). Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Fischer, C.J., and Wiseman, J., concur.

109,002 — Elohim, Inc., Plaintiff/Appellee, v. Josiah Stone, Defendant/Appellant. Appeal from an Order of the District Court of Adair County, Hon. Terry H. McBride, Trial Judge. Defendant appeals the trial court's order granting in part and denying in part his motion to set aside a protective order. This is a companion appeal to Appeal No. 109,001, which this Court also decides this date. We summarily affirm the trial court's order pursuant to Okla.Sup. Ct.R. 1.202(a), (d) and (e), 12 O.S.2001, ch. 15, app. 1, because there are no reversible errors of law and (1) the appeal is without merit because Defendant has failed to raise any arguments in his Brief-in-Chief, (2) the findings of the trial court in the order adequately explain the decision, and (3) the trial court did not abuse its discretion. SUMMARILY AFFIRMED UNDER RULE 1.202(a), (d) and (e). Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Fischer, C.J., and Wiseman, J., concur.

Thursday, April 19, 2012

109,226 — Hawk Enterprises, Inc., an Oklahoma corporation, Plaintiff/Appellant, vs. Cash America International, Inc., a Texas corporation; Cash America Financial Services, Inc., a Delaware corporation; Cash America, Inc. of Oklahoma, an Oklahoma corporation, and Bronco Pawn & Gun, Inc., an Oklahoma corporation, Defendants/Appellees. Appeal from the District Court of Oklahoma County, Hon. Patricia G. Parrish, Trial Judge. Defendant Cash America International, Inc., guaranteed the performance of Mr. Payroll, an affiliated corporation, pursuant to a franchise agreement with Hawk Enterprises, granting Hawk the exclusive right to operate check cashing facilities in Oklahoma

City using the Mr. Payroll name. Alleging Cash America caused Mr. Payroll to breach the franchise agreement when it began operating competing check cashing facilities in Hawk's exclusive territory, Hawk sued Cash America for tortious interference with the franchise agreement. We cannot determine from the basis of this record whether Cash America is liable for tortious interference with the agreement. Therefore, the June 3, 2010 order of the district court is reversed to the extent that it granted Defendants' motion for summary judgment on the tortious interference claim, and this case is remanded for further proceedings consistent with this Opinion. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division II, by Fischer, C.J., Barnes, P.J., and Wiseman, J., concur.

109,502 — Cabinet Solutions, L.L.C., a limited liability company, a/k/a Cabinet Solutions & Innovations, L.L.C., Plaintiff/Appellant, v. Bill Kelley, and Bill Kelley and Associates, Inc., Defendants/Appellees. Appeal from an Order of the District Court of Tulsa County, Hon. Theresa Dreiling, Trial Judge. Plaintiff (Cabinet) appeals the trial court's Order granting summary judgment in favor of Defendants (Kelley). Kelley, an insurance agency, solicited a quote from Nautilus Insurance on behalf of Cabinet. Cabinet accepted the quote, but it was subsequently discovered that Cabinet's payroll was larger than was reported to Nautilus Insurance. After settling with Nautilus Insurance, Cabinet filed this suit against Kelley. The question presented on appeal is whether the applicable two-year statute of limitations, 12 O.S.2011 § 95(A)(3), had run prior to Cabinet filing this suit against Kelley. Based on our review of the record on appeal and applicable law, we answer this question in the negative. Although Cabinet discovered Kelley's negligence more than two years prior to filing suit against Kelley, the fact that Cabinet would have to pay Nautilus Insurance any amount of damages as a result of Kelley's alleged negligence was speculative and did not become certain until within two years of Cabinet filing suit against Kelley. Therefore, we reverse the trial court's Order and remand for further proceedings. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Fischer, C.J., and Wiseman, J., concur.

Friday, April 20, 2012

108,932 — Janet Ann Myers, Petitioner/Appellant, v. Terry Gene Myers, Respondent/Appellee. Appeal from an Order of the District Court of Hughes County, Hon. Gordon Allen, Trial Judge. Petitioner appeals the trial court's order denying her motion for new trial on the ground of newly discovered evidence. The question presented on appeal is whether the trial court abused its discretion in denying her motion on the theory that Respondent intentionally failed to supplement his discovery response as to the fair market value of the marital property and, therefore, kept from Petitioner and the trial court information the trial court needed to properly value that property. While parties are under a continuing duty to supplement responses to interrogatories under certain conditions as set forth in 12 O.S.2011 § 3226(E), we find the circumstances in the present case have not given rise to that duty because the record on appeal, though sparse, reveals that Petitioner had "additional or corrective information . . . during the discovery process" available to her and the court. Under these circumstances, the trial court did not abuse its discretion in finding no legal basis for granting a new trial. We also find no abuse of the trial court's discretion though it found in the Order a significant discrepancy existed between the valuation it made of the marital property and the sales price. There simply is minimal evidence in the record on appeal about what the court did consider in valuing the marital property. Without that record, we cannot say the court's refusal to grant a new trial in the face of the discrepancy about the subsequent sales price is arbitrary or clearly against the weight of the evidence. Based on the record on appeal and the applicable law, we affirm the trial court's Order. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Fischer, C.J., and Wiseman, J., concur.

Wednesday, April 25, 2012

109,837 — Apache Tribe of Oklahoma, Plaintiff/Appellant, vs. John H. Graves, Defendant/Appellee, and Alonzo Chalepah, Defendant. Appeal from an order of the District Court of Cleveland County, Hon. Tom A. Lucas, Trial Judge, granting summary judgment in favor of John H. Graves. Graves is an attorney and former member of the Apache Gaming Board of Directors who had check signing authority for the Tribe's Silver Buffalo Casino bank accounts.

As chairman of the Apache Business Committee, Alonzo Chalepah also had check writing authority. Rick McKee, who was employed at the Silver Buffalo Casino, was charged with a felony in Caddo County. Graves provided McKee legal representation in the criminal matter. The charges were dismissed after McKee paid restitution and court costs. The day before the dismissal, the Apache Tribe provided McKee with a check in the amount of $40,000, which Graves and Chalepah had both signed. The check was drawn on an account held by the Tribe on which both Graves and Chalepah had authority to write checks. The Tribe later brought a lawsuit against Graves alleging he had breached his fiduciary duty by obtaining improper benefits for McKee, converted Tribal property for his own use, engaged in civil conspiracy to injure the Tribe, and committed malpractice. The trial court granted Graves' motion for summary judgment on the ground that the loan was authorized by the Tribe and Graves' act in signing the check was ratified by the Tribe. After review of the record, we conclude the question remains unresolved as to whether the Tribe's acts constitute ratification of the $40,000 check written to McKee which relieves Graves from liability or constitute acts performed to prevent the imposition of a penalty after the National Indian Gaming Commission initiated its investigation into conduct it considered illegal regarding tribal funds. We agree with the Tribe's assertion that in this lawsuit, it is not seeking to enforce any contract with McKee which Graves asserts the Tribe ratified. The Tribe is seeking compensation for breaches of duty it contends Graves owed to the Tribe. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division II, by Wiseman, J.; Fischer, C.J., and Barnes, P.J., concur.

109,709 — Tina Smith, Petitioner, vs. Southwest Airlines Co., Indemnity Insurance Co. of North America and The Workers' Compensation Court, Respondents. Appeal from an order of a three-judge panel of the Workers' Compensation Court, Hon. Kent Eldridge, Trial Judge, affirming the decision of the trial court denying Claimant's claim for compensation. The trial court found that Claimant's compensation claim for injury to her right shoulder, right arm, and right hand was barred by the doctrine of res judicata. In her first case, case no. 2009-08774K, Claimant made a claim for cumulative trauma injury to her cervical spine with a date of last exposure of March 13, 2009, claiming an injury to her right hand, arm, and shoulder as a result of that cumulative trauma. The trial court found that Claimant's own evidence did not support her claim of radiculopathy to her right upper extremity and denied her compensation claim relating to the cumulative trauma. In the current case, Claimant also seeks recovery for a cumulative trauma injury to her shoulder, hands, and arm due to repetitive work with a date of last exposure of March 13, 2009. The trial court concluded that the court in the earlier case considered and decided Claimant's claim of injury to her right hand, right arm, and right shoulder and thus Claimant could not religitate her alleged injuries to these body parts. We find no error in this determination. We also sustain the order because it is not against the clear weight of the evidence. Conflicting testimony coupled with Employer's medical evidence support the Workers' Compensation Court's decision to deny Claimant's claim. We conclude the decision of the Workers' Compensation Court is not contrary to law or against the clear weight of the evidence and sustain the decision of the three-judge panel. SUSTAINED. Opinion from the Court of Civil Appeals, Division II, by Wiseman, J.; Fischer, C.J., and Barnes, P.J., concur.

Friday, April 27, 2012

109,580 — David Dopp and Kathy Dopp, Plaintiffs/Appellees, vs. Tim Walterbach, Defendant/Appellant. Appeal from an order of the District Court of Rogers County, Hon. Dynda R. Post, Trial Judge, refusing to grant Tim Walterbach attorney fees and costs as a prevailing party. Plaintiffs brought this action against Walterbach Custom Homes, Inc. (WCHI), the builder of their home, and Tim Walterbach, owner and president of WCHI, pursuing several theories of recovery stemming from the improper construction of their house. The jury returned a verdict in favor of Plaintiffs for $250,000 against WCHI on Plaintiffs' breach of contract claim and $450,000 on their negligence claim. The jury found in favor of WCHI on Plaintiffs' fraud claim and returned a unanimous verdict in favor of Walterbach on Plaintiffs' breach of contract, negligence, and fraud claims. The trial court awarded Plaintiffs attorney fees but refused to award attorney fees to Walterbach. We conclude Walterbach is the prevailing party on Plaintiffs' claims against him just as Plaintiffs are the prevailing party on their claims against WCHI. Walterbach is entitled to attorney fees and costs as a prevailing

party, and the trial court erred in not awarding them to him pursuant to 12 O.S.2011 §§ 940 and 942. We thus reverse and remand to the trial court with directions to determine the amount of costs and reasonable attorney fees to which Walterbach is entitled pursuant to Oklahoma law. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division II, by Wiseman, J.; Fischer, C.J., and Barnes, P.J., concur.

Monday, April 30, 2012

108,492 — Robert A. McLauchlin, Petitioner/Appellant, v. Jan Darrow Kalsu McLauchlin, Respondent/Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Geary L. Walke, Trial Judge. Petitioner (Husband) appeals the trial court's Order modifying his monthly alimony payments to Respondent (Wife) from $4,400 to $3,000 per month. Husband argues the trial court should have further reduced the amount of his monthly alimony payments to $2,000. Husband also argues the trial court's ruling was the result of bias and, on this basis, that it should be reversed. Based on our review of the record on appeal and applicable law, we affirm the trial court's modification because it is not against the clear weight of the evidence. Regarding Husband's bias argument, Husband failed to move for disqualification and provide the trial court with the opportunity to exercise discretion as to whether to disqualify himself from entering an order in this case. Furthermore, the basis of Husband's bias argument — oral statements of the trial judge acknowledging the fame of Wife's former husband — does not constitute an exceptional case where public policy requires disqualification or reversal even when the issue of bias is raised for the first time on appeal. Therefore, we deny Husband's request that we reverse the Order on the basis of trial judge partiality. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Wiseman, J., concurs, and Rapp, J. (sitting by designation), dissents in part, concurs in part.

(Division No. 3)
Friday, April 20, 2012

107,951 — Ileta Carlene Duffle, Petitioner/Appellee, vs. Alan A. Duffle, Respondent/Appellant. Appeal from the District Court of Grady County, Oklahoma. Honorable John E. Herndon, Trial Judge. Respondent, Alan A. Duffle [Husband], seeks review of the Decree of Dissolution wherein the trial court determined a corporation, AD Ranch, Inc. [the corporation] and ten tracts of land to be marital property. He contends the property division is inequitable because those properties are his separate property, not subject to division. There is a presumption property acquired during marriage is property acquired through the joint efforts of the spouses. *Manhart v. Manhart*, 1986 OK 12 725 P.2d 1234. However, the gift of property to a spouse during marriage is considered separate property of such spouse and upon divorce it cannot be considered as having been acquired by the joint industry, or efforts of the spouses. *Armstrong v. Armstrong*, 1969 OK 193, 462 P.2d 656. Other than his bare testimony the trust gifted him 59% interest in the corporation, 1/3 interest in seven tracts of land, and that he purchased two tracts of land with trust funds, he presented no supporting evidence that his interest in the corporation and the properties were his separate property. The trial court's characterization of the corporation and the ten tracts of land as marital property rather than separate property is not against the weight of the evidence. AFFIRMED. Opinion by Hetherington, J.; Bell, P.J., and Mitchell, J., concur.

108,282 — Amanda Craig, Plaintiff/Appellee, vs. Max Henry, Defendant/ Appellant. Appeal from the District Court of Atoka County, Oklahoma. Honorable Neal Merriott, Judge. Appellant (Henry) appeals the decision of the trial court entered upon a non-jury trial in favor of Appellee (Craig) on Craig's action to quiet title and set aside a tax deed issued to Henry. Henry contends the trial court impermissibly relied on 68 O.S. Supp. 2002 §3118 in voiding the tax deed, because it had been repealed at the time Craig filed her quiet title action. The record shows no proof of service upon Craig was ever filed with the County Treasurer. The only document concerning service of Henry's Notice of Application for Tax Deed was an Affidavit of Mailing. Mailing alone is insufficient to comply with the notice requirements of §3118, and service of the Notice by publication was not authorized by law. Because the County Treasurer had no proof of service of proper notice upon Craig, it lacked jurisdiction to issue the tax deed to Henry. The trial court's determination the tax deed was void was not against the clear weight of the evidence. Henry has waived the issue of tender by failing to raise the issue before the trial court. The trial court's decision is AFFIRMED. Opinion by Mitchell, J.; Bell, P.J., and Hetherington, J., concur.

109,790 — In the Matter of L.M. and R.M., Deprived Children: Luke McKinney, Sr., Appellant, vs. State of Oklahoma, Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Larry Shaw, Judge. Appellant (Father) appeals an order terminating his parental rights to his two minor children pursuant to 10A O.S. Supp. 2009 §1-4-904(B)(5) and (14) and finding Father failed to correct the conditions leading to the adjudication. A thorough review of the record clearly shows Father failed to correct the vast majority of the express conditions stated in the Second Amended Petition and in the Individualized Service Plan. Father testified extensively regarding his criminal history, child welfare history and history of drug abuse. He did not participate in substance abuse counseling and admitted to the continued use of illegal drugs throughout the pendency of these proceedings. Father spent time in jail multiple times during the pendency of these proceedings and continued to participate in criminal activity. We find the adjudication hearing was properly conducted and the decision of the trial court is AFFIRMED. Opinion by Mitchell, J.; Bell, P.J., and Hetherington, J., concur.

Wednesday, April 25, 2012

108,933 — State of Oklahoma ex rel., Department of Transportation, Plaintiff/Appellant, vs. Donald A. Bowin and Mary E. Bowin, Husband and Wife, Defendants/Appellees, and Armstrong Bank, Carter Methodist Church and The Cherokee County Treasurer, Defendants. Appeal from the District Court of Cherokee County, Oklahoma. Honorable J. Jeffrey Payton, Judge. In this condemnation action, Appellant (ODOT), seeks review of the trial court's order filed November 8, 2010, which denied ODOT's motion to reconsider the trial court's order filed February 18, 2010 (final order). Relying on *Perdue v. State, ex rel. Dep't of Transp.*, 2008 OK 103, 204 P.3d 1279, the final order vacated a prior order granting ODOT's amended petition and third amended petition, it reversed and struck a prior order confirming an amended report of commissioners filed December 3, 2008, and reinstated an original report of commissioners filed July 28, 2006. The primary issue here is whether ODOT may reduce the amount of its taking by using amended petitions filed outside the statutory time limit for filing exceptions to the commissioners' report. We find *Perdue* is controlling in this case and affirm the trial court's final order. We also hold the trial court did not abuse its discretion in denying ODOT's motion to reconsider and affirm the November 8, 2010 order. AFFIRMED. Opinion by Bell, P.J.; Mitchell, J., concurs, and Hetherington, J., dissents with opinion.

Thursday, May 3, 2012

109,016 — Benny Ross Wofford, Plaintiff/Appellee, vs. Sonya Kaye Ellison (now Ellis), Defendant/Appellant. Appeal from the District Court of Osage County, Oklahoma. Honorable John Kane, Judge. In this child custody matter, Appellant (Mother) appeals from the trial court's order modifying child custody. The court awarded Appellee (Father) primary physical custody of the minor child, and awarded Mother visitation. The record reveals that at an early age, the child developed behavioral problems and became progressively violent, physically aggressive, destructive and angry while in Mother's sole custody. This was clear evidence of a change of condition to the child's detriment after the entry of the original custody order. The weight of the evidence demonstrated child's overall self-esteem, behavior, academic performance and emotional state substantially improved while the child resided with Father. We find Father met his burden of showing there was a permanent, substantial, and material change of circumstances, such that the child would be substantially better off if Father was awarded primary physical custody of the child. We hold the trial court did not abuse its discretion when it modified the custody order. Father's request for appeal-related attorney fees is denied. The trial court's order is AFFIRMED. Opinion by Bell, P.J.; Mitchell, J., and Hetherington, J., concur.

109,498 —James Mitchell Dobson and John R. Dobson, Plaintiffs/Appellants, vs. Rocket Oil & Gas Company, Limited Partnership, an Oklahoma limited partnership; Stanley H. Singer Trustee of the Stanley H. Singer Revocable Trust Agreement dated March 19, 1981; Teton Properties, L.L.C., an Oklahoma limited liability company; Fleischaker Mineral Company, L.L.C., an Oklahoma limited liability company; Three M. Oil Company, a Texas corporation; and Hammack-Rocket Properties, L.L.C., a Texas limited liability company, Defendants/Appellees. Appeal from the District Court of Kay County, Oklahoma. Honorable W. Lee Stout, Judge. Appellants (Dobsons) appeal the summary judgment order and Appellees (collectively, Rocket Oil & Gas) appeal the denial of its Motion for Attorney

Fees. The ultimate issue herein is the parties' respective claims to a royalty interest in certain real property in Kay County, Oklahoma. Primarily, Dobsons challenge the validity of a 1925 royalty conveyance. Dobsons appeal the order wherein the trial court determined, *inter alia*, that Dobsons' predecessor in interest had previously conveyed away a 1/4 royalty interest that resulted in a fee simple determinable in the grantee with grantor retaining a possibility of reverter. The court further determined Rocket Oil & Gas was entitled to a 1/4 royalty interest from oil and/or gas produced from the subject property on the basis of the prior conveyance to Rocket Oil and Gas' predecessor in title and interest having been filed of record in the land records of Kay County for more than thirty years without challenge. The royalty conveyance was therefore protected from attack in accordance with the Marketable Record Title Act, 16 O.S. §17, *et seq.* The trial court's order granting summary judgment, including the Findings of Fact and Conclusions of Law upon which it is based, contains no error of law, is sufficiently supported by the record and adequately explains its decision. Likewise, the court's order awarding Costs and denying the request for attorney fees contains no error of law, is supported by the record and adequately explains the court's decision. The Judgment and Order are AFFIRMED under Rule 1.202(d). Opinion by Mitchell, J.; Bell, P.J. and Hetherington, J., concur.

109,676 — David Dee and Sandra Dee, Individually, Plaintiffs/Appellees, vs. Brian Horton, an Individual, Defendant/Third-Party Plaintiff/Appellant, and A Shaurice Abney Company, Inc., an Oklahoma Corporation d/b/a SACO Corp., Defendant, vs. Jo Rose Fine Cabinets, Inc., Third-Party Defendant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Linda G. Morrissey, Trial Judge. Appeal of an order granting Appellees' emergency request to order release of Appellant's Mechanic's Lien and Lis Pendens notice. Appellees moved for dismissal of the appeal due to a lack of jurisdiction. HELD: Appellant's lien is a statutory remedy enforceable by foreclosure under its own statutory scheme. The appeal of the order in this matter survives Appellees' motion to dismiss only if it is a final order appealable by right. We find Appellant's lien does not constitute an attachment as contemplated by statute nor does it constitute a provisional remedy. The Order on appeal does not determine the action nor does it prevent a judgment and later appeal after trial of all pending issues. Appellees' Motion to Dismiss Appeal For Lack of Jurisdiction is SUSTAINED. APPEAL DISMISSED and the case REMANDED for further proceedings. Opinion by Hetherington, J.; Bell, P.J., and Mitchell, J., concur.

(Division No. 4)
Friday, April 20, 2012

109,817 — Charles McGuire, Petitioner, vs. N. Glantz & Sons LLC, National Fire Insurance Company of Hartford and The Workers' Compensation Court, Respondents. Proceeding to review an order of a three-judge panel of the Workers' Compensation Court. Hon. Michael J. Harkey, Trial Judge. Claimant Charles McGuire seeks review of a three-judge panel's order vacating his award for benefits. This is Claimant's second appeal of his alleged work-related injury in which he claims to have contracted Hepatitis A from one of several restaurants while on a job assignment as a driver for Employer N. Glantz & Son, LLC. In the first appeal of this matter, the trial court found the disease to be work-related and awarded benefits, a decivison later vacated by a trhree-judge panel. The panel's decision was then reviewed by this Court in an unpublished opinion (No. 105,948) in which we held the panel's given reason for vacating the trial court's order was too vague for adequate appellate review because the panel addressed neither the legal nor factual issues raised by the parties. We vacated the panel's order, reinstated the trial court's order, and remanded the matter for further proceedings. On certiorari, the Supreme Court agreed with this Court and remanded the matter to the panel, posing specific questions to be answered. The matter again before us, our review of the panel's decision reflects it is not against the clear weight of the evidence, and we therefore sustain the order. SUSTAINED. Opinion from the Court of Civil Appeals, Division IV, by Goodman, P.J.; Rapp, J., and Thornbrugh, J., concur.

Monday, April 30, 2012

106,368 — Larry Smoot; Connie Smoot and C&L Restoration Services, LLC, Plaintiffs/Appellees, vs. B & J Restoration Services, Inc., a/k/a B & J Restoration, Inc.; Hopper Properties, LLC; Brandon Hopper and Julie Hopper, Defendants/Appellants. Appeal from the District Court of Tulsa County, Hon. Rebecca Brett Nightingale, Trial Judge. Defendants appeal a judgment entered on a verdict in favor of

Plaintiffs on a breach of contract claim, and also appeal a post-trial order overruling their motion for judgment notwithstanding the verdict. The Hoppers contend they are not personally liable in this action, and all Defendants challenge the amount of damages awarded in this case. Defendants also appeal a post-trial judgment awarding Plaintiffs costs and attorney fees. We affirm the judgment as to the Hoppers' personal liability for breach of the non-compete provisions of the parties' agreements, reverse as to the Hoppers' personal liability for breach of the remaining provisions of those agreements, reverse as to the amount of damages awarded, and remand for further proceedings to determine the proper amount of damages. As a result, we vacate the amount of attorney fees awarded and remand for determination of the proper amount of fees to be awarded at the conclusion of the proceedings in the district court on the issue of damages. AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV by Fischer, C.J.; Barnes, J. (sitting by designation), concurs and Rapp, J., dissents in part, concurs in part and concurs in part in result.

Wednesday, May 2, 2012

109,954 (companion with Case No. 109,485) — The Board of Deacons of The Tabernacle Baptist Church of Oklahoma City, Inc., a non-profit religious corporation; Eddie H. Perkins, an individual; Carol D. Minix, an individual; and Melvin R. Todd, PhD, an individual, Plaintiffs/Appellants, vs. Daryl R. Hairston, Defendant/Appellee, and Board of Trustees of Tabernacle Baptist Church of Oklahoma City, Inc., Intervenor/Appellee. Appeal from Order of the District Court of Oklahoma County, Hon. Lisa T. Davis, Trial Judge. Plaintiffs appeal an award of attorney fees to Defendants and Intervenor. Because this Court's opinion in the companion appeal, Case No. 109,485, reversed the decision that led to the fee award, i.e., that the trial court lacked jurisdiction to enter a restraining order against Defendants, the record no longer supports the trial court's decision awarding fees to Defendants. The decision therefore is vacated as premature. VACATED. Opinion from Court of Civil Appeals, Division IV, by Thornbrugh, J.; Goodman, P.J., and Rapp, J., concur.

108,912 — Jean Ann Gilmore, Plaintiff/Appellee, vs. George Parvu, Defendant/Appellant. Appeal from Order of the District Court of Cherokee County, Hon. Sandy Crosslin, Trial Judge, denying Defendant's motion to vacate an agreed order. The issue is whether it was within the district court's discretion to refuse to vacate the agreed order despite Defendant's allegation in his motion to vacate that Defendant had not authorized his prior attorney to enter into the agreement forming the basis for the order. The record reflects a number of contradictions in Defendant's testimony as to circumstances surrounding the agreement and whether he authorized his prior counsel to enter into it. Where there is an inherent conflict in the testimony and other evidence generally, this Court will recognize the superior position of the trial judge to weigh the evidence and to determine the credibility of testimony. The district court did not act outside of its sound discretion in this matter. Its denial of Defendant's vacation request was not an abuse of discretion. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by THORNBRUGH, J.; GOODMAN, P.J., and RAPP, J., concur.

109,485 (companion with Case No. 109,954) — The Board of Deacons of the Tabernacle Baptist Church of Oklahoma City, Inc., non-profit religious corporation; Eddie H. Perkins, an individual; Carol D. Minis, an individual and Melvin R. Todd, PhD, an individual, Plaintiffs/Appellants, vs. Daryl R. Hairston, Defendant/Appellee, and The Board of Trustees of Tabernacle Baptist Church of Oklahoma City, Inc., Intervenor/Appellee. Appeal from Order of the District Court of Oklahoma County, Hon. Lisa T. Davis, Trial Judge, determining that the court had no jurisdiction to consider a dispute between the deacons of a church and the pastor of the church. We find the court was correct to disclaim jurisdiction on the issue of whether the pastor breached his contract, as this issue may involve consideration of the pastor's religious fitness to be the pastor, and is an issue which is beyond the jurisdiction of civil courts. The trial court erred in finding that it lacked jurisdiction over questions concerning the control of church property, including control of the church building and funds. Such a property dispute between members may be resolved without an ecclesiastical judgment, pursuant to *Fowler v. Bailey*, 1992 OK 160, 844 P.2d 141. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Thornbrugh, J.; Goodman, P.J., and Rapp, J., concur.

Thursday, May 3, 2012

110,114 – Academy Sports & Outdoors, Petitioner, vs. Rael Wolfson and The Workers' Compensation Court, Respondents. Proceeding to review an order of a three-judge panel of The Workers' Compensation Court., Hon. Michael J. Harkey, Trial Judge. Claimant worked at Employer's sporting goods store where he sustained an injury to his spine, jaw, head, and brain while engaging in horseplay in the store. During the course of his shift, Claimant picked up a football and threw it to a co-worker. A short time later, the co-worker threw the football back to Claimant. The football slipped through his hands and struck him in the throat. Claimant passed out, striking his head on a counter and the floor. He suffered a brain injury and subsequently underwent brain surgery. Claimant filed a Form 3 seeking medical treatment and temporary total disability benefits. Employer denied the claim was work-related and raised the defense of horseplay. The matter was heard by the trial court and witnesses testified that not only was throwing a ball in the store not prohibited, but members of the management team likewise participated in that activity. Employer's witnesses (all managers) testified it was not store policy to permit throwing balls in the store, and employees who did so were asked to stop, though they admitted no employee had ever been disciplined for throwing a ball. The trial court concluded that Claimant's supervisors actively participated in the type of activity which led to Claimant's injury. Our review of the evidence supports the trial court's and three-judge panel's findings of fact. Further, application of law to those facts is without error. SUSTAINED. Opinion from the Court of Civil Appeals, Division IV, by Goodman, P.J.; Rapp, J., and Thornbrugh, J., concur.

108,989 – In re the Marriage of: Brenda R. Henderson, Petitioner/Appellant, v. Paul E. Henderson, Respondent/Appellee. Appeal from an order of the District Court of Okmulgee County, Hon. John Maley, Trial Judge. Wife contends that the trial court erred in regard to her judgment of alimony in lieu of property and in not awarding her support alimony. We find the trial court erred in reducing Wife's alimony in lieu of property award by $3,000.00 representing the value of a marital asset that was sold before trial. That deduction should have been $2,000.00. In all other respects, the trial court's order is affirmed. The matter is remanded to the trial court with directions to enter judgment in accordance with this opinion. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTION. Opinion from the Court of Civil Appeals, Division IV, by Goodman, P.J.; Rapp, J., and Thornbrugh, J., concur.

109,590 – Jimmie Clunn and Jimmy Tygart, Plaintiffs/Appellees, vs. Brown, Kinion and Company, Defendant/Appellant, and Gerald L. Kinion and Susan Brown, Defendants, and Steven Hickman, Appellant. Appeal from an order of the District Court of Tulsa County, Hon. P. Thomas Thornbrugh, Trial Judge, awarding sanctions to Jimmie Clunn (Clunn) and Jimmy Tygart (Tygart) (collectively "Appellees"). There have been multiple appeals involving the parties. The present appeal arises out of a statement of judgment Appellants filed in Wagoner County. Appellees sought, and the trial court awarded, sanctions against Appellants in the amount of $5,017.90 for attorney's fees and costs incurred as a result of the filing of the wrongful judgment lien, finding the filing "[was] done for the purpose of vexing, oppressing, hindering, delaying and obfuscating the clear orders of this Court and ought to be sanctioned." Applying the appropriate deferential standard of review owed to a trial court's decision on whether to award sanctions and the appropriate sanction, we find the trial court's decision was not an abuse of discretion, and the order is therefore affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Goodman, P.J.; Rapp, J., and Wiseman J. (sitting by designation), concur.

109,377 – Rodrigo Marquez, an individual, and Candy Paper, an individual, Plaintiffs/Appellants, vs. Bellco Materials, Inc., a domestic corporation, Defendant/Appellee. Appeal from an order of the District Court of Delaware County, Hon. Robert Haney, Trial Judge, granting summary judgment to Bellco Materials, Inc. Rodrigo Marquez was employed by Bellco as a construction worker. After consuming food and alcohol paid for by Bellco, Marquez was injured in a one-car accident. Marquez initially filed a Workers' Compensation claim but subsequently dismissed it and filed a tort-based claim against Bellco, alleging it was negligent for serving alcoholic drinks to him and the driver of the vehicle after they were intoxicated, thereby causing the accident. We affirm the grant of summary judgment to Bellco. AFFIRMED. Opinion from the Court of Civil

Appeals, Division IV, by Goodman, P.J.; Rapp, J., and Thornbrugh, J., concur.

110,327 — Sherrill's Respiratory and Diabetic Medication, Inc., Plaintiff/Appellee, vs. Oklahoma Health Care Authority, Defendant/Appellant. Appeal from an order of the District Court of McCurtain County, Hon. Willard Driesel, Trial Judge, granting summary judgment to Sherrill's Respiratory and Diabetic Medication, Inc., (SRDM) against Oklahoma Health Care Authority (OHCA). OHCA is charged with oversight of Oklahoma's Medicare program. SRDM is a provider of durable medical goods and had been paid by OHCA pursuant to a contract. OHCA conducted an audit, retroactively applied new compensation rules, and determined SRDM had been overpaid under the new rules. OHCA sought recovery in the amount of $226,546.98. SRDM objected to the findings and exhausted the administrative appeals process without success. SRDM then appealed OHCA's orders to the district court. OHCA was served with SRDM's petition for judicial review, but filed no answer or other responsive pleading within the statutory time. OHCA's first pleading was a motion to change venue, even though it had yet to file an answer. Thereafter, SRDM filed a motion for default judgment, arguing OHCA had been properly served but had failed to file a timely answer. OHCA filed a request for additional time in which to respond to the motion for default judgment. Although the trial court gave OHCA a date certain to file its response, it was filed two days late and almost one year after it was originally due. SRDM filed a motion to strike the untimely answer, a reply to the untimely response to the motion for default, and a motion for summary judgment, contending OHCA waived any defenses it may have had due to its untimely responses. OHCA admitted its pleadings had been untimely, but alleged SRDM has not been prejudiced by the delay; that a hearing on the return of taxpayer's money should be done on the merits; and blamed a paralegal in its employ as the reason for failing to timely file its pleadings. The trial court, after hearing the arguments, granted judgment to SRDM on the basis that OHCA was in default since it offered no defenses to SRDM's claims. Our analysis of these facts and the applicable case law lead us to conclude that OHCA has not shown anything more than pure attorney neglect in filing timely pleadings. We find that no unavoidable casualty has occurred, and hold the trial court's order granting judgment to SRDM is not an abuse of discretion under these facts. It is, therefore, affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Goodman, P.J.; Rapp, J., concurs and Thornbrugh, J., concurs specially.

Friday, May 4, 2012

109,024 – Andrew Waldron, Plaintiff/Appellant, vs. Eva Addy, Defendant/Appellee. Appeal from Order of the District Court of Oklahoma County, Hon. Daniel L. Owens, Trial Judge, entering judgment on a jury verdict in favor of Defendant following trial on Plaintiff's claim for injuries allegedly sustained by Plaintiff in a traffic accident. We find the trial court did not err in submitting the issue of whether Plaintiff was injured to the jury or in admitting photographs of the damaged vehicles without expert testimony. We also reject Plaintiff's arguments of an inadequate jury award, and of plain or fundamental error. The verdict is supported by competent evidence and is in accord with law, and Plaintiff's allegations of error are without merit. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Thornbrugh, J.; Goodman, P.J., and Rapp, J., concur.

Tuesday, May 8, 2012

109,849 – Terry Murphy, d/b/a Environmental Products, and Roger Lackey, Plaintiffs/Appellants, vs. The Kickapoo Tribe of Oklahoma, and the Kickapoo Casino, A Separate Oklahoma Entity, Defendants/Appellees. Appeal from an order of the District Court of Lincoln County, Hon. Cynthia Ferrell-Ashwood, Trial Judge. Plaintiffs Terry Murphy, d/b/a Environmental Products, and Roger Lackey, appeal the trial court's order dismissing their claims against the Kickapoo Tribe of Oklahoma and the Kickapoo Casino, a Separate Oklahoma Entity (collectively, Tribe). In this appeal, the trial court dismissed Plaintiffs' suit on the grounds of collateral estoppel. We reverse and remand. Upon remand, the trial court should decide whether the Tribe has waived sovereign immunity by conduct, and the effect of Tribe's failure to appeal the order in the first district court case denying its sovereign immunity defense. Further, the assertion of collateral estoppel should be examined in light of the Tribe's alleged failure to establish a judicial process to address the merits of the Plaintiffs' claims. The trial court's order specifically dismissed the claim pursuant to Tribe's 12 O.S.2011, § 2012(B) motion to dismiss. This was incorrect as a mat-

ter of law. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division IV, by Goodman, P.J.; Rapp, J., and Thornbrugh, J., concur.

ORDERS DENYING REHEARING
(Division No. 1)
Thursday, April 19, 2012

108,009 — Janet L. Taylor, Petitioner/Appellant, vs. Kent O. Taylor, Respondent/Appellee. Respondent/Appellee's Petition for Rehearing filed Februray 27, 2012 is *DENIED*.

Monday, May 7, 2012

108,316 (comp. w/108,944) – In the Matter of A.D., A.D., L.C., L.C., and D.C., Adjudicated Deprived Children: Carneisha Deloney Campbell, Appellant, vs. State of Oklahoma, Appellee. Appellant's Petition for Rehearing filed May 2, 2012 is *DENIED*.

(Division No. 2)
Tuesday, April 24, 2012

108,847 — Central Oklahoma Master Conservancy District, an Oklahoma Master Conservancy District, Plaintiff/Appellant, v. City of Norman, an Oklahoma Municipal Corporation and Norman Utilities Authority, an Oklahoma Public Trust, Defendants/Appellees. Appellee, City of Norman's Petition for Rehearing is hereby *DENIED*.

(Division No. 3)
Wednesday, April 18, 2012

107,941 — Williams Production Mid-Continent Company, an Oklahoma corporation, Plaintiff/Appellee, vs. Patton Production Corporation, a Texas corporation, and J.L. Patton, Jr., Individually, Defendants/Appellees, vs. Anoco Marine Industries, Inc., a Texas corporation, Defendant/Appellant. The Petition for Rehearing with Brief in Support, filed March 20, 2012 by Appellees/Defendants, Patton Production Corporation and J.L. Patton, Jr., is *DENIED*.

(Division No. 4)
Monday, April 23, 2012

109,362 — Moshe Tal, and Bricktown Grain Elevator Co., and Tal Technologies Inc., Intervenors/Appellants, v. Bridgeview Bank, N.A. a/k/a Fidelity Bank, C.E. Renfro; T. Van Roberts; Kevin Blaney; David A. Cheek; Mark E. Ruffin; JAR Associates, L.L.C.; and John Does 1-10, Defendants/Appellees. Appellants' Petition for Rehearing is hereby *DENIED*.

Tuesday, May 1, 2012

108,673 — Long Beach Mortgage Company, Plaintiff/Appellee, v. Stewart Title Guaranty Company, Defendant/Appellant. Appellee's Petition for Rehearing is hereby *DENIED*.

CLASSIFIED ADS

SERVICES

HANDWRITING IDENTIFICATION
POLYGRAPH EXAMINATION

Board Certified	Court Qualified
Diplomate — ABFE	Former OSBI Agent
Life Fellow — ACFE	FBI National Academy

Arthur D. Linville (405) 636-1522

INTERESTED IN PURCHASING PRODUCING & NON-PRODUCING Minerals; ORRI; O & G Interests. Please contact: Patrick Cowan, CPL, CSW Corporation, P.O. Box 21655, Oklahoma City, OK 73156-1655; 405-755-7200; Fax 405-755-5555; E-mail: pcowan@cox.net.

OF COUNSEL LEGAL RESOURCES — SINCE 1992 — Exclusive research & writing. Highest quality: trial and appellate, state and federal, admitted and practiced U.S. Supreme Court. Over 20 published opinions with numerous reversals on certiorari. **MaryGaye LeBoeuf 405-728-9925, marygaye@cox.net.**

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DO YOU OR YOUR CLIENTS HAVE IRS PROBLEMS? Free consultation. Resolutions to all types of tax problems. Our clients never meet with the IRS. The Law Office of Travis W. Watkins PC. 405-607-1192 ext. 112; 918-877-2794; 800-721-7054 24 hrs. www.taxhelpok.com.

SERVICES

FREELANCE LEGAL SERVICES

Lawyer with highest rating and with 30+ years' experience on both sides of the table is available for strategic planning, legal research and writing in all state and federal trial and appellate courts and administrative agencies. Admitted and practiced before the United States Supreme Court. Janice M. Dansby, 405-833-2813, jdansby@concentric.net.

WANT TO PURCHASE MINERALS AND OTHER OIL/GAS INTERESTS. Send details to: P.O. Box 13557, Denver, CO 80201.

OFFICE SPACE

SPACE AVAILABLE FOR ONE OR TWO attorneys and staff in a professional office building in the Fairview Farm Office Park on N.W. 150th St. between Penn and Western. Easy access to Kilpatrick and I-235 for quick trips to courthouse. Current occupants include owner/attorney and staff and two independent family law attorneys. Ample on-site parking. Common kitchen. Available if needed: phones, fax, Internet, shredding/recycling, copier, postage meter, use of two conference rooms and storage. Contact Jennifer Irish at 405-285-2776 or jenniferirish@coxinet.net.

FOR LEASE MIDTOWN CLASS A EXECUTIVE OFFICE SPACE: 136 NW 10th, OKC. Two office suites including 3,100 and 3,500 sq. ft, each with separate full kitchens, 10 ft ceilings, granite counter tops and very nice finishes. Totally renovated. Free parking. 16.50 / sq. ft. 405-246-8160 (Ask for Chad Elmore) achadelmore@me.com, www.chadelmore.com.

EXECUTIVE SUITES FOR LEASE: Beautifully restored building in Downtown/Midtown Arts District. Walking distance to county and federal courthouses. Reception, phone, Internet, cable TV, copy/fax/scanner, free parking. Secretarial suites available. Case sharing opportunities with six practicing attorneys. 405-272-0303.

POSITIONS AVAILABLE

SOUTH TULSA FIRM, COFFEY, GUDGEL & MCDANIEL, is seeking an insurance defense attorney with 2 to 5 years experience. If interested, please send resume to tulsalawfirm07@yahoo.com.

NELSON ROSELIUS TERRY & MORTON is seeking an attorney with 0-5 years experience in civil trial practice, insurance litigation and insurance coverage. Submit resume, cover letter and writing sample to Derrick DeWitt at P.O. Box 138800, Oklahoma City, OK 73113.

POSITIONS AVAILABLE

HOUSTON AV-RATED LAW FIRM SEEKS ATTORNEYS licensed in Oklahoma to join its growing oil and gas practice. Candidates should have 2+ years of experience in writing title opinions. Being also licensed in Texas, Kansas or New Mexico is a plus. Excellent pay and benefits for qualified individuals. Please send cover letter and resume in confidence. Send replies to "Box W" Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

LARGE AV-RATED DOWNTOWN TULSA CIVIL LITIGATION firm seeking a qualified associate attorney with 2-4 years experience. Position requires excellent legal research and writing, and litigation skills. Excellent academic and professional credentials required. Law journal experience preferred. Send cover letter and resume to "Box O," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

TRINITY LEGAL CLINIC, a nonprofit Christian legal aid entity, seeks an executive director to administrate the clinics and volunteer lawyers. Pay commensurate with experience. Contact 405-410-4544; mail P.O. Box 7868, Edmond, OK 73083; Charles Watts, CJWattsLaw@yahoo.com.

ASSISTANT DISTRICT ATTORNEY – District 23 has an immediate opening for an experienced assistant district attorney in the Chandler office. The applicant must have prosecution experience. This is a position that will require excellent communication and leadership skills. Organization and time management are crucial. Highly competitive salary will reflect the experience and responsibility level of the position. To apply, forward a resume to District Attorney Richard L. Smothermon, 331 N. Broadway, Shawnee, OK 74801.

DOWTOWN OKC/MID-SIZE LAW FIRM seeking experienced paralegal/legal assistant (4+ yrs) for an insurance defense practice. Must have good communication, computer and organization skills. Competitive salary and benefits. Send resume to "Box P," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

SMALL AV-RATED CANADIAN COUNTY LAW FIRM seeking contract/associate attorney with 2-5 years experience in civil litigation, brief preparation and research. Applicants must have good communication and writing skills, be organized and motivated. Salary based on experience and motivation. Send resume, references and salary requirements to "Box Y," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

FULL-TIME RECEPTIONIST NEEDED for an Oklahoma City AV-rated law firm. Receptionist must have professional appearance, excellent communication skills and be familiar with Microsoft Word. Light typing is required. Knowledge of Excel spreadsheets is preferred but not required. Send resume, references and salary requirements to rfitzgerald@whittenburragelaw.com.

POSITIONS AVAILABLE

LITIGATION ATTORNEY WANTED for Oklahoma City office of an expanding national insurance defense firm. Candidate should have 4 to 8 years experience in litigation and must demonstrate strong client relations skills. Construction defect, professional liability, employment, bad faith and personal injury defense work helpful. Compensation package will reward skills, experience and existing relationships. Additional information may be found at www.helmsgreene.com. Please direct inquiries to Steve Greene at sgreene@helmsgreene.com or 770-206-3371.

HIGH-VOLUME TULSA SOCIAL SECURITY DISABILITY PRACTICE has an opening for an associate attorney with 3+ years experience. Competitive salary and bonus structure. Potential signing bonus. Send resume to "Box U," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

TULSA IN-HOUSE INSURANCE DEFENSE FIRM seeks associate with previous first chair trial experience. Competitive salary and benefits. Send resume and salary requirement to "Box J," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

LITIGATION FIRM WITH OFFICES IN DALLAS, TULSA AND OKLAHOMA CITY seeks two to three experienced litigators for the firm's Tulsa and Oklahoma City offices. New hires will be located in downtown Tulsa and downtown Oklahoma City. The firm is a litigation firm with a broad client base and a strong, growing presence in Oklahoma and Texas. The law firm recently was recognized as one of the 40 fastest growing companies in eastern Oklahoma, and the only law firm on the list. The firm seeks attorneys with 4 to 7 years of experience or more in litigation. Those seeking a top litigation environment in which to mentor and be mentored are encouraged to inquire. Salary is above the norm when compared with commensurate job opportunities. Please send resume to "Box C," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

MAGELLAN'S LEGAL DEPARTMENT IS SEEKING an experienced attorney. The ideal candidate will have preferably 5-15 years of legal experience. The position will primarily focus on commercial transactions counseling, negotiation and documentation; will provide legal counsel and guidance regarding contract matters, right-of-way issues as well as acquisitions and divestitures; will also be responsible for managing the resolutions of disputes related to transactional work; may assist with FERC and other regulatory matters. Apply online at www.magellanlp.com or send resume to lynn.somerville@magellanlp.com.

ASSISTANT ATTORNEY GENERAL. Experienced employment law attorney. Well versed in defending and counseling employers in employment matters. Experience before the Merit Protection Commission a plus. Strong research and writing skills required. Send resume and writing sample to resumes@oag.ok.gov. Salary is commensurate with experience according to the office pay scale. EOE.

POSITIONS AVAILABLE

LESTER, LOVING & DAVIES PC, an AV-rated law firm, seeks an associate with minimum 0-2 years litigation experience. Send resume to Lester, Loving & Davies PC, 1701 South Kelly Ave., Edmond, OK 73013.

OKC AV FIRM SEEKS ASSOCIATE with a minimum of three years experience. The attorney must be a motivated self-starter. The position allows the attorney to handle his or her caseload with supervision. Law firm desires an associate with experience in insurance defense and insurance subrogation. Deposition experience helpful. Send resume and salary requirements to "Box F," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

GEICO STAFF COUNSEL — LAW OFFICES OF MICHAEL H. GITHENS, is seeking an attorney with 2-6 years of experience in insurance defense and/or personal injury practice. The attorney will be expected to handle a caseload including research, drafting pleadings and motions, attending depositions, mediations, court appearances and trial. The applicant must be admitted to practice in the state of Oklahoma and be willing to travel throughout the state. Good organizational, communication and computer skills are required. Please fax resumes to 405-242-6401 or email to mgithens@geico.com.

MUNICIPAL JUDGE: The City of Oklahoma City seeks full-time municipal judge. Must be a resident of Oklahoma City with a minimum of four years experience in state as a licensed, practicing attorney. Additional requirements listed in application. Pick up and return application to Department of Court Administration, 700 Couch Drive, Oklahoma City, OK 73102. Direct all inquiries to Court Administrator Stacey Davis at 405-297-2780. Applications will be accepted until 5 p.m. May 28, 2012.

FULL TIME POSITION AS ASSOCIATE ATTORNEY for large Tulsa law firm. Must be fluent in Spanish, have a broad knowledge of the law and good telephone skills. Send resumes to: Human Resources Dept., P.O. Box 1046, Tulsa, OK 74101.

MIDDLETON, NOWAKOWSKI & SMITH, In-House counsel for Farmers Insurance Company Inc., has immediate opening for a trial attorney with a minimum of 2 years trial and/or insurance defense experience. Candidates must have prior jury trial experience, be motivated to improve and learn new skills and exhibit strict adherence to professionalism and ethical behavior. All candidates must be able to work efficiently and effectively with an electronic docketing system and paperless office. Qualified candidates should go to www.farmers.com/careers to apply and upload their resume. Farmers Insurance Company is an Equal Opportunity Employer.

POSITIONS AVAILABLE

GENERAL COUNSEL

A leading provider of workers' compensation insurance to Oklahoma businesses is seeking a licensed attorney to serve as Chief Legal Officer/General Counsel. We are a customer service driven employer and take pride in hiring motivated professionals who are excited about making a difference for Oklahoma businesses. We are committed to providing a work environment that cultivates growth and productivity for our employees.

The successful candidate must meet the following requirements:

- Juris Doctorate
- Above average academics
- Active membership in the Oklahoma Bar Association

Seven (7) years experience in the practice of law, three years of which must have been in the practice of insurance law.

Preference will be given for experience in the following areas:

- Experience as a general counsel, assistant or associate general counsel, managing partner or managing member of a law firm and supervising work of other attorneys
- Workers' Compensation experience
- Litigation management
- Contracts
- Tracking and management of legislation

We provide a professional working environment and an excellent benefit package that includes paid vacation, sick leave, paid holidays, health, dental and life insurance. Annual salary range is $90,000 - $105,000. **EEO/AA Employer**. Send resume to Box D, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

ASSISTANT ATTORNEY GENERAL. Experienced workers' compensation attorney. Well versed in all aspects of workers' compensation litigation, consultation and defense. Strong research and writing skills required. Send resume and writing sample to resumes@oag.ok.gov. Salary is commensurate with experience according to the office pay scale. EOE.

POSITION WANTED

EXPERIENCED LAWYER SEEKING PT POSITION in appellate or administrative (immigration, SSA) or other areas, while upstarting own practice. Bilingual Spanish; Interpretation Translation. Prefer congenial, fun atmosphere in OKC or surrounding area. Salary negotiable. Contact okclawyer4hire@gmail.com.

8:30 a.m.
Registration and Continental Breakfast

9
Introduction to Dealing with Cities and Towns
Diane Pedicord, General Counsel, Oklahoma Municipal League, Oklahoma City

9:50
Break

10
Interacting with Public Schools
Stephanie J. Mather, Center for Education Law, Oklahoma City

10:50
Open Meeting/Open Records Acts of Oklahoma
Matthew J. Love, Law Office of Margaret McMorrow-Love, Oklahoma City

11:40
Networking lunch (included in registration)

12:10 p.m.
Public Financing Arrangements: TIFs and Bonds
Wiley L. Williams Jr., Assistant Municipal Counselor, City of Oklahoma City, Oklahoma City

1
Claims Against Government Entities: Tort Claims, Qui Tam Actions and Suits Under 42 U.S.C. §1983
Margaret M. Love

1:50
Break

2
Eminent Domain/Inverse Condemnation Actions
TBD

2:50
Adjourn

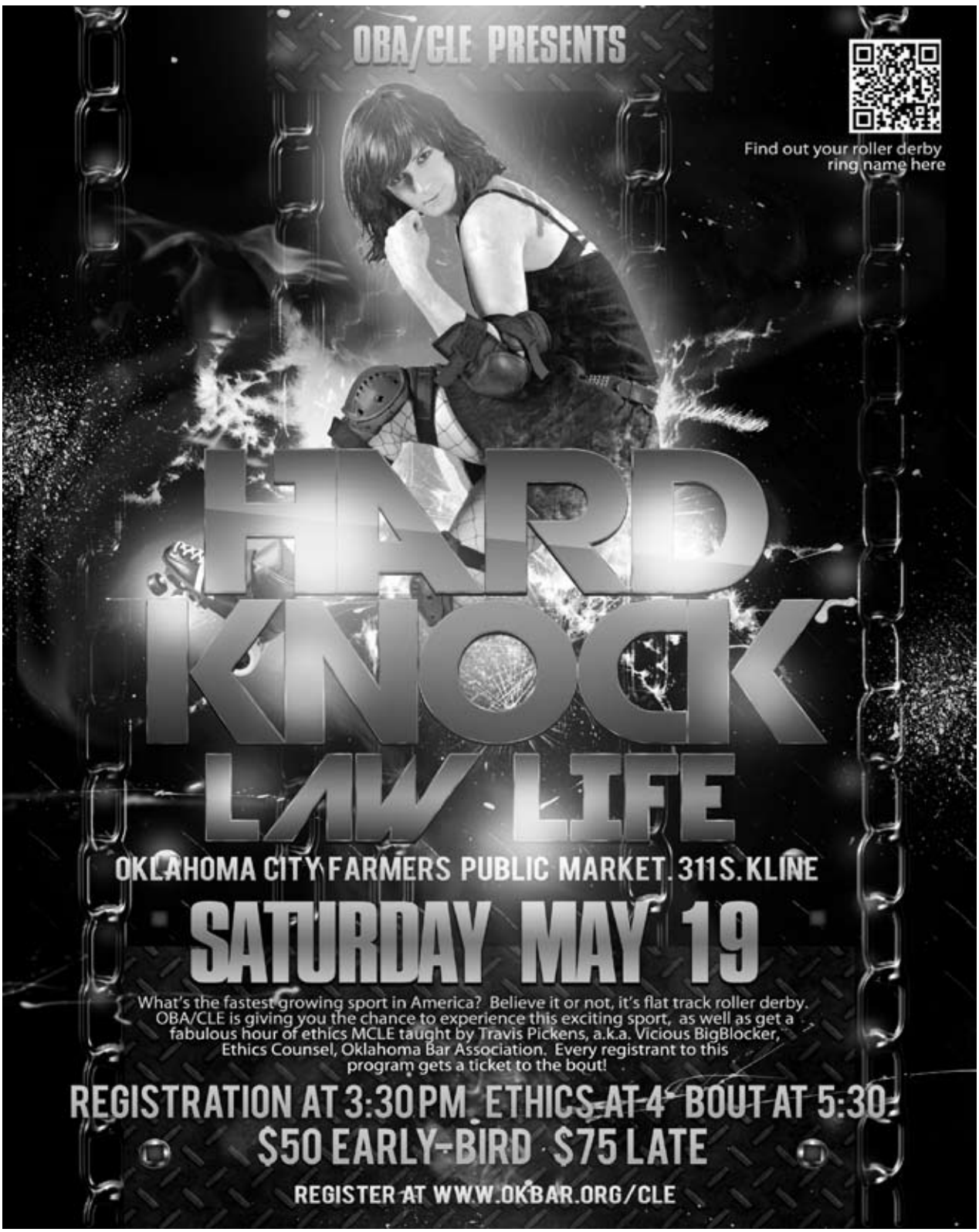
oba cle
continuing legal education

Credit: Approved for 6 hours MCLE/ 0 Ethics.

Tuition: $150 for early-bird registrations with payment received at least four full business days prior to the seminar date; $175 for registrations with payment received within four full business days of the seminar date.

Cancellation Policy: Cancellations will be accepted at any time prior to the seminar date; however, a $25 fee will be charged for cancellations made within four full business days of the seminar date. Cancellations, refunds, or transfers will not be accepted on or after the seminar date.

The OKC program will be webcast
Price varies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