

# THE Oklahoma Bar JOURNAL

Volume 81 ♦ No. 1 ♦ January 9, 2010



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# EVENTS CALENDAR

## JANUARY 2010

- 12 **Death Oral Argument**; Clarence Rozell Goode Jr.; D-2008-43; 10 a.m.; Court of Criminal Appeals Courtroom
- 14 **OBA Leadership Academy**; 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Heidi McComb (405) 416-7027  
**OBA Mock Trial Committee Meeting**; 5:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Judy Spencer (405) 755-1066
- 15 **OBA Leadership Academy**; 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Heidi McComb (405) 416-7027  
**OBA Board of Governors Meeting**; 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000
- 16 **OBA Title Examination Standards Committee Meeting**; 9:30 a.m.; Tulsa County Bar Center, Tulsa; Contact: Kraettli Epperson (405) 848-9100  
**OBA Young Lawyers Division Meeting**; 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Molly Aspan (918) 594-2595
- 18 **OBA Closed** – Martin Luther King Jr. Day
- 20 **Ruth Bader Ginsburg American Inn of Court**; 5 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donald Lynn Babb (405) 235-1611
- 21 **OBA Law-related Education Committee 2010 Supreme Court Teacher and School of the Year Judging**; 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jack G. Clark Jr. (405) 232-4271
- 22 **Oklahoma Bar Foundation Meeting**; 12:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Nancy Norsworthy (405) 416-7070
- 23 **OBA Law-related Education We the People State Finals**; 10 a.m.; Oklahoma History Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024
- 27 **Luther L. Bohanon American Inn of Court**; 5:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Mary A. Roberts (405) 943-6472

## FEBRUARY 2010

- 2 **OBA Law-related Education Committee Meeting**; 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Jack G. Clark Jr. (405) 232-4271
- 12 **OBA Board of Editors Meeting**; 1 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Carol Manning (405) 416-7016

**For more events go to [www.okbar.org/news/calendar.htm](http://www.okbar.org/news/calendar.htm)**

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# OBA DAY at the CAPITOL

Don't miss this year's opportunity to visit with members of your Okla. Legislature as part of the OBA Day at the Capitol to get up-to-speed on the OBA legislative agenda. Register and meet at the Oklahoma Bar Center for the day's briefing at 10:30 a.m. Lunch will be provided at noon. After lunch, head to the Capitol to visit with the legislators and attend a reception at the bar center at 5 p.m.



**Tuesday,  
March 2, 2010**

|                         |  |
|-------------------------|--|
| 10:30 - 11 a.m.         | Registration   |
| 11 - 11:10 a.m.         | Welcome — Allen M. Smallwood,<br>President, Oklahoma Bar Association   |
| 11:10 - 11:25 a.m.      | Comments Re: Funding for the Courts —<br>Chief Justice James E. Edmondson,<br>Oklahoma Supreme Court         |
| 11:25 - 11:40 a.m.      | Legislation of Interest —<br>Duchess Bartmess, Chairperson,<br>Legislative Monitoring Committee              |
| 11:40 - 11:55 a.m.      | Oklahoma Association for Justice —<br>Reggie Whitten, President,<br>Oklahoma Association for Justice         |
| 11:55 a.m. - 12:10 p.m. | Break — Lunch Buffet (Provided,<br>please RSVP to <a href="mailto:debbieb@okbar.org">debbieb@okbar.org</a> ) |
| 12:10 - 12:25 p.m.      | Oklahoma Lawyers Association —<br>Thad Balkman   |
| 12:25 - 12:35 p.m.      | Legal Aid — Status of Funding —<br>Laura McConnell-Corbyn, LASO,<br>Board Member Liaison OCBA                |
| 12:35 - 12:45 p.m.      | Bills on OBA legislative agenda —<br>John Morris Williams  |
| 12:45 - 1 p.m.          | Legislative Process and Tips on Visiting<br>with Legislators — David Braddock                                |
| 1 - 5 p.m.              | Meet with Legislators  |
| 5 - 7 p.m.              | Legislative Reception —<br>Oklahoma Bar Center, Emerson Hall   |

**Please RSVP if attending lunch to: [debbieb@okbar.org](mailto:debbieb@okbar.org), or call (405) 416-7014**



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# Supreme Court Opinions

*Manner and Form of Opinions in the Appellate Courts;*  
*See Rule 1.200, Rules — Okla. Sup. Ct. R., 12 O.S. Supp. 1996 (1997 T. 12 Special Supplement)*

2009 OK 97

**Robert Reynolds, Plaintiff, v. Advance Alarms, Inc., an Oklahoma Corporation; and Robert Morrison, as an Officer and/or Director, Defendants.**

No. 106,989. December 16, 2009

## ORDER

The dissenting opinion was promulgated in this matter on December 15, 2009. That dissenting opinion is hereby corrected to reflect:

Colbert, J. dissenting, with whom Edmondson, C.J. and Watt, J. join.

/s/ Steven W. Taylor  
Vice Chief Justice

2009 OK 91

**PAUL M. POWERS, Petitioner, v. THE DISTRICT COURT OF TULSA COUNTY, STATE OF OKLAHOMA, and the Honorable TERRY H. BITTING, Special District Judge, Respondents. AND PAUL M. POWERS, Petitioner, v. THE DISTRICT COURT OF TULSA COUNTY, STATE OF OKLAHOMA, and the Honorable CARL FUNDERBURK, Special District Judge, Respondent.**

No. 105,611. No. 106,432

## CORRECTION ORDER

¶1 The Opinion of the Court filed herein on December 8, 2009, shall be corrected as follows:

1. In footnote number 18 the language stating: "See the discussion of federal procedure and authority at notes 6-9 *supra*." shall be changed to the corrected form stating: "See the discussion of federal procedure and authority at notes 7-10 *supra*."

2. In the last sentence of footnote number 31 the language stating: "See note 31, *infra*." shall be changed to the corrected form stating: "See note 1 *supra*, and notes 32 and 47 *infra*."

3. The first sentence of footnote number 52 stating: "Our Court of Civil Appeals has concluded that § 601-201 must be construed

be construed in harmony with due process and *Kulko v. California Superior Court, supra*." shall be changed to the corrected form stating: "Our Court of Civil Appeals has concluded that § 601-201 must be construed in harmony with due process and *Kulko v. California Superior Court, supra*."

¶2 The Opinion shall otherwise remain as filed December 8, 2009.

¶4 DONE BY ORDER OF THE SUPREME COURT THIS 29th DAY OF DECEMBER, 2009.

/s/ James E. Edmondson  
Chief Justice

2009 OK 89

**GINA JO CARRIGAN-ST. CLAIR, Executrix of the Estate of JAMES FRANCIS CARRIGAN, deceased, Plaintiff/Appellant, v. WILDWOOD PRESERVE FARMS, INC., an Oklahoman Corporation, PAUL ECKSTEIN, CHRISTINE ROLLINS, HIDDEN VALLEY TIMBER COMPANY, INC., and LOVE BOX COMPANY, INC. Defendants/Appellees.**

No. 106,545. December 28, 2009

OPALA, J., with whom TAYLOR, V.C.J., joins, concurring

¶1 I write separately to explain my support for the court's order.

¶2 When sitting alone and acting without power expressly conferred by a published court rule, **the chief justice is unable to exercise any of the court's adjudicative authority.**<sup>1</sup> A request made before the Supreme Court to disqualify a judge of another court calls for the court's exercise of an adjudicative function.<sup>2</sup> The invoked statute, 20 O.S.Supp. 2008 §95.10,<sup>3</sup> is so narrowly drawn that its use could be justified **only in those rare instances** in which the record for appeal contains sufficient evidence to support the allegation that the judge whose decision was reversed upon review did not act in the case as a neutral and detached arbiter of the controversy.

¶3 If the Supreme Court movant cannot draw the needed proof from the appellate record, the effort to disqualify a judge by invoking §95.10

would fail. Appellate courts are unable to give first-instance consideration to a motion for disqualification of a trial judge. **That process must commence** before the judge sought to be removed.<sup>4</sup>

¶4 In sum, the statute invoked by movant in this case may not be pressed for use in the absence of both allegation and proof that the record for appeal submitted with the quest for review will alone support the *factum* of the judge's demonstrated lack of detachment and neutrality in the litigated case.

1. The chief justice is one of nine justices and cannot claim any adjudicative power when acting alone. Art. 7, § 2, Okl. Const. The office of chief justice is not an established institution of the judicial department which is able to function in an adjudicative capacity separately from the court over whose sessions, executive as well as public, that official is authorized to preside. While the Supreme Court's purely adjudicative functions are clearly nondelegable, the court may grant to its chief justice some or all of its managerial powers by published institutional rules of administration.

2. A motion to disqualify calls for the performance of an adjudicative act as distinguished from one made in the exercise of a managerial function. For a discussion of the judiciary's adjudicative and managerial powers see Board of Law Library Trustees of Oklahoma County v. State ex rel. Petuskey, 1991 OK 122, 825 P.2d 1285, 1289.

3. The terms of 20 O.S. Supp. 2008 §95.10 provide:

A. Except as provided in subsection B of this section, in the event a civil case brought in a district court of the State of Oklahoma is appealed, and is subsequently reversed and remanded, in whole or in part, by final order of an appellate court of this state, the Chief Justice of the Supreme Court of Oklahoma may appoint a different district court judge or associate district court judge upon application to the Supreme Court pursuant to rules promulgated by the Court.

B. If all parties are in agreement, the same district court judge or associate district court judge presiding in the case prior to appeal may preside over all proceedings in the case remanded to the district court.

4. The process for the disqualification of a judge begins before the trial judge. Rule 15 (Disqualification of Judges in Civil and Criminal Cases), Rules for District Courts of Oklahoma, 12 O.S.2001, Ch. 2, App. Rule 15 provides a three-step process for challenging the assigned judge's neutrality and detachment. Without the assigned judge's critical on-the-record ruling, the movant cannot seek relief in this court in a proceeding for a writ of mandamus. Clark v. Board of Educ. of Independent School District No. 89 of Oklahoma County, 2001 OK 56, ¶¶9, 11, 32 P.3d 851, 855-56.

**2009 OK 94**

**Marie J. Carter, D.O., and Marie J. Carter, D.O., P.C., Plaintiff/Appellants, v. Michael Schuster, Defendant-Appellee, and Apex Practice Management, LLC, and TSG, Inc., Defendants.**

**No. 102,602. December 18, 2009**

**CORRECTION ORDER**

The Court's opinion in this matter is hereby corrected as follows:

Michael Paul Kirschner, Lorrie A. Corbin, Jim W. Lee, Kirschner, Kisner & Lee, PLLC, Oklahoma City, Oklahoma, for Plaintiffs-Appellants.

Shawn J. Roberts, Craig E. Brown, Brown & Roberts, P.C., Oklahoma City, Oklahoma, for Defendant-Appellee.

T.P. Howell, J. Clay Christensen, Day Edwards, Propester & Christensen, P.C., for Defendant-Appellee.

In all other regards the opinion shall remain unaltered.

DONE BY ORDER OF THE SUPREME COURT, THIS 18th DAY OF DECEMBER, 2009.

/s/ James E. Edmondson  
Chief Justice

**No. 102,602. December 22, 2009**

**CORRECTION ORDER**

The Court's opinion in this matter is hereby corrected to reflect the following vote:

Concur: Edmondson, C.J., Taylor, V.C.J., Hargrave, Opala, Winchester, JJ., Summers, S.J.

Dissent: Watt, Colbert, Reif, JJ.

In all other regards the opinion shall remain unaltered.

DONE BY ORDER OF THE SUPREME COURT, THIS 22nd DAY OF DECEMBER, 2009.

/s/ Steven W. Taylor  
Vice Chief Justice

**2009 OK 98**

**In re Amendment to 12 O.S. Ch. 15, App. 1, Rule 1.14 of the Rules of the Oklahoma Supreme Court.**

**S.C.A.D. No. 2009-103. December 15, 2009**

**¶0 Order Amending Oklahoma Supreme Court Rule 1.14**

¶1 The Court hereby amends Oklahoma Supreme Court Rule 1.14, 12 O.S.2001 Ch. 15, App. 1.

¶2 Oklahoma Supreme Court Rule 1.14 is amended to read as follows.

**Rule 1.14. Taxation of costs and motions for an appeal related attorney's fee**

**(A) Costs.**

(1.) Costs must be sought by a separately filed and labeled motion in the appellate court prior to mandate. The Clerk shall not tax as costs any expense unless the person claiming the same, prior to the issuance of

a mandate in the cause, shall file with the Clerk a verified statement of taxable cost items showing that person has paid the same.

(2.) Costs taxable by the Supreme Court Clerk are limited to the following:

- (a.) The cost deposit required by 20 O.S. § 15;
- (b.) The cost deposit required by 20 O.S. § 30.4;
- (c.) The reasonable cost of copying and binding the record pursuant to Rule 1.36. *Carroll v. Axelson, Inc.*, 1999 OK 13, 976 P.2d 1046;
- (d.) Reasonable costs for transcripts which are a part of the record on appeal. These costs may include the fee for recording and transcribing the proceedings, and mileage if the trial judge requires the parties to bring their own court reporter. Any charges for mailing and delivery of copies, or for an additional electronic transcript, are not taxable.

(3.) No fee paid to the district court clerk is taxable in the appellate courts.

12 O.S. § 978, *Spears v. Shelter Mutual Insurance Co.*, 2003 OK 66, 73 P.3d 865, *Wilson v. Glancy*, 1995 OK 141, 913 P.2d 286, *Oklahoma Turnpike Authority v. New*, 1993 OK 42, 853 P.2d 765.

### (B) Attorney's Fee.

A motion for an appeal related attorney's fee must be made by a separately filed and labeled motion in the appellate court prior to issuance of mandate, or in the applicant's brief on appeal in a separate portion that is specifically identified. The motion must state the statutory and decisional authority allowing the fee. See 12 O.S. § 696.4(C). If the motion for an attorney's fee is included in the brief and the court does not address the motion in its opinion the party shall reurge the request by separate motion prior to mandate. In an appeal governed by Rule 1.36 a motion for an appeal related attorney's fee must be made by a separately filed and labeled motion in the appellate court prior to issuance of mandate.

¶3 The version Oklahoma Supreme Court Rule 1.14 amended by this Order shall take effect January 1, 2010. This Order shall be published three times in the *Oklahoma Bar Journal*.

¶4 DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 14th DAY OF DECEMBER, 2009.

/s/ James E. Edmondson  
Chief Justice

ALL JUSTICES CONCUR

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# Court of Criminal Appeals Opinions

2009 OK CR 32

LATORIS DEWAYNE COLLINS, Appellant,  
v. THE STATE OF OKLAHOMA, Appellee.

Case No. F-2008-654. December 17, 2009

## OPINION

CHAPEL, JUDGE:

¶1 LaToris DeWayne Collins was tried by jury and convicted on two counts of Rape in the First Degree, in violation of 21 O.S.Supp.2006, §§ 1111 & 1114 (Counts I and IV); and two counts of Kidnapping, in violation of 21 O.S.Supp.2004, § 741 (Counts III and V), all After Two or More Previous Felony Convictions, in the District Court of Oklahoma County, Case No. CF-2006-6326.<sup>1</sup> In accordance with the jury's recommendation, the Honorable Virgil Black sentenced Collins to imprisonment for twenty (20) years on each of the four counts, with Counts I and III to run concurrently, but consecutively to Counts IV and V, which also run concurrently with each other. Counts I and IV are subject to the 85% Rule, pursuant to 21 O.S.Supp.2002, § 13.1(10).

¶2 C.M. first met LaToris Collins outside an Oklahoma City night club, in the early morning hours of August 26, 2006. C.M. was in her van, smoking marijuana laced with crack cocaine. C.M. testified that at some point her lighter ran out of fluid, and she approached a white Cadillac and asked to borrow a lighter. Collins and a man identified as his cousin were in the car and invited C.M. inside to smoke crack cocaine with them. The cousin eventually returned to the club, leaving Collins and C.M. in the car. C.M. testified that she smoked approximately five dollars worth of crack with Collins.

¶3 After an alert from Collins' radar detector, Collins suggested the pair circle the block in order to avoid the police, and C.M. agreed. Rather than going around the block, however, Collins drove straight ahead and on to I-35. Noting the change in course, C.M. twice asked Collins to pull over and let her out of the car. Collins refused and began driving faster.

¶4 Collins eventually pulled off the interstate and parked at a convenience store, because his car was overheating. While Collins was in the store, C.M. remained in the car. C.M. testified

that she could have left, but that she stayed because she hoped to get more drugs from Collins. They eventually arrived at Collins' house, and C.M. followed Collins into his bedroom. Upon entering the bedroom, Collins told C.M. that she owed him for the drugs she had already used. Collins also told C.M. that he had been to prison, that he had a gun, and that he would use it if she did not comply with his demands. Collins then told C.M. to remove her clothes.

¶5 After C.M. removed her clothes, Collins performed oral sex on her and ordered C.M. to perform oral sex on him. At this point C.M. reached for a curtain above the bed, in an attempt to escape through the window, and Collins responded by punching her in the nose. C.M. then performed oral sex on Collins, at one point biting his penis in an effort to end the sexual assault. After that, Collins forced C.M.'s legs open and vaginally raped her. During the rape, C.M.'s husband called her on her cell phone, which C.M. had concealed near her head in hopes of dialing 911. When he heard the ringing, Collins took C.M.'s phone, bent it so that it no longer worked correctly, and threw it in a nearby basket.

¶6 After raping C.M., a more docile Collins offered to drive her back to the club where her van was parked. As the two walked off Collins' porch, however, C.M. bolted to a neighbor's house and asked to use the phone. There C.M. called her husband to come and get her. When her husband arrived, she relayed to him the story of what had happened. C.M.'s husband then called the police, and the couple waited outside Collins' home until officers arrived.

¶7 C.K. first met Collins on September 2, 2006, one week after the rape of C.M., at the Oklahoma City apartment of an acquaintance known to C.K. only as "Therman." C.K. went to Therman's apartment to meet her friend, April, for a shopping trip to the mall. Shortly after being introduced, Collins asked C.K. if she could help him with some grocery shopping, as he had recently had prostate surgery and needed assistance. After C.K. got into Collins' car, Collins told C.K. that he had to go back to his house to get some money. When they arrived at Collins' house, C.K. stood in the

doorway while Collins retrieved his money. Rather than going to the grocery store, however, Collins then drove to a nearby liquor store and ordered C.K. to go in and buy him a bottle of Kentucky Deluxe bourbon.

¶8 After the trip to the liquor store, Collins told C.K. that he again needed to return to his home, to get more money for the grocery store. C.K. grudgingly agreed. Upon arriving at the house, C.K. entered, and Collins invited her into his bedroom to see his collection of suits. C.K. went into the bedroom to look at the clothes, and after briefly listening to Collins brag about his fashion collection, C.K. asked to be returned to her car. Instead, Collins locked the bedroom door. Collins then showed C.K. an old picture of himself, wearing what appeared to be a prison uniform. Collins bragged that he had been in prison for murder and asked C.K. how much she would charge to allow him to “eat [her] pussy.” C.K. was shocked and confused by this request and declined, saying she would only do such things with her boyfriend or husband. Collins then accused C.K. of “playing him.” After C.K. attempted to answer a call from her thirteen-year-old son, Collins took C.K.’s cell phone, laying it on the floor behind him. C.K.’s phone would continue to ring while Collins sexually assaulted her.

¶9 Now acutely aware of her situation, C.K. began to cry and told Collins again that she wanted to leave. In response, Collins called C.K. a “stupid bitch” and threatened to “fuck [her] up.” Collins then told C.K. that if she did not remove her clothes and stop crying, he was going to get his gun and put it in her mouth.<sup>2</sup> C.K. removed all of her clothes, and Collins pushed her onto the bed and vaginally raped her.<sup>3</sup>

¶10 After the rape, Collins asked C.K. to get him a glass of water. C.K. complied, and Collins politely thanked her.<sup>4</sup> Going back outside, Collins asked C.K. to grab a garden hose, in order to help him put water in his car, which was overheating. C.K. again complied, but when Collins returned to the house to get something, she took off and ran several blocks back to Therman’s apartment complex, where her car was parked. C.K. first went to Therman’s apartment and angrily asked why anyone would let her leave with Collins. C.K. then got in her car and returned home. She reported the rape to police the next day.

¶11 Collins appeals from his convictions and sentences, raising three propositions of error.

¶12 In Proposition I, Collins claims that the joinder of all the charges against him in a single trial was improper and unfairly prejudiced his right to a fair trial. Collins entered a plea of “not guilty,” without objecting to the joinder of the charges or filing a motion to sever, waiving all but plain error review.<sup>5</sup>

¶13 Collins contends that joinder of the crimes involving C.M. with those involving C.K. into a single trial did not meet the criteria for joinder set out in *Glass v. State*.<sup>6</sup> He claims that this joinder prejudiced him, because the State used testimony from an arguably more credible witness, C.K., to bolster the testimony of an arguably less credible witness, C.M.

¶14 In *Glass*, this Court held that joinder is permitted when the offenses arise out of the same criminal act or transaction or are part of a series of criminal acts or transactions.<sup>7</sup> Criminal acts are properly called a “series” where the joined counts: (1) refer to the same type of offenses, (2) occurred over a relatively short period of time, (3) in approximately the same location, and (4) proof of each act or transaction overlaps, so as to show a common scheme or plan.<sup>8</sup>

¶15 Collins first argues that the offenses did not all occur within the “relatively short period of time” required by *Glass*. This Court has previously upheld joinder where the crimes were separated by as much as four months.<sup>9</sup> The seven-day span between the kidnapping and rape of C.M. and the kidnapping and rape of C.K. is well within the relatively short period of time required by *Glass* and subsequent cases.

¶16 Collins also argues that there is insufficient evidence of a “common scheme or plan.” Collins contends that while the facts of the C.M. and C.K. cases are arguably similar, similarity alone is not sufficient to indicate a common scheme or plan. Yet there are more than “arguable similarities” between the two cases. The striking commonality of these cases begins with the undisputed satisfaction of two of the other elements in the *Glass* analysis. Not only were the criminal acts charged very similar, with both victims being kidnapped and then raped, the attacks on both women occurred at the same location, Collins’ Oklahoma City residence.

¶17 Collins' plan of attack against these women was also quite similar. Both women agreed to go somewhere with Collins in his car, but were then brought to his home instead. C.M. left with Collins ostensibly to avoid the police. C.K. went with Collins as a Good Samaritan, under the false impression that Collins was somehow incapacitated. After getting the women into his car, Collins changed the plan and drove to his home. Both women also entered Collins' home and his bedroom under false pretenses. C.M. entered with the expectation that Collins was getting her more drugs. C.K. was brought to Collins' home (twice) so he could get money and was later lured into his bedroom to look at his clothes.

¶18 Once Collins had the women inside his bedroom, he began employing force and fear. Collins told C.M. that she owed him for the drugs and told C.K. that she had been leading him on, "playing him." Collins intimidated both women by informing them that he had been to prison, even showing C.K. pictures of himself in a prison uniform; and he threatened both with an unseen gun. Collins kept the women in his room, after they displayed a desire to leave, by threatening them and later even physically assaulting them.<sup>10</sup> Collins ordered both women to fully disrobe and took their cell phones when their loved ones called, eliminating their ability to call for help. Collins finished the attack by vaginally raping both women, without using a condom.

¶19 Requiring overlapping proof of a "common scheme or plan" contemplates that there be a relationship or connection between/among the crimes in question, such that proof of one becomes relevant in proving the other/others. Here, both encounters, taken together, display Collins' unique predatory pattern and common plan of attack. Evidence of this pattern and common plan is relevant to proving both kidnappings and both rapes. We soundly reject Collins' claim that there is no overlapping proof suggesting a common plan.

¶20 We further find that Collins' claim of prejudice is unsupported by the record. While C.M.'s testimony about what happened to her was arguably reinforced by C.K.'s testimony, nothing in the record indicates that the jury was unable to independently assess the credibility of each woman and arrive at independent verdicts on each count.<sup>11</sup> Furthermore,

there was no "great disparity" in the amount of evidence underlying the joined cases.<sup>12</sup>

¶21 Collins committed the same types of crimes, only one week apart, at exactly the same location, and the proof of the crimes overlapped significantly. Collins cannot demonstrate that he was unfairly prejudiced by the joinder, and the interest of judicial economy was well served by joining these two cases. This proposition is rejected accordingly.

¶22 In Proposition II, Collins argues that that the trial court erred by granting the State's motion *in limine* to exclude any mention of C.M.'s history of prostitution.<sup>13</sup> Collins argues that this ruling impaired his ability to impeach C.M. with her past crimes of "moral turpitude." Collins also argues, more broadly, that this exclusion "choked off" his defense and limited his right to confrontation, because the convictions and past acts of prostitution were relevant to prove C.M.'s motive or propensity to lie and to support Collins' defense of consent.<sup>14</sup> Decisions to grant motions *in limine* excluding evidence are within the sound discretion of the trial court, and we review the trial court's decision for an abuse of discretion.<sup>15</sup>

¶23 Collins claims that Oklahoma law permits attacking witness credibility with crimes of moral turpitude. This overbroad claim is patently incorrect. The crime of prostitution does not meet the requirements for admissibility as impeachment evidence under 12 O.S.Supp.2004, § 2609. Looking to the statute, § 2609(A)(1) permits impeaching witness credibility with evidence of felony convictions within the last ten years.<sup>16</sup> And § 2609(A)(2) permits impeaching witness credibility with evidence of any conviction (even misdemeanors) involving dishonesty or false statement within that same time period.<sup>17</sup> Collins does not argue that C.M.'s prostitution convictions are felonies; nor does he claim that they are crimes involving dishonesty; nor does he allege that C.M. has had any convictions at all within the last ten years.

¶24 The "moral turpitude" language invoked by Collins comes from § 2609(B). This section provides that any conviction of a felony or "a misdemeanor involving moral turpitude," within the preceding ten years, can "revive" previous convictions for felonies or misdemeanors involving dishonesty, which would otherwise be outside of the ten-year window.<sup>18</sup>

Nothing in the record reflects that C.M. had *any* prior convictions for felonies or crimes of dishonesty that could be revived by more recent “misdemeanors involving moral turpitude,” such as prostitution. And § 2609 does *not* make crimes of moral turpitude, by themselves, generally admissible for impeachment purposes.<sup>19</sup> This Court finds that the record in this case contains no evidence that C.M. has any convictions that would be admissible for impeachment under § 2609.

¶25 Collins also submits that the exclusion of C.M.’s history of prostitution evidence limited his right to confrontation and to present a defense. Collins acknowledges that evidence of past instances of sexual behavior is inadmissible to support a defense of consent under Oklahoma’s rape shield law.<sup>20</sup> Collins argues, however, that this evidence was not being offered (or not solely being offered) to prove that C.M. consented, but rather on the legitimate issues of motive, bias, and propensity to lie. Collins seems to be arguing, on appeal, that because C.M. had been a prostitute, she must be a liar; therefore she should not now be believed when she testifies that she did not consent to having sex with him.

¶26 At trial, defense counsel waffled between arguing that C.M.’s prostitution convictions and admitted acts were admissible to support Collins’ defense of consent, since Collins maintained that the encounter with C.M. was essentially a consensual act of prostitution, where sex acts were traded for drugs, and arguing that the convictions were admissible as impeachment evidence against C.M. These two theories, *i.e.*, consent and credibility, are consistent with the two major justifications by which defendants have historically been allowed to present evidence that a complaining witness is or was a prostitute.<sup>21</sup> And in some states, evidence that a complaining witness has a history of prostitution continues to be admissible in sexual assault cases, at least under certain conditions, on the theory that it is relevant to the issue of either consent or credibility.<sup>22</sup> Oklahoma, however, is *not* one of these states.

¶27 Oklahoma’s rape shield statute contains no exception allowing for a complainant’s history of prostitution, either acts or convictions, to be brought out at trial.<sup>23</sup> Thus we must address Collins’ claim that Oklahoma’s rape shield law must yield to his constitutional rights to present a defense and to confront the

witnesses against him. The federal rape shield law, as well as the rape shield laws of many states, contains an explicit exception for instances where the exclusion of a victim’s sexual history evidence would violate the constitutional rights of the defendant.<sup>24</sup> Oklahoma’s rape shield statute contains no such exception.

¶28 This Court notes that in comparison to the federal rape shield statute and those of many other states, Oklahoma’s rape shield law is notably broad and robust.<sup>25</sup> Nevertheless, this Court also recognizes that where a defendant can establish that in the specific circumstances of a particular case, the unlimited application of Oklahoma’s rape shield law will violate the defendant’s constitutional trial rights, including the right to present a defense and to confront and cross-examine witnesses, the statutory protection of the complainant must yield to the constitutional rights of the defendant.<sup>26</sup> This determination should be made, initially, at the trial court level, considering all of the specific facts at issue. Where such a conflict arises, the district court should seek to promote the goals of Oklahoma’s rape shield law as much as possible, while still ensuring the defendant’s fundamental right to a fair trial, including the rights to confront and cross-examine witnesses and to develop and present a defense. Hence any ruling that particular evidence must be admitted at trial, which would otherwise be inadmissible under 12 O.S., § 2412(A), should be narrowly tailored to achieve the end of protecting the rights of the defendant.

¶29 Here, Collins totally fails to establish that the exclusion of the evidence regarding C.M.’s history of prostitution amounted to a violation of his constitutional rights. In particular, it must be emphasized that the prostitution evidence that Collins desired to introduce was quite remote, *i.e.*, no convictions within the past ten years and C.M.’s testimony that she had not engaged in prostitution within the preceding seven years. Collins could not point to any outside evidence of recent prostitution activity by C.M.; nor could he point to outside evidence of prostitution activity by C.M. that was similar to the facts brought out at trial. Nevertheless, it should be noted that Oklahoma’s rape shield law did not prevent Collins from arguing that the cases on trial were, in fact, examples of sex-for-drugs prostitution, which is precisely what he did at trial.

¶30 Furthermore, the exclusion of the history of prostitution evidence did not impact Collins' ability to thoroughly cross-examine and impeach C.M. with admissible evidence. C.M. testified that she was a married woman, at a club, late at night, without her husband, and that she approached Collins' car to ask for a lighter. C.M. stated that she willingly got in Collins' car and moved to the front seat when Collins' cousin went back into the club. C.M. openly testified that she was a drug addict and that she did not try to escape Collins' vehicle when he stopped at the convenience store, because she hoped she would receive more drugs. She also testified that she went into Collins' bedroom willingly, still hoping to get more drugs. This direct testimony was more than adequate to allow Collins to argue, quite forcefully, that C.M. had agreed to consensual sex in exchange for drugs and was now lying to avoid problems with her husband, which was the heart of Collins' defense relative to C.M.

¶31 Collins totally fails to explain how admitting evidence of C.M.'s history of prostitution would have demonstrated her bias or her motive or propensity to lie. Although Collins' contention that his sexual encounter with C.M. was an act of prostitution (in exchange for drugs) might have been strengthened if he could also have presented evidence of her actual history as a prostitute, Oklahoma's rape shield statute, on its face, clearly prohibits this evidence. In addition, this Court finds that the exclusion of this sexual history evidence, in the context of this case, did not unconstitutionally impair Collins' right to present his defense or to confront and cross-examine the witnesses against him. This claim is rejected accordingly.

¶32 In Proposition III, which purports to be a cumulative error claim, Collins asserts three new substantive claims, including a claim of prosecutorial misconduct and two claims of improperly admitted evidence. Under our recently revised Rule 3.5(A)(5), combining multiple issues in a single proposition is clearly improper and constitutes waiver of the alleged errors.<sup>27</sup> As such, this proposition is denied.<sup>28</sup> Nevertheless, we further find that any errors committed during Collins' trial, even considered cumulatively, did not render his trial, as a whole, unfair; nor did they make his sentence excessive.<sup>29</sup>

¶33 After thorough consideration of the entire record before us on appeal, including the

original record, transcripts, exhibits, and briefs, we find that relief is not required by law or evidence.

### Decision

¶34 Collins' CONVICTIONS for two counts of First-Degree Rape (Counts I and IV) and two counts of Kidnapping (Counts III and V) are AFFIRMED. The SENTENCES announced by the trial court on these convictions are also AFFIRMED. Nevertheless, this case is REMANDED to the district court for correction of the Judgment and Sentence document, through an order nunc pro tunc, to reflect that all four of these convictions were found to be After Two or More Previous Felony Convictions. Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App. (2009), the MANDATE is ORDERED issued upon the delivery and filing of this decision.

### APPEARANCES AT TRIAL

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**Opinion By:** Chapel, J.; C. Johnson, P.J., Concur; A. Johnson, V.P.J., Concur; Lumpkin, J., Concur in Results; Lewis, J., Concur.

1. Collins was also charged, but acquitted, on two counts of Forcible Oral Sodomy, in violation of 21 O.S. Supp. 2006, § 888 (Counts II and VI). Counts I, II, III, and VI involved female victim "C.M.," while Counts IV and V involved female victim "C.F." The State presented evidence during the second stage of the trial that Collins had prior convictions for Felony Larceny of Merchandise from a Retailer (1986), Concealing Stolen Property (1994), First Degree Burglary (1996), Possession of Controlled Dangerous Substance (1996), and Domestic Abuse (2003). The Judgment and Sentence document in this case fails to note that all four conviction counts were found to be After Two or More Previous Felony Convictions and must be corrected accordingly.

2. Although Collins threatened to use a gun on both victims, neither victim reported actually seeing a firearm.

3. At trial, Doctor John Yuthas testified that in during her initial rape examination, C.K. reported that Collins performed oral sex on her before vaginally raping her. At trial, however, C.K. denied being forced to engage in any sexual activity other than the vaginal rape.

4. C.K. testified that she specifically remembered that this “thank you” had struck her as surreal and odd at the time, considering what Collins had just done to her.

5. *Huddleston v. State*, 1985 OK CR 12, ¶ 12, 695 P.2d 8, 10 (plea to information waives all defects except those that go to jurisdiction).

6. 1985 OK CR 65, 701 P.2d 765.

7. *Id.* at ¶ 8, 701 P.2d at 768. This Court also noted, in *Glass*, that “[m]ere similarity of offenses does not provide an adequate basis for joinder.” *Id.* at ¶ 9, 701 P.2d at 768.

8. *Id.*; *Smith v. State*, 2007 OK CR 16, ¶ 23, 157 P.3d 1155, 1165.

9. *See Lott v. State*, 2004 OK CR 27, ¶ 35, 98 P.3d 318, 333-34 (upheld joinder on rape and murder of two elderly women where crimes separated by four months); *see also Pack v. State*, 1991 OK CR 109, ¶ 8, 819 P.2d 280, 283 (upheld joinder on burglaries that occurred eight weeks apart).

10. Collins punched C.M. in the nose and forced C.K. onto the bed by pushing her on the throat.

11. Collins argues that the jury’s acquittals on Counts II and VI, the forcible oral sodomy counts involving C.M., show that the jury did not believe C.M., and only convicted Collins of kidnapping and raping her due to the bolstering testimony of C.K. We disagree.

This Court notes, in particular, that the acquittals on those counts may well have been the result of the following instruction, which was given to Collins’ jury:

No person may be convicted of forcible oral sodomy unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, penetration;

Second, of the mouth of the defendant;

Third, by the mouth or vagina of the defendant or victim;

Fourth, by threats of force or violence accompanied by the apparent power of execution.

You are further instructed that any sexual penetration, however slight, is sufficient to complete the crime.

This instruction was based upon an attempt to tailor OUJI-CR (2d) 4-128 to the facts of this case, but this particular adaptation was ultimately confusing, misleading, and inaccurate. Although there were discussions of this instruction during a pre-trial conference, the final instruction, which was drafted later, was not objected to at trial by either party.

Regarding OUJI-CR(2d) 4-128, this Court notes that in cases involving separate counts of forcible oral sodomy, where the crimes alleged involve different factual theories, it is advisable to instruct the jury with separate instructions. In particular, such instructions should make clear whether the crime alleged is forcing the victim to perform oral sex on the perpetrator (penetration of the mouth of the victim by the penis of the defendant) or forcing the victim to endure oral sex performed by the perpetrator (penetration of the vagina of the victim by the mouth of the defendant). Furthermore, this Court also notes that the Fourth Element of this crime should be modified to read “which is accomplished by means of force or violence, or threats of force or violence that are accompanied by apparent power of execution.” This language would be more clear and would better track the language of 21 O.S.Supp.2006, § 888(B)(3), for cases of forcible sodomy that do not depend upon the age of the victim. We refer this instruction and the Notes on Use regarding it to the Oklahoma Uniform Jury Instructions (Criminal) Committee for the committee’s assistance in this matter.

12. *See Smith v. State*, 2007 OK CR 16, ¶ 37, 157 P.3d 1155, 1168.

13. C.M. admitted at the preliminary hearing that she had been a prostitute for 18 years and that she had prostitution convictions in several states. She also testified that she had not been a prostitute for 7 years.

14. Collins also argues, in passing, that exclusion of this evidence deprived him of the right to compulsory process. Collins totally fails to show how his right to compulsory process was infringed, and this claim is rejected accordingly.

15. *Dill v. State*, 2005 OK CR 20, ¶ 5, 122 P.3d 866, 868.

16. *See* 12 O.S.Supp.2004, § 2609(A)(1) & (B) (10-year period measured from date of conviction or release from confinement, whichever is later; 10-year period can sometimes be expanded through giving of prior written notice and court finding that probative value of conviction, within particular case, substantially outweighs its prejudicial effect).

17. 12 O.S.Supp.2004, § 2609(A)(2) & (B).

18. 12 O.S.Supp.2004, § 2609(B).

19. Collins asserts that the idea of using crimes of moral turpitude for impeachment purposes is “ingrained in Oklahoma jurisprudence.” He supports this with citations to *Cowan v. State*, 1911 OK CR 83, 114 P. 627, and *Nelson v. State*, 1910 OK CR 46, 106 P. 647. Both of these cases were decided early in the twentieth century, long before the 1978 adoption of the Oklahoma Rules of Evidence. The Rules necessarily supercede any contrary evidentiary rulings in these cases.

20. Oklahoma’s “rape shield” law, like other such laws, applies in rape and other sexual offense prosecutions and is intended to “shield” the alleged victim from being forced to endure, at the trial of the defendant, the improper use of evidence regarding her (or his) own sexual history and reputation. The basic provisions of Oklahoma’s law are as follows:

A. In a criminal case in which a person is accused of a sexual offense against another person, the following is not admissible:

1. Evidence of reputation or opinion regarding other sexual behavior of a victim or the sexual offense alleged.

2. Evidence of specific instances of sexual behavior of an alleged victim with persons other than the accused offered on the issue of whether the alleged victim consented to the sexual behavior with respect to the sexual offense alleged.

*See* 12 O.S.2001, § 2412(A).

Oklahoma’s law provides for only three limited exceptions to this rule of inadmissibility, namely, (1) “[s]pecific instances of sexual behavior if offered for a purpose other than the issue of consent, including proof of the source of semen, pregnancy, disease or injury,” (2) “[f]alse allegations of sexual offenses,” and (3) “[s]imilar sexual acts in the presence of the accused with persons other than the accused which occur[] at the same time of the event giving rise to the sexual offense alleged.” 12 O.S.2001, § 2412(B). If a defendant purports to have evidence that fits one of these exceptions, this issue must be resolved at an in-camera hearing, prior to use at trial, according to the procedure established in 12 O.S.2001, § 2412(C).

21. Before rape shield laws began to be enacted in the 1970’s, the two main justifications for allowing complainants (nearly always women) to be interrogated at trial about their own prior sexual history were the issues of consent and credibility. Under the *consent* rationale, sometimes described as the “yes/yes inference,” it was held that a woman who had previously consented to some sexual activity outside of marriage was more likely to have consented to the sexual activity at issue at trial, *i.e.*, to any sexual activity. Under the *credibility* rationale, it was held that a woman (though not a man) who had engaged in sexual activity outside of marriage was less credible than a woman who had remained chaste. A third but related justification for the admission of such evidence in some rape trials was the idea that if a woman’s history of sexual activity was known to the defendant at the time of the acts alleged, this knowledge was relevant to the defendant’s *reasonable belief* that the woman had consented. *See* Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant’s Past Sexual Behavior*, 44 Cath. U. L. Rev. 709, 713-18 (1995). For a victim with a history of prostitution, the consent and credibility rationales worked powerfully, and “in tandem,” to justify the broad admission of this evidence, since a prostitute was considered to be even more likely to have consented to the activity alleged and also more likely to be untruthful about it. *See* Karin S. Portlock, Note, *Status on Trial: The Racial Ramifications of Admitting Prostitution Evidence Under Rape Shield Legislation*, 107 Colum. L. Rev. 1404, 1409-12 (2007). Note: The word “victim,” as used herein and also in many state statutes, refers generally to the complaining witness in a sexual offense case.

22. New York is rather unique in its treatment of prostitution convictions, since its rape shield statute contains an explicit exception for prostitution convictions that are within three years prior to the sexual offense alleged, making such convictions always admissible. N.Y. CRIM. PRO. LAW § 60.42(2) (McKinney 2004). (Commentators note, however, that New York courts have applied this exception to New York’s rape shield law quite strictly. *See* Portlock, 107 Colum. L. Rev. at 1419-20 (discussing cases).) In most states, the admissibility of evidence that a victim has a history of prostitution would be evaluated under the state’s general rape shield statute.

A few states have rape shield statutes which specifically provide that sexual history evidence can be admitted to attack the victim’s credibility. *See, e.g.*, Cal. Evid. Code § 1103(a)(1) & (c)(5) (West Supp. 2009); Del. Code Ann. tit. 11 §§ 3508, 3509(d) (1998); *see also People v. Chandler*, 65 Cal. Rptr. 2d 687, 690-91 (Ct. App. 1997) (noting that “credibility exception” to California rape shield statute “has been utilized sparingly, most often in cases where the victim’s prior sexual history is one of prostitution”) (listing cases). In a few other states, rape shield statutes specifically provide that sexual history evidence can be admis-

sible to show the victim's consent, so long as certain procedures are followed and standards are met. See Nev. Rev. Stat. Ann. §§ 48.069 (West 2009) (accused may present "evidence of any previous sexual conduct of the victim of the crime to prove the victim's consent," in compliance with statutory procedures); Wash. Rev. Code Ann. § 9A.44.020(3) (West 2009) ("victim's past sexual behavior... is admissible on the issue of consent," in compliance with statutory procedures, including finding that exclusion of evidence "would result in denial of substantial justice to the defendant"). Nevada's approach to prostitution is unique, since, while it continues to allow for legal prostitution, in "licensed house[s] of prostitution," see Nev. Rev. Stat. Ann. § 201.354 (West 2009), the Nevada Supreme Court has held that acts of illegal prostitution are simply not covered by that state's rape shield law. See *Drake v. State*, 836 P.2d 52, 55 (Nev. 1992) ("Illegal acts of prostitution are not intimate details of private life. They are criminal acts of sexual conduct engaged in, for the most part, with complete strangers. The legislature could not have intended to afford special protection... to acts of illegal prostitution just because those acts happen to involve sexual conduct.").

In various other states the admissibility of a victim's sexual history evidence, including prostitution evidence, is left largely to the discretion of the trial judge, who must make a case-specific determination regarding the admissibility of this evidence, based mainly on criteria such as relevance and prejudice. See, e.g., Alaska Stat. § 12.45.045(a) (2006); Ark. Code Ann. § 16-42-101(c) (1999); Colo. Rev. Stat. Ann. § 18-3-407(2) (West Supp. 2006); Kan. Stat. Ann. § 21-3525(b) (Supp. 2009); N.M. R. Evid. 11-413 (2009); R.I. R. Evid. 412 (2009); S.D. Codified Laws § 23A-22-15 (2004); Wyo. Stat. Ann. § 6-2-312(a) (2007). In these states as well, the admissibility of prostitution evidence would presumably be established by demonstrating that the evidence was relevant either to the victim's consent or the victim's credibility.

23. See 12 O.S.2001, § 2412 (quoted *supra* in note 20). It is possible that an act of prostitution might fit one of Oklahoma's limited exceptions to the rape shield law, but the exception would not be based upon the fact that the specific act was an act of prostitution. See *id.*

24. Fed. R. Evid. 412(b)(1)(c) (making exception to rape shield provisions for "evidence the exclusion of which would violate the constitutional rights of the defendant"); see also Conn. Gen. Stat. Ann. § 54-86f (West 2009); D.C. Code § 22-3022(a)(1) (2001); Haw. R. Evid. 412(b)(1); Idaho R. Evid. 412(b)(1); 725 Ill. Comp. Stat. Ann. 5/115-7(a)(2) (West 2009); Iowa Code Ann. Rule 5.412(b)(1) (West 2009); Miss. R. Evid. 412(b)(1); N.D. R. Evid. 412(b)(3); Or. Rev. Stat. Ann. § 40.210(2)(b)(C) (West 2009); Tenn. R. Evid. 412(c)(1); Tex. R. Evid. 412(b)(2)(E); Utah R. Evid. 412(b)(3).

25. The federal statute, along with that of states that are patterned after it, contains an exception for prior sexual activity between the defendant and the complaining witness. See Fed. R. Evid. 412 (b)(2)(b) (making exception for "evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent..."). This exception would apply equally to any prior act of prostitution involving the defendant and the alleged victim. Oklahoma law contains no comparable exception.

26. Cf. *Davis v. Alaska*, 415 U.S. 308, 311, 320-21, 94 S.Ct. 1105, 1107, 1112, 39 L.Ed.2d 347 (1974) (reversing burglary and grand larceny convictions where defendant prevented from impeaching key State witness with prior juvenile delinquency adjudication—involving two burglaries—under state law protecting confidentiality of juvenile records). In *Davis*, the Supreme Court found that the defendant had been "denied the right of effective cross-examination" and that "the right of confrontation is paramount to the State's policy of protecting a juvenile offender." *Id.* at 318, 319, 94 S.Ct. at 1111, 1112; see also *id.* at 320, 94 S.Ct. at 1112 ("[T]he State's desire that Green fulfill his public duty to testify free from embarrassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the process of defending himself."). The decision of the Supreme Court of New Mexico in *State v. Stephen F.*, 188 P.3d 84 (N.M. 2008), presents an admirable example of the kind of careful, case-specific analysis that is required in the context of balancing rape shield laws with a defendant's constitutional trial rights.

27. See Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2008) ("Each proposition of error shall be set out separately in the brief. Merely mentioning a possible issue in an argument or citation to authority does not constitute the raising of a proposition of error on appeal. Failure to list an issue pursuant to these requirements constitutes waiver of alleged error.").

28. This Court notes that these improperly presented claims have been reviewed on their merits and have been found to be non-meritorious.

29. See *Sanders v. State*, 2002 OK CR 42, 60 P.3d 1048, 1051. In light of his criminal history, Collins received the minimum sentence (20 years) on each count. Additionally, the trial court ran counts I and III, the crimes against C.M., as well as counts IV and V, the crimes against C.K., concurrently, though the crimes against the two victims were run consecutively, for an effective total sentence of 40 years.

## LUMPKIN, JUDGE: CONCUR IN RESULTS

¶1 While I agree that the proper result is reached in this case, I cannot join in the *dicta* resulting from the discussion of non-germane issues and the attempt to provide a mini law review article in the footnotes. As I have previously noted in *Cannon v. State*, 1995 OK CR 45 (Lumpkin Concur in Results) ¶ 2, 904 P.2d 89, 108 (citing *Wainwright v. Witt*, 469 U.S. 412, 422, 105 S.Ct. 844, 851, 83 L.Ed.2d 841 (1985)), "while there are exceptions, statements in footnotes are generally regarded as *dicta*, having no precedential value". While the discussion of the evidence of prostitution is interesting, the bottom line is that the Oklahoma Rape Shield Law does not allow it and that in this case the denial did not deny Appellant any constitutional right. Based on that holding, I can join in the affirmance of the judgment and sentence in this case.

### ASSISTANT UNITED STATES ATTORNEY - CRIMINAL DIVISION

The United States Attorney's Office for the Western District of Oklahoma is seeking to fill an attorney vacancy in its Criminal Division. An attorney hired for this position will be assigned to one of four teams handling counter-terrorism and national security, violent crimes, narcotics trafficking, white collar and public corruption, and other federal major crimes. Salary is based on the number of years of professional attorney experience. Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have three (3) years or more litigation experience post-J.D. Trial experience preferred. Interested applicants should send their resumes to: Robert J. Troester, First Assistant U.S. Attorney, U.S. Attorney's Office, Western District of Oklahoma, 210 Park Avenue, Suite 400, Oklahoma City, OK 73102. Resumes must be received no later than January 29, 2010, and should reference announcement number 10-WOK-05-A.



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# Applicants for February 2010 Oklahoma Bar Exam

The Oklahoma Rules of Professional Conduct impose on each member of the bar the duty to aid in guarding against the admission of candidates unfit or unqualified because of deficiency in either moral character or education. To aid in that duty, the following is a list of applicants for the bar examination to be given February 23-24, 2010.

The Board of Bar Examiners requests that members examine this list and bring to the board's attention in a signed letter any information which might influence the board in considering the moral character and fitness to practice of any applicant for admission. Send correspondence to Cheryl Beatty, Administrative Director, Oklahoma Board of Bar Examiners, PO Box 53036, Oklahoma City, OK 73152.

**BROKEN ARROW**

Sandra Ann Burrus  
Brett Alan Claar  
Adam Don Green  
Roger Clifton Johns  
Deborah Ann Troutman

**EDMOND**

Nicholas Olsen Codding  
Clarence Joe Hutchison  
Kristina Nicole Kirkpatrick  
Kathryn Renee Metheny  
Stephanie Ann Roberts

**NORMAN**

Bradley Edward Bowlby  
Amanda Elizabeth Gentry  
David Kelso Hale  
Andrew Ralph Harroz  
Christy Darlene Keen  
Andrea Nicole Monachella  
Julie Kathryn Owen  
Chase Harrison Schnebel  
Elizabeth Cynita Thomas

**OKLAHOMA CITY**

Suma Ananthaswamy  
Shanna Dee Bokoff  
Joshua Michael Brannon  
Gregory Pierre Chansolme  
Matthew Dale Conrad  
Scott Lee Cravens  
Thad Allen Danner  
Teofilo Andres Diaz  
Matthew Ryan Gile  
John Thomas Green  
Edward Wesley Grimes  
Robert Granville Martin

Lori Christine Barker McInnes  
Austin Tyler Murrey  
Ryan Curtis Mushrush  
Shiny Rachel Pappy  
Joshua Ryan Parsons  
Manish Kumar Rajwar  
Stacy Suby Ramdas  
Mark Andrew Schantz  
William Thomas Sheaffer  
Marla Stripling  
Gigit Tranae Underwood  
Seth Grant Von Tungeln  
Kathleen Wendlocher Wallace  
Robbi Jill Young

**TULSA**

Dustin James Allen  
Jessica Noel Battson  
Amy Charlat Blom  
Sean Vincent Johnson  
Melody Joan Jones  
Michael Lipson Leshoure Jr.  
Andrew Joseph Maloney  
Laura Elizabeth Miller  
John Richard Olson  
Deborah Ann Reed  
Heidi Leigh Shadid  
Benjamin David Waters

**OTHER OKLAHOMA  
CITIES AND TOWNS**

Jennifer Hope Barrett, Owasso  
John Edward Cadenhead,  
Seminole  
Wesley James Cherry,  
Muldrow  
Dustin Lane Compton,  
Mustang

Ron Cornelius, Bartlesville  
Adam Lawrence Finfrock,  
Sapulpa  
Cody Lee Fleming, Enid  
Michele Ann Freeman,  
Shawnee  
Alexandra Josee Fugairon,  
Yukon  
Kendra Daishon Gill,  
Midwest City  
Marcus Lorrell Haberichter,  
Choctaw  
Kevin Sean Haines, Jenks  
Misti Dawn Halverson, Wayne  
Nathan Hugh Harper, Yukon  
Andrew Ashby Cornell  
Harrell, Nichols Hills  
Nathan Drew Hendrickson,  
Muskogee  
Barbara Ellen Hill, Ardmore  
Amanda Vernell Hopson,  
Spiro  
Michael Bernard Hunter,  
Muskogee  
Khalid Khader Hussein,  
Warr Acres  
Jacob Todd Keyes, Boswell  
Earl Dean Lawson, Skiatook  
James Eric Lemon, Kingfisher  
Rachel Lynn McAlvain,  
Tahlequah  
Brandi Lynne Morgan,  
Bethany  
Audrey Jean Myers, Muskogee  
Janel Elizabeth Perry, Welling  
Stephanie Marie Powers, Altus  
Vanessa Ann Purdom, Elk City

Craig Marshall Regens,  
Nichols Hills  
Peary Livingston Robertson,  
Seminole  
Jayme Kathryn Smith,  
Chandler  
Mark Daniel Uptegrove,  
Moore  
Aimee Melissa Vardeman,  
Lawton  
Christina Louise Whitehurst,  
Meeker  
Troy Anthony Zimmerman,  
Collinsville

**OUT OF STATE**

Rebecca Davis Bauer,  
Redondo Beach, CA  
Rosemarie Dora Boyd,  
Van Buren, AR  
Malori Riah Dahmen,  
Carl Junction, MO

James Patrick Denton,  
Boise, ID  
Christin Murphy Donovan,  
Missouri City, TX  
Nicholas Eugene Grant,  
Little Rock, AR  
Elijah Jacob Lancaster Haahr,  
Springfield, MO  
Diane Marie Hanmer,  
Lansing, MI  
Robert Lee Harmon,  
Colleyville, TX  
Gregory Thomas Harris,  
Phoenix, AZ  
Heath Robert Hasenbeck,  
Springdale, AR  
Richard Lamont Koller,  
Spring, TX  
Christine Marie Larson,  
Liberal, KS  
James Matthew Linehan,  
Shaker Heights, OH

Andrea Jo Peek,  
Wichita Falls, TX  
Christopher Eugene Phillips,  
Tallahassee, FL  
Lindsay Vandever Rogers,  
Austin, TX  
William Lucas Ross, Paris, TX  
Sheila Dawn Sayne,  
Seminole, FL  
Kari Ann Staats, Houston, TX  
Jennifer Kaye Stephens,  
The Woodlands, TX  
Samara Lyn Stone,  
Roseville, MN  
Lawrence James Trautman,  
Dallas, TX  
Christopher David Tyler,  
El Paso, TX  
Samuel Ryan Vanover,  
Lansing, MI  
Chanelle Monique Whittaker,  
Van Nuys, CA  
Glen L. Work, Roundrock, TX

**NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT  
OF ANGELA BUNKLEY PLOWMAN, SCBD #5584  
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 Angela Bunkley Plowman should be reinstated to active membership in the Oklahoma Bar Association.

Any person desiring to be heard in opposition to or in support of the petition may appear before the Professional Responsibility Tribunal at the Oklahoma Bar Center at 1901 North Lincoln Boulevard, Oklahoma City, Oklahoma, at 9:30 a.m. on **Thursday, February 18, 2010**. 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, no less than five (5) days prior to the hearing.

**PROFESSIONAL RESPONSIBILITY TRIBUNAL**



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Oklahoma City, OK 73152**

# Court of Civil Appeals Opinions

**COCA ADMIN 2009-2. December 11, 2009**

OKLAHOMA CITY DIVISIONS

ELECTION OF PRESIDING JUDGES

TO THE CLERK OF THE APPELLATE COURTS

You are hereby requested to cause the following notice to be published twice in the Journal of the Oklahoma Bar Association.

NOTICE

For the calendar year 2010, the Honorable Kenneth L. Buettner has been elected to serve as Presiding Judge for Division One of the Court of Civil Appeals. Division One will consist of Kenneth L. Buettner, Presiding Judge, Carol M. Hansen, Judge, and Wm. C. (Bill) Hetherington, Judge.

For the calendar year 2010, the Honorable Larry Joplin has been elected to serve as Presiding Judge of Division Three of the Court of Civil Appeals. Division Three will consist of Larry Joplin, Presiding Judge, Robert Dick Bell, Vice-Chief Judge, and E. Bay Mitchell, III, Judge.

Done by Order of the Court of Civil Appeals this 11th day of December, 2009.

/s/ E. Bay Mitchell, III  
Chief Judge

**COCA ADMIN 2009-3. December 11, 2009**

ORDER

The Clerk of the Appellate Courts is directed to cause the following notice to be published twice in the *Oklahoma Bar Journal*.

NOTICE

Judge Jane P. Wiseman has been elected to serve as Chief Judge of the Court of Civil Appeals of the State of Oklahoma for the year

2010. Judge Robert Dick Bell has been elected to serve as Vice-Chief Judge of the Court of Civil Appeals of the State of Oklahoma for the year 2010.

Dated this 11th day of December, 2009.

/s/ E. Bay Mitchell, III  
Chief Judge

**COCA ADMIN 2009-4. December 29, 2009**

TULSA DIVISIONS

ELECTION OF PRESIDING JUDGES

TO THE CLERK OF THE APPELLATE COURTS

You are hereby requested to cause the following notice to be published twice in the Journal of the Oklahoma Bar Association.

NOTICE

For the calendar year 2010, the Honorable John F. Fischer has been elected to serve as Presiding Judge for Division Two of the Court of Civil Appeals. Division Two will consist of John F. Fischer, Presiding Judge, Jane P. Wiseman, Chief Judge, and Deborah Barnes, Judge.

For the calendar year 2010, the Honorable Douglas Gabbard, II has been elected to serve as Presiding Judge of Division Four of the Court of Civil Appeals. Division Four will consist of Douglas Gabbard, II, Presiding Judge, Keith Rapp, Judge, and Jerry L. Goodman, Judge.

Done by Order of the Court of Civil Appeals this 28th day of December, 2009.

/s/ E. Bay Mitchell, III  
Chief Judge

# IN THE SUPREME COURT OF THE PAWNEE NATION OF OKLAHOMA

---

**IN RE: LINDA JESTES**  
**Appeal No. PNSC-2009-01**  
**OPINION AND ORDER**

This matter comes on for consideration of an Interlocutory Appeal and later, an Appeal. For the reasons stated herein, we affirm the judgment of the District Court dismissing this lawsuit without prejudice to refile.<sup>1</sup>

### Procedural History

On May 15, 2009, Pawnee Nation Attorney General, John E. Parris, filed a Petition for “declaratory judgment and emergency injunction.” The Petition sought an order declaring that Linda Jestes could not at the same time hold elected office as a Pawnee Business Council member and also serve as the Executive Director of the Pawnee Tribal Housing Authority (“PTHA”). Article IV, Section 4(vi) of the CONSTITUTION OF THE PAWNEE NATION OF OKLAHOMA (as revised on June 14, 2008) (the “PAWNEE NAT. CONST.”), provides that “[a] Pawnee Nation of Oklahoma employee shall resign his/her position if elected or appointed to the Pawnee Business Council.” Ms. Jestes was scheduled to be sworn in the next day as a Business Council member yet served as the PTHA Executive Director.

The District Court held an emergency hearing on May 15, 2009. It denied the request for emergency injunctive relief and set the matter for further hearing. The District Court noted “Mr. Parris appears for Petitioner, although it is unclear who Petitioner truly is.” The Attorney General filed an Interlocutory Appeal.

On June 5, 2009 the Court held another hearing. This time Ms. Jestes had legal counsel. The Court dismissed, without prejudice, the Attorney General’s Petition finding a lack of standing and a failure to file a verified Petition in accordance with Title 3, § 812 of the Pawnee Nation Civil Procedure Code.

### Analysis

This Court has jurisdiction to consider these appeals pursuant to Article IX, § 2 of the PAWNEE NAT. CONST. We review the District Court’s legal

determinations *de novo*. *In the Matter of L.C.M.* 9 Okla. Trib. 6, 14 (Pawnee 2005). We apply our Nation’s Constitution and laws first and we may look to authority from other jurisdictions when our laws and precedence provide no guidance. Law and Order Code, Title 1, Tribal Courts, § 8 “Law to Be Applied”; Title 3, Civil Procedure, § 11 “Laws Applicable to Civil Actions.” *In the Matter of L.C.M.*, 9 Okla. Trib. at 14.

The Attorney General raises eleven errors for consideration. Ms. Jestes recasts the issues on appeal as only three. We believe only one issue needs resolution now. We agree with the District Court that “it is unclear who Petitioner truly is.” The Petition style of the lawsuit raises questions of standing.<sup>2</sup> The record below also reveals that the Attorney General appeared to lack authority to file this civil lawsuit on behalf of the Nation because the record contains no Business Council resolution or law authorizing the filing of this matter.<sup>3</sup>

Standing is a critical and important preliminary matter for courts to consider.<sup>4</sup> It is a jurisdictional concern that ensures due process and promotes the orderly administration of justice. It promotes judicial economy. Unless these threshold questions are satisfied, a lawsuit cannot go forward, regardless of the merits.

Recently the Osage Nation Supreme Court decided its first case under their new constitution. *Gray v. Mason*, No. SPC-08-01, slip op. at 7-12 (Osage Dec. 11, 2009), <http://www.osage-tribe.com/judicial/uploads/OpinionSPC-08-01.pdf>. That Court considered a Petition filed by the Principal Chief questioning the constitutionality of that Nation’s “Independent Press Act of 2008.” In that case, the Court addressed the issue of standing in light of the Osage Constitution’s grant of jurisdiction over cases and controversies. *Id.* at 8; *cf.* PAWNEE NAT. CONST. Art. IX, § 2 (“The Courts . . . shall . . . have jurisdiction in all cases arising under” the laws of the Pawnee Nation.). We find that Court’s decision compelling.

To have standing under the PAWNEE NAT. CONST., a plaintiff must establish (1) an injury to a legally protected interest; (2) causation that can be reliably traced to the challenged activity;

and (3) redressability that goes beyond speculative relief. *Gray*, slip op. at 9. We hold that the PAWNEE NAT. CONST. requires a petitioner or plaintiff to demonstrate proper standing prior to the court adjudicating their claims. Our courts should not exercise jurisdiction unless an actual case or controversy is properly before us and the complaining party has shown proper standing to proceed. Here, Attorney General Parris lacks standing when he demonstrates no authority to act on behalf of the Nation either under law or resolution of the Business Council. We therefore find it unnecessary to address the other issues raised in the appeals.

**Conclusion**

Without addressing the merits of the claims, we affirm the District Court’s ruling dismissing the lawsuit.

**/s/ D. Michael McBride III  
Justice**

**Justices Terry Mason Moore and Walter R. Echo-Hawk concur.<sup>5</sup>**

1. Pursuant to the Pawnee Nation Law and Order Code, Appellate Procedure, Title 2, §442, after examination of the briefs and the record,

the participating Justices unanimously find that the resolution of the issues would not be aided by oral argument and we therefore find that we do not need oral argument.

2. “Standing to sue” traditionally means that the party has a sufficient stake in an otherwise justiciable controversy to obtain a judicial resolution of that controversy. *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972). Standing is a jurisdictional issue which concerns the power of courts to hear and decide cases; this issue does not concern the ultimate merits of substantive claims. *Weiner v. Bank of King of Prussia*, 358 F. Supp. 684, 697 (E.D. Pa. 1973); see also *Bus. Dev. Bd. v. Salazar*, 3 Okla. Trib. 80 (Kickapoo D. Ct. 1993) (dissolved entity lacked capacity to bring suit), *aff’d* 4 Okla. Trib. 172 (Kickapoo 1994); *Sanders v. Cherokee Nation (In re Sanders)*, 7 Okla. Trib. 523, 538-40 (Cherokee 2002) (finding “sovereign immunity intersects to defeat standing”); *State ex. rel. Cartwright v. Okla. Tax Comm’n*, 1982 OK 146, ¶¶ 6-10, 653 P.2d 1230, 1232-34 (finding Attorney General lacked standing to bring suit).

“Standing” is the legal right of a person to challenge the conduct of another in a judicial forum. “When standing is placed in issue in a case, the question is whether the person whose standing is challenged, is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable.” Stated another way, “Standing” is the right to commence litigation, to take the initial step that frames legal issues for ultimate adjudication by a court or jury. *Id.* ¶ 6, 653 P.2d at 1232 (citation omitted).

3. Article IV, Sections 1 and 2 of the Pawnee Nation Constitution provide that the Pawnee Business Council is the “supreme governing body” of the Nation and has the power to legislate, transact business and to speak and act on behalf of the Nation on all matters. The Pawnee Business Council exercises its powers by a majority vote of its present members and determines the transaction of all tribal business with a quorum present. PAWNEE NAT. CONST. Art. IV, §5. The President votes only in the case of a tie. *Id.* Art. V, §1.

4. Before a case or controversy exists to adjudicate, a plaintiff must first establish standing. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006).

5. Chief Justice Bob D. Buchanan and Associate Justice Marsha Harlan not participating.



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**NOTICE**  
**RE: POSTJUDGMENT AND PREJUDGMENT INTEREST**

**PLEASE NOTE THAT DIFFERENT INTEREST RATES ARE SET FORTH BELOW  
FOR POSTJUDGMENT VERSUS PREJUDGMENT INTEREST DUE TO THE  
2009 AMENDMENT OF 12 O.S. §727.1 (I)**

**POSTJUDGMENT INTEREST:** The State Treasurer has certified to the Administrative Director of the Courts that the prime interest rate as listed in the first edition of the Wall Street Journal published for calendar year 2010 is 3.25 percent. In accordance with 12 O.S. §727.1 (I), the postjudgment interest rate shall be the prime interest rate plus two (2%) percentage points, which equals 5.25 percent.

**PREJUDGMENT INTEREST:** In accordance with 12 O.S. §727.1 (I) and (K), the prejudgment interest rate applicable to actions filed on or after January 1, 2010, shall be "a rate equal to the average United States Treasury Bill rate of the preceding calendar year." The State Treasurer has certified to the Administrative Director of the Courts that the average United States Treasury Bill rate of the preceding calendar year is 0.14 percent.

These interest rates will be in effect from January 1, 2010 until the first regular business day of January, 2011.

Interest rates listed below for each year prior to the current year were calculated in accordance with the statute in effect for that year.

Interest Rates since January 1, 2010, are as follows:

| <b>Year</b> | <b>Postjudgment Interest Rate</b> | <b>Prejudgment Interest Rate</b> |
|-------------|-----------------------------------|----------------------------------|
| 2010        | 5.25%                             | 0.14%                            |

Interest rates from November 1, 1986, through December 31, 2009, are as follows:

|             |            |            |             |
|-------------|------------|------------|-------------|
| 1986 11.65% | 1992 9.58% | 1998 9.22% | 2004 5.01%  |
| 1987 10.03% | 1993 7.42% | 1999 8.87% | 2005 7.25%  |
| 1988 9.95%  | 1994 6.99% | 2000 8.73% | 2006 9.25%  |
| 1989 10.92% | 1995 8.31% | 2001 9.95% | 2007 10.25% |
| 1990 12.35% | 1996 9.55% | 2002 7.48% | 2008 9.25%  |
| 1991 11.71% | 1997 9.15% | 2003 5.63% | 2009 5.25%  |

/s/ Michael D. Evans  
Administrative Director of the Courts

---

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# Disposition of Cases Other Than by Published Opinion

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## COURT OF CRIMINAL APPEALS Tuesday, December 29, 2009

**F-2008-1191** — Appellant Matthew Haws was tried by jury and convicted of Child Sexual Abuse, After Former Conviction of a Felony, Case No. CF-2007-339, in the District Court of Stephens County. The jury recommended as punishment life imprisonment and the trial court sentenced accordingly. It is from this judgment and sentence that Appellant appeals. **AFFIRMED.** Opinion by: Lumpkin, J.; C. Johnson, P.J., concur in results; A. Johnson, V.P.J.: concur; Chapel, J., concur in results; Lewis, J., concur.

## Thursday, December 31, 2009

**RE-2008-911** — Dale Lynn McCroskey, Appellant, appeals from the partial revocation of his seven year suspended sentence, to the extent he shall serve thirty-two (32) consecutive weekends in the Garvin County Jail, in Case No. CF-2003-129 in the District Court of Garvin County. On October 13, 2003, Appellant entered a plea of guilty to Unlawful Possession of Methamphetamine, and was sentenced to a term of seven (7) years, with the sentence suspended. On September 15, 2008, the District Court found Appellant had violated rules and conditions of his probation and partially revoked his seven year suspended sentence to the extent he shall serv thirty-two (32) consecutive weekends in the Garvin County Jail. The partial revocation of Appellant's seven year suspended sentence in Case No. CF-2003-129 in the District Court of Garvin County is **AFFIRMED.** Opinion by Lewis, J.; C. Johnson, P.J., Concur; A. Johnson, V.P.J., Concur; Lumpkin, J., Concur; Chapel, J. Concur.

## Tuesday, January 5, 2010

**F-2008-1154** — Lawrence Larue Barrientez, Appellant, was charged by information in Oklahoma County District Court, Case No. CF-2007-1855, with Count I, Robbery in the First Degree in violation of 21 O.S.Supp.2001, § 797, and Count II, Assault with a Dangerous Weapon in violation of 21 O.S. Supp.2006, § 645. A

jury trial was had before the Honorable Jerry D. Bass, District Judge. On November 6, 2008, the jury found Appellant guilty of both crimes and punishment was set at twenty (20) years on Count I and twenty-five (25) years on Count II after finding that Appellant had two or more prior felony convictions. At Judgment and Sentencing, the court ordered the sentences to run consecutively. The trial court sentenced accordingly. From this judgment and sentence, Mr. Barrientez has perfected his appeal. **AFFIRMED.** Opinion by: Lewis, J.; C. Johnson, P.J., Concur; A. Johnson, V.P.J., Concur in Results; Lumpkin, J., Concur; Chapel, J., Concur.

## COURT OF CIVIL APPEALS (Division No. 1) Monday, December 21, 2009

**105,736** — Grand River Dam Authority, Plaintiff/Appellee, vs. Ozark Materials River Rock Company, L.L.C., Defendant/Appellant. Appeal from the District Court of Mayes County, Oklahoma. Honorable Erin L. Oquin, Judge. In this action for forcible entry and detainer, Appellant (Ozark) appeals the trial court's judgment in favor of Appellee (GRDA), an agency of the State of Oklahoma. The parties entered into a lease agreement on July 1, 2005. GRDA filed the instant action to have Ozark removed from its property and sought rental due and owing. GRDA contends the term of the lease expired and the lease was not renewed. Ozark argues it was entitled to possess the property because it had a valid lease and lifetime permit issued by the Department of Mines with approval and license of GRDA to mine gravel from the leased premises for the "life of the mine." The terms of the written lease are controlling in this case. Those terms provide for the expiration of the lease after two years. The evidence demonstrated the term of the lease expired and that GRDA was entitled to possession of the leased premises. Accordingly, the trial court's judgment is **AFFIRMED.** Opinion by Bell, P.J.; Buettner, J., and Hetherington, J., concur.

**106,134** — In re The Marriage of Joshua Slate, Petitioner/Appellee, and Amber Chadwick, formerly Slate, Respondent/Appellant. Appeal

from the District Court of McClain County, Oklahoma. Honorable Gary Barger, Judge. In this appeal from a final decree of dissolution, Amber Chadwick (Mother) seeks reversal of the trial court's award of primary custody to Joshua Slate (Father). The trial court determined by sufficient evidence to include factual findings under 43 O.S.Supp. §107.3(D), that Mother's allegations of abuse against Father were frivolous. Mother also alleges error regarding the trial court's failure to admit certain other evidence. We affirm the trial court's judgment. AFFIRMED. Opinion by Hetherington, J., Bell, P.J., and Buettner, J., concur.

**106,348** — Pamela L. Williams, Plaintiff/Appellee, vs. Midland Mortgage Co., and David Morgan, in his capacity as General Counsel for Midland Mortgage Co., Defendants/Appellants. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Barbara G. Swinton, Judge. Appellants (Midland and Morgan) appeal from the trial court's denial of Midland's motion for attorney fees, costs and interest following the trial court's dismissal of the claims of Appellee (Williams). Williams is a former employee of Midland. Morgan is Midland's general counsel. Williams' state law claims were brought to recover for breach of Appellants' alleged agreement to arbitrate in the federal lawsuit. While that federal suit undoubtedly emanated from Williams' former employment with Midland, her state suit was based directly upon Appellants' actions in defending the federal suit. The injury alleged in the underlying state suit was, at most, "merely related to" Williams' employment with Midland. *Kay*, 1991 OK 16 at ¶6, 806 P.2d at 650. The suit was not "brought to recover for labor or services rendered" by Williams to Midland. *Id.* Strictly applying 12 O.S. Supp. 2002 §936, we hold the court properly denied Appellants motion for attorney fees. Accordingly, the judgment of the district court is AFFIRMED. Opinion by Bell, P.J.; Buettner, J., and Hetherington, J., concur.

**107,291** — In the Matter of C.D., F.D., L.D., N.M. AND I.M. State of Oklahoma, Plaintiff/Appellee, vs. Denisha Day, Defendant/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Terry H. Bitting, Judge. Defendant/Appellant Denisha Day (Mother) appeals from a judgment terminating her parental rights to C.D., F.D., L.D.,

N.M., and I.M. (collectively, Children). The jury terminated Mother's rights on the grounds that she failed to correct the conditions leading to the deprived adjudication, that she failed to pay child support, and that Children were in foster care for 15 of the most recent 22 months. We have reviewed the record presented to the jury and we do not find clear and convincing evidence that Mother failed to correct the conditions leading to the deprived adjudication, that Mother wilfully failed to support Children, or that termination of Mother's parental rights is in Children's best interests. Additionally, the trial court erred in instructing the jury both that the State had the burden of proving Mother did not correct the conditions and also that Mother had the burden of proving she did correct the conditions leading to the deprived adjudication; not only did such instructions likely confuse and mislead the jury, but placing the burden on Mother did not comply with the statute in effect at the time of trial. Finally, the termination statute in effect at the time of trial of this case did not provide for termination based on length of time in foster care. REVERSED. Opinion by Buettner, J.; Bell, P.J., and Hetherington, J., concur.

#### Tuesday, December 22, 2009

**106,437** — Susan Glomset, Plaintiff/Appellant, vs. Travelers Property Casualty Company of America, and The Standard Fire Insurance Company, Defendants/Appellees. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Vicki L. Robertson, Trial Judge. Appeal of the entry of judgment in favor of Travelers Property Casualty Company of America, and The Standard Fire Insurance Company following summary proceedings in Plaintiff Glomset's lawsuit seeking damages for bad faith arising from the indemnity claims handling and settlement process for the total loss of her 2003 Chevrolet Tahoe Z-71. HELD: Defendants' offer to settle Plaintiff's total loss claim fell within the range set by her own evidence under the valuation method provided in 36 O. S.Supp.2003 § 1250.8(A)(2)(c), which she had cited in support of her arguments in opposition to Defendants' motions. Under the content of the appellate record, reasonable minds could not differ both as to the material facts regarding valuation and the existence of a simple dispute, not bad faith. Consequently, Defendants Standard and Travelers were entitled to judgment as

a matter of law, and the trial court orders entering those judgments are AFFIRMED. Opinion by Hetherington, J.; Buettner, J., concurs, and Bell, P.J., dissents.

**(Division No. 2)**

**Thursday, December 17, 2009**

**107,386** — Janna Graham, individually, as Personal Representative of the Estate of Stanley H. Graham, Deceased, Appellant/Plaintiff, v. Irl J. Kellogg Revocable Trust, Appellee/Defendant. Appeal from an order of the District Court of Okmulgee County, Hon. H. Michael Claver, Trial Judge, granting summary judgment in favor of Irl J. W. Kellogg and the Irl J. Kellogg Revocable Trust (Kellogg). Janna and Stanley Graham married in 1994 and remained married at the time of Stanley's death. During the course of the marriage, they briefly lived on, then collected rent from, property owned by Stanley's mother, Marcella Kellogg. On February 15, 2002, Marcella conveyed the property to Stanley. On January 8, 2003, Stanley conveyed the property to his stepfather, Kellogg. On January 14, 2003, Janna filed for divorce from Stanley. Before the divorce action could proceed, Stanley was killed in an accident. Janna learned of the conveyance to Kellogg after Stanley's death and demanded return of the property. Kellogg refused to return the property. Janna sued for return of the property, collected rents, and punitive damages, alleging the conveyance from Stanley to Kellogg was fraudulently made to deprive her of marital rights to the property. Kellogg argues that the property was separate property because Stanley received it as a gift from his mother, it was never homestead property, and Stanley therefore had the right to convey his separate property without Janna's knowledge or consent. Janna argues that because she and Stanley once lived on the property, and later supplemented their income with rent collected from it, the property is either their homestead or jointly acquired and cannot be considered separate property. She alternatively argues that even if it is separate property, the conveyance was not *bona fide* and complete, giving her rights to the property as Stanley's surviving spouse under intestate succession. The trial court granted Kellogg's motion for summary judgment finding Janna had no marital rights to the property. The fact that Stanley conveyed the property shortly

before Janna filed for divorce is not relevant unless Janna can show she has some interest in the property based on it being jointly acquired or homestead. We find nothing in the record to convince us the property was either jointly acquired or homestead. We also find Janna's allegation that the conveyance deprived her of property rights at Stanley's death is not relevant without evidence the conveyance was a gift, incomplete, and made to defeat any rights she may have in the property at his death. The trial court properly granted summary judgment. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Wiseman, V.C.J.; Barnes, P.J. and Goodman, J., concur.

**106,435** — Virginia Starr, Plaintiff/Appellant, v. Teresa Knox, Defendant/Appellee, and Knox Laboratory Services, Inc., MKG, LLC, d/b/a Knox Laboratories, Defendants. Starr appeals from an order of the District Court of Tulsa County, Hon. Linda G. Morrissey, Trial Judge, dismissing her claims against Defendant Teresa Knox (Knox). Starr sued Knox, Knox Laboratory Services (KLS) and MKG, LLC (MKG) for damages arising from an allegedly faulty drug test performed by KLS. After settling with KLS and MKG, Starr appealed the dismissal of her claims against Knox individually, seeking to hold Knox personally liable under two different theories. We find the trial court was correct in finding no facts to support Starr's contention that she was a third-party beneficiary of a stock purchase agreement between Knox and MKG, but erred in dismissing Starr's remaining theory of recovery, without leave to amend, as Starr's petition adequately states a claim to disregard the corporate veil for acts of common law negligence. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division II, by Goodman, J.; Wiseman V.C.J., and Rapp, J. (sitting by designation), concur.

**Monday, December 21, 2009**

**107,132** — Ruby M. Priore, Petitioner, v. PetSmart, Travelers Indemnity Company of America, and The Workers' Compensation Court, Respondents. Proceeding to Review an Order of a Three-Judge Panel of The Workers' Compensation Court, Hon. William R. Foster, Trial Judge. Ruby M. Priore (Claimant) appeals the May 19, 2009, order of a three-judge panel of the Workers' Compensation Court, which

vacated the trial court's March 17, 2009, order, awarding benefits and continuing medical treatment to Claimant for injuries to her jaw. Claimant complains that the *en banc* panel erred in finding that the statute of limitations bars her claim for compensation and continuing medical treatment for her jaw injury. Based upon our review of the record and applicable law, we find the *en banc* panel erred as a matter of law. We conclude that Claimant's claim for compensation and medical treatment for her jaw injury was not barred by the statute of limitations. We vacate the three-judge panel's order with instructions to reinstate the trial court's March 17, 2009, Order in its entirety. **VACATED WITH INSTRUCTIONS.** Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Wiseman, V.C.J., and Goodman, J., concur.

**Monday, December 28, 2009**

**106,446** — DKMT, Co., Plaintiff/Appellee, v. Cimmarron Transportation, L.L.C., Defendant/Appellant. Appeal from the September 26, 2008, order of the District Court of McClain County, Hon. Charles N. Gray, Trial Judge, assessing an attorney's fee and costs against Defendant on Plaintiff's action for damages. Based on our review of this record and the applicable law, we affirm in part, reverse in part, and remand with directions. Opinion from the Court of Civil Appeals, Division II, by Goodman, J.; Wiseman, V.C.J., and Barnes, P.J., concur.

**Wednesday, December 30, 2009**

**107,323** — Nicholas E. Martinez, Plaintiff/Appellee, v. State of Oklahoma ex rel. Department of Public Safety, Defendant/Appellant. Appeal from an order of the District Court of Pottawatomie County, Hon. Douglas L. Combs, Trial Judge, denying the Department of Public Safety's (DPS) motion for new trial after having entered an order directing DPS to permit an administrative hearing on a notice of revocation of driver's license issued to Plaintiff. The notice of revocation did not inform Plaintiff of his right to request an administrative hearing on the revocation. When Plaintiff's counsel sent DPS a letter requesting an administrative hearing on the notice of revocation, DPS denied the request on the ground Plaintiff failed to make a written request within 15 days after receiving the notice of revocation. Plain-

tiff appealed the revocation arguing that the arresting officer gave him only the front page of the form and not the back page that customarily would have informed him of this right to request an administrative hearing. The district court ordered DPS to provide Plaintiff an administrative hearing and to restore his driving privileges pending the outcome of the hearing. We find that when read together with all of its provisions, the relevant statute, 47 O.S. Supp. 2008 § 754, requires DPS to give a licensee both notice of the revocation and notice of the licensee's right to request an administrative hearing which affords a licensee the due process protections contemplated by the legislature. The trial court properly interpreted the statute to require DPS to give both notice of the revocation and notice of the licensee's right to request an administrative hearing. Plaintiff was not given notice of his opportunity for a hearing, and the trial court properly ordered DPS to provide Plaintiff with such a hearing. **AFFIRMED.** Opinion from the Court of Civil Appeals, Division II, by Wiseman, V.C.J.; Barnes, P.J., and Goodman, J., concur.

**106,513** — Access Employer Resources and Compsource Oklahoma, Petitioners, v. Patricia J. Pennington and The Workers' Compensation Court, Respondents. Review of an Order of the Workers' Compensation Court, Hon. John M. McCormick, Trial Judge. The trial court did not use an incorrect legal standard nor incorrectly place the burden of proof on Employer to prove that Claimant's employment was not the major cause of her spinal injury. There is competent evidence to support the trial court's order. **SUSTAINED.** Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Wiseman, V.C.J., and Goodman, J., concur.

**106,629** — Teresa J. Barnard, Plaintiff/Appellant, v. Thomas A. Allen, James Battles, Jr., Justin R. Hart, and Joe Muller, Defendants/Appellees. Appeal from a Judgment of the District Court of Payne County, Hon. Donald L. Worthington, Trial Judge. Plaintiff appeals from the trial court's summary judgment in favor of Defendants/Appellees. We find that even if Defendants/Appellees were acting outside the scope of their employment and knew or should have known the driver was intoxicated, Defendants/Appellees owed no duty to protect Plaintiff from the driver's negligent driving. Based on our review of the record on appeal and applicable law, we

affirm the trial court's summary judgment in favor of Defendants/Appellees because there are no controverted issues of material fact and Defendants/Appellees are entitled to judgment as a matter of law. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Goodman, J., concurs, and Wiseman, V.C.J., concurs specially.

**106,729** — Arrow Trucking Co., Inc., and Own Risk, Petitioners, v. Felix M. Jimenez and the Workers' Compensation Court, Respondents. Proceeding to review an order of the Workers' Compensation Court, Hon. Gene Prigmore, Trial Judge. Review of the trial court's order awarding temporary total disability payments (TTD) and permanent partial disability payments to the claimant after he suffered an accidental, work-related injury to his neck and back arising out of and in the course of his employment. We vacate the trial court's TTD award and its denial of overpayment of TTD because we find the claimant is only entitled to eight weeks of TTD for his non-surgical soft tissue injury under 85 O.S. Supp. 2005 § 22(3)(d). We direct the trial court to enter an order reflecting an overpayment of \$2,477.85, as stipulated to by the parties. VACATED WITH DIRECTIONS. Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Wiseman, V.C.J., concurs, and Goodman, J., concurs in result.

**106,525 (comp. w/106,523 and 106,524)** — Frank Combs, Plaintiff/Appellee, v. Helen K. Combs, Defendant/Appellant. Appeal from a judgment of the District Court of Coal County, Hon. Richard E. Branam, Trial Judge. As to the trial court's October 16, 2008, Judgment on appeal, we reverse the trial court's denial of Wife's Estate's "Petition to Vacate Orders Nunc Pro Tunc" and the trial court's granting of Husband's Estate's "Motion to Dismiss the Petition to Vacate the Order Nunc Pro Tunc" as an abuse of discretion only in regard to the improperly entered *nunc pro tunc* orders. We remand this case to the trial court for further consideration of Husband's Estate's request for *nunc pro tunc* relief. However, as a matter of law, because the 1993 Decree is final and not subject to attack, we affirm the granting of Husband's Estate's Motion to Dismiss Wife's Estate's "Petition to Vacate Orders Nunc Pro Tunc" insofar as the Judgment on appeal finds the 1993 Decree is a final judgment, not subject

to attack, and we affirm the trial court's denial of Wife's Estate's Motion for Summary Judgment for the same reason. AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Wiseman, V.C.J., and Goodman, J., concur.

**106,524 — (comp. w/106,523 and 106,525)** — Raelene K. Combs, individually, and as Trustee of the Raelene K. Combs Living Trust dated May 31, 2001; Coldeen Combs-Sampaga; and Kathleen K. Hardy, Plaintiffs/Appellees, v. The Known and Unknown Heirs, Beneficiaries, Administrators, Executors, Devisees, Trustees, Legatees, Successors and Assigns Immediate and Remote of the Following Named Persons, to-wit: Helen Knight Waterhouse Shannon a/k/a Helen Combs and Robert L. Knight, deceased, Defendants/Appellants, and Anna Jump née Cogburn, all Deceased; Kyle D. Thompson and Traci Thompson, Co-Trustees of the Kyle and Traci Thompson Trust dated January 29, 2004, Defendants. Appeal from a judgment of the District Court of Coal County, Hon. Richard E. Branam, Trial Judge. In this quiet title action, the trial court granted plaintiffs' motion to dismiss the intervenor, Violet Clark, an heir of Helen Combs, deceased, as a sanction for failing to appear for her deposition, in violation of an order compelling her to appear. We reverse the trial court's granting of the "Motion to Dismiss Intervenor" and remand with instructions to the trial court to reinstate Clark as a party defendant and to consider fashioning a less severe discovery sanction consistent with this Opinion. REVERSED AND REMANDED WITH INSTRUCTIONS. Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Wiseman, V.C.J., and Goodman, J., concur.

**106,523 (comp. w/106,524 and 106,525)** — Frank Combs, Plaintiff/Appellee, v. Helen K. Combs, Defendant/Appellant. Appeal from a judgment of the District Court of Coal County, Hon. Richard E. Branam, Trial Judge. In the Judgment, the trial court denied Wife's Estate's "Petition to Vacate Orders Nunc Pro Tunc." We reverse the trial court's Judgment only in regard to the improperly entered December 13, 1999 order *nunc pro tunc*, and remand for further trial court consideration of *nunc pro tunc* relief. We affirm the Judgment, however, as a matter of

law, as to the issue of the finality of the 1999 Decree. **AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS.** Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Wiseman, V.C.J., and Goodman, J., concur.

**106,250** — In the Matter of HP, OP, SCP and CP, adjudicated deprived juveniles. Michelene Azevedo, Appellant, v. State of Oklahoma, Appellee. Appeal from an order of the District Court of Pottawatomie County, Hon. John D. Gardner, Trial Judge, terminating the parental rights of Michelene Azevedo (Mother) to her four children, HP, OP, SCP, and CP. After review of the record and applicable law, we find that the trial court did not err and that the State of Oklahoma met its burden of proof. Mother asserts the trial court erred in granting State's motion in limine to exclude the deposition testimony of a pastor. Although we conclude the deposition testimony was admissible, Mother failed to include the deposition in the record on appeal, and we are therefore unable to address Mother's assertion of error in excluding the deposition based on relevance. Mother further failed to show the trial court erred in admitting hearsay testimony regarding SCP. Mother next contends that, before allowing into evidence a statement by a child under 13 years of age describing physical abuse, the trial court failed to conduct a hearing required by 12 O.S. Supp. 2008 § 2803.1 to test the trustworthiness of the statement. Nothing in the record indicates whether the trial court held a hearing. We cannot presume legal error from a silent record. Finally, we reject Mother's assertion the trial court improperly delegated authority to the children's counselors regarding family counseling sessions making it impossible for her to complete the treatment plan and preventing the return of her children. Mother did not raise this issue before the trial court. State did not seek to terminate Mother's parental rights due to her noncompliance with the treatment plan, but requested termination because the children had been in foster care for 15 of the most recent 22 months. **AFFIRMED.** Opinion from the Court of Civil Appeals, Division II, by Wiseman, V.C.J.; Barnes, P.J., and Goodman, J., concur.

**Thursday, December 31, 2009**

**106,308** — Dale McAlary and Pearl McAlary, Plaintiffs/Appellees, v. State of Oklahoma ex

rel. Oklahoma Department of Human Services; Howard Hendrick, Director of Oklahoma Department of Human Services; Oklahoma Health Care Authority; Mike Fogarty, Director of Oklahoma Health Care Authority; Howard Hendrick, individually; and, Gerry Moore, individually, Defendants/Appellants. Appeal from an Order of the District Court of Dewey County, Hon. Ray Dean Linder, Trial Judge. The trial court found husband and wife, nursing home residents, were improperly denied Medicaid benefits and issued an injunction preventing the State from denying Medicaid benefits to them and those similarly situated. We reverse for the reason that certain resources of husband and wife placed in a trust prior to submission of their Medicaid applications are available to them and place them above the applicable Medicaid resource limit, all pursuant to the Oklahoma Administrative Code. **REVERSED.** Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Wiseman, V.C.J., and Goodman, J., concur.

**106,775** — Public Service Company of Oklahoma, Plaintiff/Appellee, v. Rick Lovejoy and Debbie Lovejoy, Defendants/Appellants. Appeal from an order of the District Court of Comanche County, Hon. Allen McCall, Trial Judge, granting Public Service Company of Oklahoma (PSO) injunctive relief against the Lovejoys from "interfering with the trimming and/or removal of trees or other vegetation in proximity to electric utility conductors and equipment by the agents, employees, contractors, and subcontractors of PSO, to the extent necessary to comply with the four (4) year trim cycle as set forth in the Reliability Program mandated by the OCC." At PSO's request, the trial court ordered the Lovejoys to post a supersedeas bond by a certain date to stay the effect of the injunction. When the Lovejoys failed to post the bond by the deadline, the trial court, at PSO's request, lifted the stay allowing PSO to proceed with the removal of the trees which occurred on June 5, 2009. Following the Lovejoys' appeal of the trial court's grant of injunctive relief, PSO filed a motion to dismiss the appeal arguing the appeal is now moot. The Lovejoys argued the appeal was not moot for public policy reasons. The only viable question presented, however, is whether the trial court properly enjoined the Lovejoys from interfering with PSO's removal of vegetation on the Lovejoys' property. With the removal of

the vegetation, there can be no effective relief granted by this Court. We find the issue presented in the Lovejoys' appeal is now moot, and we find no exception to the mootness doctrine applicable. DISMISSED. Opinion from the Court of Civil Appeals, Division II, by Wiseman, V.C.J.; Barnes, P.J., and Goodman, J., concur.

**106,308** — In the Matter of BC, a Deprived Child. Jodi L. Compton, Appellant, v. State of Oklahoma, Appellee. Mother appeals from an order of the District Court of Garfield County, Hon. Tom L. Newby, Trial Judge, terminating her parental rights in the minor child, BC, following a jury trial. An order terminating parental rights must identify the specific statutory basis relied on and must also contain specific findings required by that statutory provision. In this case, the order fails to identify the specific conditions leading to adjudication, the specific findings justifying termination, and the specific statutory basis for termination. Because the order does not identify a specific statutory basis for termination or any findings which support a specific statutory basis for termination, we reverse and remand the case with instructions to enter a proper final order correcting the deficiencies as described in this opinion. REVERSED AND REMANDED WITH INSTRUCTIONS. Opinion from the Court of Civil Appeals, Division II, by Goodman, J.; Wiseman, V.C.J., and Barnes, P.J., concur.

**(Division No. 3)**

**Friday, December 18, 2009**

**106,002** — Faust Corporation, Plaintiff/Appellant, vs. Tracy D. Stanfield, by his Guardian, Mildred Stanfield, Defendant/Appellee. Appeal from the District Court of Seminole County, Oklahoma. Honorable Timothy L. Olsen, Judge. Appellant Faust Corporation, (Faust) appeals from the trial court's Journal Entry of Judgment, granting Defendant Tracy D. Stanfield's (Stanfield) Petition to Vacate a default judgment previously entered in Faust's favor in 2001. Additionally, Faust appeals from a subsequent order granting Stanfield's Motion for Judgment for Money Had and Received, Application for Attorney Fees and Costs and Supplemental Application for Attorney Fees and Costs. This case presents a straightforward jurisdictional question — whether the undisputed lack of personal service of process on an adjudicated incapacitated person in a debt col-

lection action renders the consequential default judgment void and subject to vacation at any time on motion of a party. We answer in the affirmative. Further, Oklahoma law provides a party who successfully vacates a default judgment qualifies as a prevailing party entitled to an award of attorney fees in accordance with 12 O.S. 2001 §936. The Judgments appealed are AFFIRMED. Faust is granted 20 days from the date this opinion is filed to respond to Stanfield's request for appeal-related attorney fees. Stanfield's request for costs is DENIED without prejudice to future filing in the appellate court prior to mandate. AFFIRMED. Opinion by Mitchell, C.J.; Hansen, P.J., and Joplin, J., concur.

**106,433** — In re: the Marriage of Tanner Wayne Harris, Petitioner/Appellee, vs. Lindsay Baker Harris, Respondent/Appellant. Appeal from the District Court of Jefferson County, Oklahoma. Honorable Carl O. LaMar, Trial Judge. In this divorce proceeding, Appellant/Mother (Mother) seeks review of the trial court's decision granting Appellee/Father (Father) sole custody of the couple's minor child and granting Mother visitation. Mother and Father were married in 2003. They had one child during the marriage, a son born in 2006. Each parent presented evidence of their devoted and effective parenting. Mother testified that she was the boy's primary caretaker, until Father was granted temporary custody pending the divorce. Mother demonstrated she had a stable job, her own apartment and was working toward her masters degree. Father showed he had taken a new job closer to extended family, had daycare available in the building in which he worked and had assumed the responsibility of single-parenting well. Both parties had criticized each other. Mother arguing Father was largely absent and not involved in the day-to-day affairs of raising his young son. Father complained Mother threatened to interfere with his contact with their child if Father did not conduct himself in a manner acceptable to Mother. At least two other witnesses corroborated Father's testimony in this regard. Mother asserted on appeal that only the alleged threats to withhold contact with their son as a punitive measure against Father and her post-separation relationship with another man provided the court any reason to award Father custody and she had effectively countered this evidence. This court cannot determine upon

the record provided what, if any, weight the trial court gave either Mother's new relationship or the alleged threats. However, the trial court is required to consider, in evaluating the child's best interests, which parent is more likely to allow frequent and continuing contact with the noncustodial parent. 43 O.S. Supp. 2009 §112(C)(3)(a). Because of the statute's requirement to consider cooperative visitation, it is possible the alleged threats to use contact with the boy in a punitive manner influenced the court's best interests analysis. In awarding custody to Father, the trial court specifically noted both parents were fit. Both parents provided examples demonstrating their devotion and commitment to their son, but the court deemed Father the better custodial option. We cannot determine what specific factors moved the court in favor of choosing Father, but there is evidence in the record to support the court's decision. Supported by competent evidence, the trial court's decision cannot be overturned on appeal. Mother's next proposition of error alleges the trial court reached an erroneous conclusion of law, improperly considering her post-separation relationship and the alleged threats to withhold contact with the boy from Father. Mother did not meet her burden on appeal. *In re B.T.W.*, 2008 OK 80, ¶20, 195 P.3d 896, 908 ("The appealing party bears the burden of demonstrating the faultiness of the trial court's decision. An abuse of discretion occurs when a decision is based on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling."). She failed to support her basic premise that there was no rational basis for awarding Father custody without having improperly considered her relationship and the alleged threats. Because a rational basis for the lower court's decision exists, the trial court order awarding custody of the couple's minor son to Father and awarding Mother visitation is AFFIRMED. Opinion by Joplin, J.; Hansen, P.J., and Mitchell, C.J., concur.

**106,470** — Nancy Fuller Hebble and Susan Fuller Maley, as Individuals; Nancy Fuller Hebble and Susan Fuller Maley, as Co-Trustees of Thomas R. Fuller Testament Trust; Wachovia Bank, N.A., as Executor of the Estate and Trust of Elizabeth Fuller Gardner Trust; and Marshall T. Steves, Trustee of the Dings Trust Agency, Plaintiff/Appellees, vs. Shell Western E & P, Inc., and Shell Oil Company, Defendant/Appel-

lants. Appeal from the District Court of Stephens County, Oklahoma. Honorable Michael C. Flanagan, Trial Judge. Appellants (Shell) seek review of the trial court's judgment based on a jury verdict in favor of Appellees (Owners) for \$13,205,916.00 in actual damages and \$53,625,000.00 in punitive damages in Owners' action for underpayment of oil and gas proceeds. At issue is whether Owners's claims sounded in tort such that the statute of limitations was tolled until Owners learned of their loss. We hold Shell owed a fiduciary duty to Owners arising from its resort to the police powers of the state in unitizing oil and gas interests, and therefore, Owners timely brought a tort claim. We find no error of law in the conduct of trial and AFFIRM. Opinion by Hansen, P.J.; Mitchell, C.J., and Hetherington, J. (sitting by designation), concur.

**106,483** — LaShonda Estell, Petitioner/Appellant, vs. Kenneth D. Estell, Respondent/Appellee. Appeal from the District Court of Cleveland County, Oklahoma. Honorable Janet A. Foss, Trial Judge. In this divorce proceeding, Wife appeals the court's order denying her Motion to Reconsider. Wife contends the court abused its discretion when calculating Husband's income for child support purposes, by not including his employment-related expense reimbursements. Wife did not demonstrate the amount by which Husband's living expenses were reduced by his travel expense reimbursements. Therefore, it is not clear whether any portion of Husband's travel expense reimbursements significantly reduced his personal living expenses. Based on the record presented, Wife did not meet her burden of producing a sufficient record to demonstrate error. Wife also contends the court abused its discretion in its award of child support because it failed to order Husband to pay for private school because the parties had an agreement they would pay their pro rata share of private school for the children. Wife does not provide this Court with any authority to support her assertion. We see no abuse. Wife complains the court abused its discretion in failing to award her support alimony. The record reveals Wife did not demonstrate her need for support alimony. The court's decision in refusing to award Wife support alimony is not against the clear weight of the evidence. Next, Wife takes issue with the court's division of marital property, specifically, the marital home, because the court failed to

account for her premarital equity in the home. Prior to Wife's conveyance of the home into joint tenancy between her and Husband, she used her separate funds to pay off one-half of the mortgage and Husband used his separate funds to pay off one-half of the mortgage. Separate property loses its character as such when used as the marital home. Wife next takes issue with the court's valuation of the marital home by not deducting the costs of repairs. There was no expert testimony regarding the repair costs. We hold the court did not abuse its discretion in declining to award any offset for repairs. Wife contends the court abused its discretion in awarding Husband one-half of her retirement account. The court awarded Wife one-half of Husband's retirement account. It is not against the clear weight of the evidence nor inequitable for the trial court to award Husband one-half of Wife's retirement accounts. Wife's contention regarding health insurance for the children is without merit. Husband's motion for appeal-related attorney fees is denied. The trial court's order is AFFIRMED. Opinion by Hansen, P.J.; Mitchell, C.J., and Joplin, J., concur.

**106,791** — Roberta Dampf-Aguilar, a licensed Bail Bondsman in the State of Oklahoma, Plaintiff/Appellee, vs. State of Oklahoma, ex rel., Kim Holland, Insurance Commissioner, Defendant/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Bryan C. Dixon, Trial Judge. Appellant (Department) ordered revocation of Appellee's (Aguilar) bail bond license. Aguilar appealed this decision to the District Court who reversed Department's order. Department appeals and contends the reasons for revocation of Aguilar's bail bond license are part of, and directly related to, her activities as a bondsman. Department further contends Aguilar's failure to respond to the tribunal during the proceedings in Case No. 05-1690-DIS circumvented Department's ability to regulate her as a bail bondsman, thus making her presence in the bail bond business detrimental to the public interest. Aguilar contends she was not even required to respond to Department, and her non-appearance was not related to her competence or trustworthiness as a bondsman. Aguilar's license was not revoked for violating any statute or Department regulation or any code of ethics of bail bondsmen. A default judgment already had been entered against her (twice) on the underlying issues and a penalty

assessed. She was not required to appear at the hearings. Pursuant to 59 O.S. 2001 §1310(A)(9), the issues of trustworthiness, competence and good character must be related to the bail bond business. Department presented no evidence indicating Aguilar's conduct constituted a detriment to the public. Her alleged misconduct had no relationship to the public and did not reflect on her practices with the public. Department's decision to revoke Aguilar's bail bondsman's license was arbitrary and capricious. The decision of the district court reversing Department's January 4, 2008 Administrative Order is AFFIRMED. Opinion by Hansen, P.J.; Joplin, J., concurs; Mitchell, C.J., dissents.

**107,053** — Marla J. Wright, Petitioner, vs. Hiland Dairy Co. LLC, Fidelity & Guaranty Insurance Co., and The Workers' Compensation Court, Respondents. Proceeding to Review an Order of a Three-Judge Panel of The Workers' Compensation Court. Petitioner (Claimant) seeks review of an order of the Workers' Compensation Court (WCC) denying her claims for disfigurement, psychological overlay, temporary total disability (TTD) and continued medical maintenance. There is competent evidence showing Claimant's psychological overlay, if any, did not arise from, or as a consequence of, her admitted compensable injury to her arm. There is also competent evidence that Claimant's inability to work resulted from the rash and complications from treating the rash, and that the rash did not arise out of and in the course of her employment. In view of this competent evidence, we may not vacate the WCC's denial of her claimed psychological overlay. Claimant adduced evidence from which the WCC could conclude that if she were TTD, the major cause could have been the non-compensable scarring. There is thus competent evidence to support the WCC's denial of the claimed TTD compensation. Regarding continued medical maintenance, Dr. Hensley's report stands properly admitted and provides competent evidence to support the denial of Claimant's request for continuing medical maintenance. We hold the WCC's order is supported by competent evidence and SUSTAIN. Opinion by Hansen, P.J.; Mitchell, C.J., and Joplin, J., concur.

**106,812** — Ronald Frantz, Plaintiff/Appellant, vs. D'Aurizio Drywall and Acoustics, an Oklahoma Corporation, Nick D'Aurizio, Personally, Defendants/Appellees, and TMG

Staffing Services, Inc., a Foreign Corporation, Colleen Thosteson, Personally, Rosemary McKibben, Personally, Jeff Goodson, Personally, and Transpacific International Insurance Co., Ltd., a foreign Corporation, Defendants. Appeal from the District Court of Murray County, Oklahoma. Honorable John H. Scaggs, Judge. Plaintiff Ronald Frantz (Frantz) appeals from an Order granting summary judgment in favor of Defendants D'Aurizio Drywall and Acoustics and Nick D'Aurizio. The district court determined it does not have jurisdiction over Frantz's claims against the D'Aurizio defendants for enforcement of two Workers' Compensation Court awards (each properly certified unpaid) previously entered in favor of Frantz. Frantz sustained a work-related injury in January 2003, whereupon he filed a workers' compensation claim against TMG Staffing Services, Inc. (TMG) and its purported workers' compensation insurance carrier, Transpacific International Insurance Company, Ltd. (Transpacific). For reasons unclear from the record, Frantz did not assert claims against D'Aurizio Drywall and/or Nick D'Aurizio in the Workers' Compensation Court. The D'Aurizio defendants' Motion for Summary Judgment challenged the District Court's jurisdiction, arguing there is no Oklahoma authority supporting Frantz's attempt to enforce a Workers' Compensation Court judgment against an employer not a party/respondent to the underlying workers' compensation proceeding. They assert that the Workers' Compensation Court has exclusive jurisdiction over the matter. Further, the D'Aurizio defendants argue that to impose liability on them after the fact in District Court without affording them a first-instance opportunity to participate as parties in the Workers' Compensation proceeding would be an unconstitutional violation of their due process rights under the U.S. and Oklahoma Constitutions. A first instance determination of the workers' compensation liability of these Defendants *in the proper forum* is required to afford them due process, particularly where Frantz seeks to impose *personal liability* upon Nick D'Aurizio for the workers' compensation benefits unpaid by employer, TMG. The trial court correctly granted Defendants D'Aurizio Drywall and Nick D'Aurizio's Motion for Summary Judgment upon a determination that the district court lacked jurisdiction over claims seeking to enforce Frantz's Workers' Compensation Court awards previously entered in a Workers' Com-

pensation Court proceeding in which neither Defendant D'Aurizio Drywall nor Nick D'Aurizio were parties. AFFIRMED. Opinion by Mitchell, C.J.; Hansen, P.J., and Joplin, J., concur.

(Division No. 4)

Wednesday, December 16, 2009

**105,839** — Kathy Hardy, Plaintiff/Appellant, vs. Farmers Insurance Company, Inc. and Joseph Johnson, Defendants/Appellees. Appeal from Order of the District Court of Tulsa County, Hon. J. Michael Gassetts Trial Judge. Plaintiff Kathy Hardy appeals from the trial court's order denying her motion for new trial in an automobile negligence action. Hardy argues that she presented "unrebutted evidence" regarding necessary medical care, pain and suffering and temporary disability, and, therefore, the jury's verdict is inadequate and contrary to law. Even if the absence or amount of damages appears inconsistent with a finding of liability, the jury's verdict must be affirmed if there is any theory pursuant to which the damages, or lack thereof, can be supported. Where there is conflicting evidence regarding damages, or where witness credibility is at issue, a zero damages verdict following a finding or admission of liability is not grounds for a new trial. Where there is no showing of prejudicial legal error, and there is competent evidence that reasonably supports the jury's verdict, this Court must affirm the judgment entered by the trial court thereon. Opinion from Court of Civil Appeals, Division IV, by Fischer, J.; Gabbard, P. J., concurs and Rapp, J., dissents.

**107,101** — Vinita Public Schools and Comp-source OK (Consolidated Benefits), Petitioners, vs. Lisa Wilhite and The Workers' Compensation Court. Proceeding to Review an Order of a Workers' Compensation Court Three-Judge Panel, Hon. Mary A. Black, Trial Judge, affirming in part and modifying in part a trial court decision which awarded Claimant temporary total disability benefits and adjudicated her level of permanent partial disability. The panel's order is supported by competent evidence, and is in accord with the law. SUSTAINED. Opinion from Court of Civil Appeals, Division IV, by Gabbard, P.J.; Rapp, J., and Fischer, J., concur.

**Thursday, December 17, 2009**

**107,240** — Oklahoma Attorneys Mutual Insurance Company, an Oklahoma Insurance Corporation, Plaintiff/Appellee, vs. Newton, O’Conner, Turner & Ketchum, P.C., an Oklahoma Professional Corporation, Defendant/Appellant. Appeal from the District Court of Tulsa County, Hon. J. Michael Gassett, Trial Judge, granting summary judgment in favor of Plaintiff, which is Defendant-law firm’s liability insurer. The insurance policy at issue here unambiguously excludes from coverage the type of claim made against the law firm. The claim was made by a guardian who sought to disgorge attorney fees paid to the law firm in a guardianship case. **AFFIRMED.** Opinion from Court of Civil Appeals, Division IV, by Gabbard, P.J.; Fischer, J., and Goodman, J. (sitting by designation), concur.

**107,309** — John F. Hledik, Plaintiff/Appellant, vs. Albertson’s, LLC and Young’s Concrete, LLC, Defendants/Appellees. Appeal from the District Court of Oklahoma County, Hon. Barbara G. Swinton, Trial Judge, granting summary judgment to Defendants in this premises liability action. Plaintiff slipped and fell in an icy parking lot owned by Albertson’s and cleared by Young’s Concrete. The danger presented by the accumulated ice and the ruts created by the clearing was open and obvious as a matter of law. **AFFIRMED.** Opinion from Court of Civil Appeals, Division IV, by Gabbard, P.J.; Rapp, J., and Fischer, J., concur.

**Friday, December 18, 2009**

**106,255** — Barbara J. Nettles, Plaintiff/Appellee, vs. Farmers Insurance Company, Inc., and Farmers Insurance Exchange, Defendants/Appellants. Appeal from Order of the District Court of Oklahoma County, Hon. Barbara Swinton, Trial Judge, entering judgment on a jury verdict in this bad faith action in favor of Plaintiff for \$4,500,000 in actual damages, of which \$2,800,000 was specifically designated as damages for emotional distress; and \$4,500,000 in punitive damages, based on the jury’s finding that Defendants had recklessly and intentionally breached their duty to Plaintiff. While the record contains evidence supporting an award for \$2,800,000 for emotional distress, there was no evidence establishing an amount greater than \$10,000 for Plaintiff’s economic losses. The amount of the actual dam-

ages award that exceeds the emotional distress portion is subject to remittitur, as is a similar amount of the punitive damages award. Therefore, Plaintiff shall file a remittitur in district court of all damages in excess of \$5,620,000, and if she elects not to do so then Defendants shall be entitled to a new trial. **AFFIRMED UPON CONDITION OF REMITTITUR.** Opinion from Court of Civil Appeals, Division IV, by Gabbard, P.J.; Rapp, J., concurs, and Fischer, J., concurs specially.

**107,128** — Sequoyah Quinton, Petitioner, vs. Cherokee Nation Enterprises, Hudson Insurance Company, and The Workers’ Compensation Court, Respondents. Proceeding to review an order of a three-judge panel of The Workers’ Compensation Court, Hon. Richard L. Blanchard, Trial Judge, dismissing Claimant’s claim due to lack of subject matter jurisdiction. Claimant is a member of a federally-recognized tribe and works for the tribe. The court’s dismissal is in accord with previous appellate opinions. Claimant asserts barring him from Oklahoma courts violates his constitutional rights to equal protection and due process. However, the fact remains that Oklahoma courts lack jurisdiction to hear his claim because his employer has not waived its sovereign immunity and consented to allow such an action to be brought against it. **SUSTAINED.** Opinion from Court of Civil Appeals, Division IV, by Gabbard, P.J.; Rapp, J., and Fischer, J., concur.

**107,420** — Countrywide Home Loans Servicing LP, Plaintiff/Appellee, vs. Robert E. Guess, Defendant/Appellant, and Spouse, if any of Robert E. Guess, John Doe, Jane Doe, Camelia R. Gill, Spouse, if any, of Camelia R. Gill, Oklahoma Central Credit Union Successor to Williams Employee Credit Union, Defendants. Appeal from an Order of the District Court of Tulsa County, Hon. Rebecca B. Nightingale, Trial Judge. The trial court defendant, Robert Guess (Guess), appeals a trial court Order which denied his combined motions to vacate a summary judgment granted to the plaintiff, Countrywide Home Loans Servicing, LP (CHLS), and to dismiss the petition and first amended petition. Guess maintains that the summary judgment was a default judgment because he did not respond. Based upon this assertion, Guess then argues that the trial court entered the judgment by default, but without complying with the five day notice require-

ment under Rule 10, Rules For District Courts, 12 O.S.2001, ch. 2 app. However, Guess was not in default. The trial court ruled upon an unopposed motion for summary judgment under Rule 13, Rules For District Courts, 12 O.S. Supp. 2009, ch. 2 app. Guess's argument is without merit. Next, Guess asserts that CHLS should not have been permitted to amend the petition or to be substituted as plaintiff for Countrywide. The amendment came after Guess answered and more than twenty days after he was served. The amended petition's allegations added new defendants, but did not change the claim against Guess. Substitution of CHLS as plaintiff is supported factually by the documentation contained in the motion for summary judgment showing that entity to be the holder of the promissory note and assignee of the real estate mortgage. Finally, all of the papers were mailed to Guess at or about the time they were filed in December of 2008. His objection, via the motion to dismiss, did not come until almost six months later, in May of 2008. Moreover, he has not demonstrated any prejudice, miscarriage of justice, or a substantial violation of a constitutional or statutory right because of the failure to seek permission from the trial court to file the amended petition or to substitute CHLS as plaintiff. Thus, Guess has not presented ground for reversal. Summary judgment is proper only if the record reveals uncontroverted material facts failing to support any legitimate inference in favor of the nonmoving party. CHLS was required to demonstrate that it was the holder of a promissory note and the assignee of the securing mortgage and that a default occurred entitling it to foreclose. CHLS met its burden to show its entitlement to summary judgment and was unopposed. Guess has not demonstrated that any basis existed to deny the summary judgment motion. Thus, the trial court did not err in denying his motion to vacate, deemed here a motion for new trial. The judgment of the trial court denying the motion to vacate and the motion to dismiss the amended and original petition is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Gabbard, P.J., and Goodman, J. (sitting by designation), concur.

**Tuesday, December 22, 2009**

**104,316** — (Opinion on Rehearing) — Richard Lynn Dopp, Plaintiff/Appellant, vs. State

of Oklahoma, and Board of County Commissioners of the County of Ottawa Oklahoma, Defendants/Appellees. Appeal from an Order of the District Court of Ottawa County, Hon. B. David Gambill, Trial Judge. The trial court plaintiff, Richard Lynn Dopp (Dopp), appeals an order dismissing his action against the State of Oklahoma (State) for lack of subject-matter jurisdiction. This appeal proceeds under the accelerated appeal provisions of Okla. Sup. Ct. R. 1.36, 12 O.S. Supp. 2008, ch. 15, app. 1. Dopp's Petition For Rehearing is granted in part and denied in part and this Opinion is substituted for the Original Opinion of August 22, 2008. On May 8, 1996, the State seized two sums of cash, \$139.00 from Dopp's person and \$33,725.00 from his residence, and a pickup truck in connection with a search and arrest of Dopp for drug offenses. The case progressed to pretrial where a Pretrial Order was entered, again not listing 51 O.S. Supp. 2007, § 156(B) as a defense. On the date of trial, the State was permitted to present an oral motion to dismiss for lack of subject matter jurisdiction based upon Section 156(B). The resolution of this appeal proceeds depends upon whether the Section 156(B) time bar is a statute of limitation or a statute of repose. This Court holds that Section 156(B) is a statute of repose. The facts here in Dopp's case clearly show that the one-year statute of repose set out in Section 156(B) began as to the \$33,725.00, upon his obtaining the hard-won admission of the theft of this money by burglary while his money was in the custody and control of law enforcement. The one-year statute of repose had here expired well before Dopp filed his tort claim as to all of that cash in the amount of \$33,725.00 and the truck. The trial court correctly determined that the statute of repose was here applicable and as a result, it did not have jurisdiction to hear the case and properly dismissed Dopp's action. A different result occurs with respect to the \$139.00. Dopp was not informed that this sum was stolen. The State asks this Court to infer that because Dopp was on notice that his \$139.00 was stolen due to the reluctant disclosure, in the federal action, of the theft of the \$33,725.00. Based upon this inference, the State incorrectly maintains that it may be inferred that Dopp knew he had a tort claim for his \$139.00, at the same time he knew he had a tort claim for the \$33,725.00. AFFIRMED IN PART AND REVERSED IN PART AND REMANDED WITH INSTRUCTIONS TO ENTER JUDG-

MENT FOR DOPP IN THE SUM OF \$139.00. Opinion on Rehearing from Court of Civil Appeals, Division IV, by Rapp, J.; Gabbard, P.J., and Barnes, J., concur.

**Wednesday, December 23, 2009**

**106,787** — Sarah Devasto, Plaintiff/Appellant, vs. Pontotoc Area Vocational Technical School District No. 14, d/b/a Pontotoc Technology Center, Defendant/Appellee. Appeal from Order of the District Court of Oklahoma County, Hon. Vicki L. Robertson, Trial Judge, granting summary judgment to defendant school district on grounds that it was statutorily exempt from liability for injuries suffered by plaintiff while she was operating a piece of equipment supplied by the school. Pontotoc is a governmental entity covered by the GTCA, and therefore, exempt from liability for a loss that is covered by any workers' compensation act pursuant to 51 O.S. Supp. 2004 § 155(14). The loss for which Devasto seeks to recover is covered by a workers' compensation act. Although Pontotoc has obtained a liability insurance policy, that policy does not cover liabilities for which Pontotoc is exempt pursuant to § 155(14), nor does that policy cover Devasto's injuries by implication. **AFFIRMED.** Opinion from Court of Civil Appeals, Division IV, by Fischer, J.; Gabbard, P.J., and Rapp, J., concur.

**Monday, December 28, 2009**

**106,086** — In the Matter of A.T., an alleged deprived child. The Choctaw Nation of Oklahoma, Appellant, v. State of Oklahoma, Appellee. Appeal from an order of the District Court of Oklahoma County, Hon. Stephen Alcorn, Trial Judge, sustaining a motion to reconsider presented by the State, on the appropriate adoptive placement of a child under the Indian Child Welfare Act (ICWA). This Court finds the trial court appropriately considered the child's best interests as well as the demands of ICWA, and the good cause requirement for deviating from the ICWA preference was satisfied. **AFFIRMED.** Opinion from the Court of Civil Appeals, Division IV, by Rapp, J.; Gabbard, P.J., concurs; Fischer J., concurs in part, dissents in part.

**Tuesday, December 29, 2009**

**107,126** — Terri L. Cope, Plaintiff/Appellee, vs. Rich Cope, Defendant/Appellant. Appeal from the District Court of Tulsa County, Hon.

Kyle B. Haskins, Trial Judge, granting summary judgment in favor of Plaintiff and determining that the parties' oral agreement waiving Plaintiff's right to child support from Defendant was void and unenforceable. The parties' agreement regarding the future payment of child support and visitation is clearly unenforceable. However, the trial court erred in not considering Defendant's asserted defense of equitable estoppel as a bar to Plaintiff's claim for unpaid support. Equitable estoppel bars Plaintiff's action. **REVERSED AND REMANDED WITH DIRECTIONS.** Opinion from Court of Civil Appeals, Division IV, by Gabbard, P.J.; Fischer, J., concurs, and Rapp, J., specially concurs.

**Wednesday, December 30, 2009**

**107,494** — James Craig, Plaintiff/Appellant, vs. The Goodyear Tire & Rubber Company, Defendant/Appellee. Appeal from Order of the District Court of Comanche County, Hon. Mark R. Smith, Trial Judge, granting summary judgment in favor of Defendant on Plaintiff's claims of retaliatory discharge and wrongful termination in violation of the provisions of 85 O.S. Supp. 2008 § 5. The record contains sufficient evidence to establish a dispute of fact as to whether Defendant terminated Plaintiff during a period of temporary total disability solely on the basis of Plaintiff's absence from work, in violation of 85 O.S. Supp. 2008 § 5(B). However, Plaintiff failed to present evidence sufficient to raise a disputed fact issue to suggest that his discharge was "significantly motivated" by alleged retaliation for Plaintiff's filing workers' compensation proceedings. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.** Opinion from Court of Civil Appeals, Division IV, by Gabbard, P.J.; Rapp, J., and Fischer, J., concur.

**Tuesday, January 5, 2010**

**106,966** — Paula Crockett, Plaintiff/Appellant, v. Central Oklahoma Transportation and Parking Authority (COTPA), Defendant/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma, Honorable Daniel L. Owens, Trial Judge. The district court's dismissed Crockett's tort suit against COTPA on the grounds that, pursuant to section 157(B) of the Governmental Tort Claims Act, 51 O.S. 2001 & Supp. 2008 §§ 151-200, she failed to file suit within the 180-day period following the denial of her claim. The record shows that

Crockett's claim was deemed denied on August 7, 2007, and Crockett was therefore required by section 157(B) to suit file on or before February 4, 2008. Crockett did not file suit until February 8, 2008. However, the record shows disputes of fact concerning whether COTPA either tolled the section 157(B) limitation period by requesting additional information after August 7, 2007, or made representations to Crockett that may have estopped it from seeking relief pursuant to the limitation period. Therefore, COTPA was not entitled to a dismissal of Crockett's suit based on the section 157(B) limitation period. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals. Division IV, by Fischer, J.; Gabbard, P.J., and Rapp, J., concur.

**106,925** — The Town of Goldsby, Oklahoma, Plaintiff/Appellee, v. The City of Purcell, Oklahoma, Defendant/Appellant. Appeal from the District Court of McClain County, Oklahoma, Honorable John A. Blake, Trial Judge. Purcell appeals the district court's decision declaring a Purcell annexation ordinance void for lack of proper statutory notice. We affirm. On May 17, 2007, Goldsby published notice in the *Purcell Register* of a proposed annexation of certain territory, setting a date of June 11, 2007, for a public hearing on the proposal. On May 25, 2007, Purcell published notice in the *Oklahoman* of a proposed annexation of the same territory, setting a date of June 8, 2007, for a public hearing. Immediately after its June 8 hearing, Purcell passed an ordinance annexing the disputed area. After its June 11 hearing, Goldsby by passed a similar ordinance. Goldsby filed an action in the district court seeking declaratory judgment that the Purcell ordinance was void for lack of timely publication in a "legally qualified newspaper of general circulation in the territory" as required by 11 O.S. Supp. 2005 §§ 21-103(B) and (C). The district court found that the *Oklahoman* was not "published" in McClain County pursuant to 25 O.S.2001 § 106(3), and therefore not a "legally qualified newspaper" of McClain County. *Oklahoma Journal Publ'n Co. v. City of Oklahoma City*, 1980 OK CIV APP 42, ¶ 17, 620 P.2d 452, 455, holds that a newspaper is published in the location where its principal offices are located, its content is determined or edited, and from which it is disseminated. The same view is noted by the State Attorney General in opinion 2002 OK AG 10, ¶ 17, which states that "a newspaper is considered

'published' at the location where the newspaper is disseminated by admission to the mails and has its principal offices, and where its form and content is determined." We find these authorities persuasive, and find no error in the district court decision that the *Oklahoman* is not "published" in McClain County pursuant to 25 O.S.2001 § 106(3). Because the *Purcell Register* is published in McClain County, and section 106 permits publication in legal newspapers of other counties only if the county in question has no legal newspaper, publication in the *Oklahoman* did not meet the requirements of 11 O.S. Supp. 2005 §§ 21-103(B) and (C), and the resulting ordinance was void for lack of proper publication. AFFIRMED. Opinion from Court of Civil Appeals. Division IV, by Fischer, J.; Gabbard, P.J., Rapp, J., concur.

**107,615** — City of Stillwater, Oklahoma, a municipal corp., Plaintiff/Appellant, v. International Association of Fire Fighters, Local 2095, Defendant/Appellee. Appeal from an Order of the District Court of Payne County, Hon. Stephen R. Kistler, Trial Judge. The trial court defendant, The City of Stillwater, Oklahoma (City), appeals a judgment granting summary judgment to the plaintiff, International Association of Firefighters, Local 2095 (Firefighters), and denying City's motion for summary judgment. The City decided to discontinue ambulance service. Firefighters currently are used for that service. Firefighters claim that they have a grievance with the City's termination of ambulance service and that, under the collective bargaining agreement (CBA), the City is required to arbitrate its decision. City claims that it did not agree to arbitration regarding this type of decision and that the decision it is a management prerogative of the City under the CBA. The trial court granted summary judgment to Firefighters. On June 30, 2009, the Oklahoma Supreme Court, decided *Coulter v. First American Resources L.L.C.*, 2009 OK 53, 214 P.3d 807. The record here does not show that the parties presented *Coulter* to the trial court or that the trial court was otherwise aware of *Coulter*. Therefore, the judgment of the trial court granting summary judgment to International Association of Firefighters, Local 2095 is hereby vacated and the cause is remanded to the trial court for further consideration in light of *Coulter*. SUMMARY JUDGMENT VACATED AND CAUSE REMANDED FOR FURTHER PROCEEDINGS. Opinion from

Court of Civil Appeals, Division IV, by Rapp, J.; Gabbard, P.J., and Fischer, J., concur.

## ORDERS DENYING REHEARING

### (Division No. 1)

**Tuesday, December 28, 2009**

**107,022** — In the Matter of E.L.M.S. State of Oklahoma, Petitioner/Appellee, vs. John Schoonover, Respondent/Appellant. Respondent/Appellant's Application for Rehearing filed December 21, 2009 is *DENIED*.

**Tuesday, January 5, 2010**

**107,351** — Deanna Justick and Chauncey Justick, Plaintiffs/Appellants, vs. Tulsa City-County Health Department, Defendant/Appellee. Plaintiff/Appellants' Petition for Rehearing filed December 28, 2009 is *DENIED*.

### (Division No. 2)

**Thursday, December 17, 2009**

**107,014** — BancFirst, an Oklahoma state banking corporation, Plaintiff/Appellee, v. CZ-I-40 Development, LLC, an Arkansas limited liability company, and Roger S. Clary, Defendants/Appellants. Appellee's Petition for Rehearing is hereby *DENIED*.

**Wednesday, December 23, 2009**

**105,543** — The CIT Group/Consumer Finance, Inc., Plaintiff/Appellee, vs. William R. Satterfield, Defendant/Appellant. Appellant's Petition for Rehearing is hereby *DENIED*.

**106,873** — AAR Aircraft Services and Sentry Insurance, A Mutual Company, Petitioners, vs. Donald Vancuren, and The Workers' Compensation Court, Respondents. Petitioners' Petition for Rehearing is hereby *DENIED*.

### (Division No. 3)

**Friday, December 18, 2009**

**107,139** — Alea London LTD., Plaintiff/Appellant, vs. Canal Club, Inc., d/b/a The

Wild Coconut, an Oklahoma Corporation; Charlena J. Kennedy, Individually; and Erica L. Gilmore, Individually, Defendants/Appellees, and Tanya Wistrand, Individually; Stephen Wistrand, Individually; Diversified Historic Properties, Inc., an Oklahoma Corporation, Defendants. On this day this Court *DENIES* both Appellees' petitions for rehearing.

**106,769** — Kristin Peltier, Plaintiff/Appellee, vs. Modern Oil Company, Inc., an Oklahoma Corporation, Defendant/Appellant. Plaintiff/Appellee's Petition for Rehearing, filed November 17, 2009, is *DENIED*.

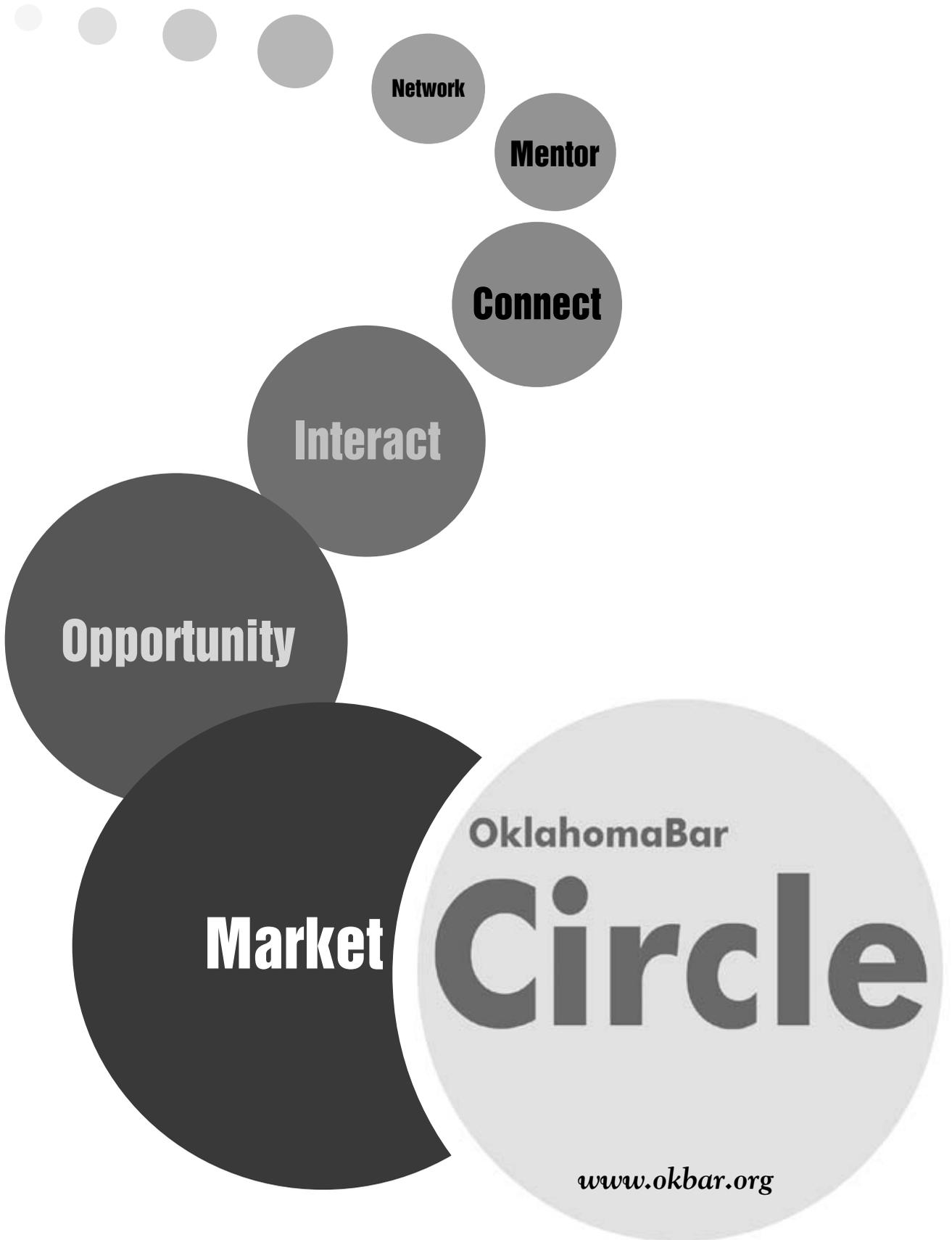
### (Division No. 4)

**Wednesday, December 16, 2009**

**105,460** — Tulsa Industrial Authority, Plaintiff/Appellee, v. City of Tulsa, Oklahoma, and Tulsa Hills, L.L.C., Defendants/Appellees, and J. Clark Bundren M.D., a resident taxpayer of the City of Tulsa, State of Oklahoma, Intervenor/Appellant. Appellant's Petition for Rehearing is hereby *DENIED*.

**Thursday, December 17, 2009**

**106,726** — Great Plains National Bank, Plaintiff, v. Jabez Farms, L.L.C., and Ronald Ladd and Patricia Ladd, individuals, and sometimes doing business as Ronald and Patricia Ladd Joint Venture, Defendants and Third-Party Plaintiffs, v. Stockmans Bank, Deere & Company, and Farm Credit of Western Oklahoma, PCA, Additional Defendants, v. First State Bank of Altus, Defendants and Third-Party Plaintiff/Appellee, v. Quality Implement Co., Third-Party Defendant/Appellant, v. R&P Farms, Inc., Boaz Land & Cattle, LLC, Triple 777 Farm, LLC, Martha Farm, LLC, Liberty National Bank, Barbee-Neuhaus Implement Co., Ryan Robbins, Timothy Wayne McDaniel, Western Equipment, LLC, Danny McCustin, and Larry McLaughlin, Third-Party Defendants. Appellee's Petition for Rehearing is hereby *DENIED*.



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**OFFICES FOR RENT:** Newly constructed office building located at 222 N.W. 13th St., Oklahoma City, has offices for rent. Parking on site; two conference rooms; kitchen and internet ready. Contact Goldman Law PLLC at (405) 524-3403.

**MIDTOWN RENAISSANCE OFFICE SPACE FOR LEASE:** Office space yours in a beautifully renovated 1920s building in the heart of Midtown within walking distance to many new restaurants and the Boulevard Cafeteria. Amenities include receptionist, phones, Internet, copier, fax, postage meter, 2 conference rooms, library, kitchen, housekeeping, onsite file storage and parking. Located in the vicinity of 12th and Walker. (405) 627-1380 or (405) 204-0404.

**OFFICES FOR RENT: NORTH CLASSEN LOCATION:** Four office suite with reception area, office desk, furniture, utilities and janitorial service all included in rent. \$650.00 per mo., also one separate office at \$290.00 per mo., free parking no lease required. Call Charlie or Gene at 525-6671.

## OFFICE SPACE

SOUTH OKC OFFICE SPACE in a building complex surrounding a tranquil park-like setting in the Willowbrook Gardens Professional Building complex located on South Walker Avenue just south of I-240. No long-term lease required. Variety of space available from as little as one office up to six offices. Renovated in 2007. Large reception area, several conference rooms, kitchen, and convenient parking. Call Jana Leonard at (405) 239-3800.

## POSITIONS AVAILABLE

**LEGAL SECRETARY.** Legal Department of OKC based Love's Travel Stops & Country Stores seeks legal secretary/assistant. Responsibilities include daily filing and logging of electronic documents in document management system, maintaining dockets, screening mail and calls, editing and proofreading documents, photocopying and other support tasks. Must have strong work ethic, be self-motivated, detail oriented, highly organized and have the ability to work independently and as part of a team. Proficiency in Word and minimum of 3 years legal experience with focus of litigation support required. Apply online at [www.loves.com](http://www.loves.com).

**CONTRACTS REPRESENTATIVE: THE BENHAM COMPANIES, LLC** (an SAIC Company) has an opportunity available for a contracts representative with at least a bachelor's degree and 2 years of applicable contracts experience. A qualified candidate must have the ability to interface well with internal and external clients, work in a fast paced environment, and have the ability to readily manage shifting work priorities and be a significant contributor. Graduate study, a law degree and/or experience in engineering contracting is highly desirable. Please visit [www.saic.com/career](http://www.saic.com/career) and apply using req ID: 162656.

**AV RATED DOWNTOWN OKC INSURANCE DEFENSE LITIGATION FIRM** seeks associate with 0-5 years experience. Salary commensurate with experience. Please send resumes to "Box C," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

**EMPLOYMENT LITIGATION ASSOCIATE — OKLAHOMA CITY:** Associate with 5 years experience in Employment law; Title VII, ADEA needed for Downtown Oklahoma City firm. Trial experience preferred but not required. Billable hours: 2000 annually. Very competitive salary range & bonus potential. Partner track position. Please email Word resume & salary requirements to: [tamar@tmsrecruiting.com](mailto:tamar@tmsrecruiting.com).

## POSITIONS AVAILABLE

**AV-RATED TULSA LAW FIRM SEEKS ATTORNEY** with 1-5 years experience; business, real estate and energy transactions, and general litigation practice. Send resume to [tulsalawoffice@sbcglobal.net](mailto:tulsalawoffice@sbcglobal.net).

**SOUTH OKC LAW FIRM SEEKING ATTORNEY** with litigation experience and strong writing skills to join employment litigation firm. Please fax resume and writing sample to (405) 239-3801 or email to [leonardjb@leonardlaw.net](mailto:leonardjb@leonardlaw.net).

**LEGAL CLAIMS CONSULTANT NEEDED:** Our client, a major oil and gas company with offices in Bartlesville, is searching for a legal claims consultant to join the claims group. Qualified candidates will be either senior paralegals with legal claims experience or junior attorneys with experience as a claims adjuster or agent. Interviewing to begin immediately. Great opportunity to join a fantastic company! Qualified candidates please apply online at <http://eresume.ProvidusGroup.com> and reference Job #5181.

**IMMEDIATE OPENING FOR A FULL-TIME RECEPTIONIST.** Light computer skills and excellent telephone skills required. Good work ethic is a must. Fax resume to (405) 239-3801.

**SPANISH SPEAKING LEGAL ASSISTANTS IMMEDIATE EMPLOYMENT:** Must be fluent in Spanish and must be able to interpret and translate from English to Spanish. Must have 5 years experience in personal injury, \$40k plus benefits. Send resume & references to: Legal Research & Management Systems, Inc. P.O. Box 2243, Oklahoma City, OK 73101.

**BRIEF WRITER-OKLAHOMA CITY:** Litigation/Brief Writer w/5 years experience needed for Downtown Oklahoma City firm. Experience as Clerk for U.S. Judge required. Billable hours: 2000 annually. Very competitive salary range & bonus potential. Partner track position. Please email Word resume & salary requirements to: [tamar@tmsrecruiting.com](mailto:tamar@tmsrecruiting.com).

**AV RATED OKLAHOMA CITY FIRM SEEKS EXPERIENCED CIVIL LITIGATION ASSOCIATE** with 5 to 10 years experience in civil litigation. The position is focused on and experience is required in general civil rights and employment litigation. Salary is commensurate with experience. Travel is required. Send resume, writing sample and salary history via email to [jodi@czwglaw.com](mailto:jodi@czwglaw.com) or by mail to: Collins, Zorn & Wagner P.C., Attn: Jodi S. Casey, 429 NE 50th, Second Floor, Oklahoma City, OK 73105.

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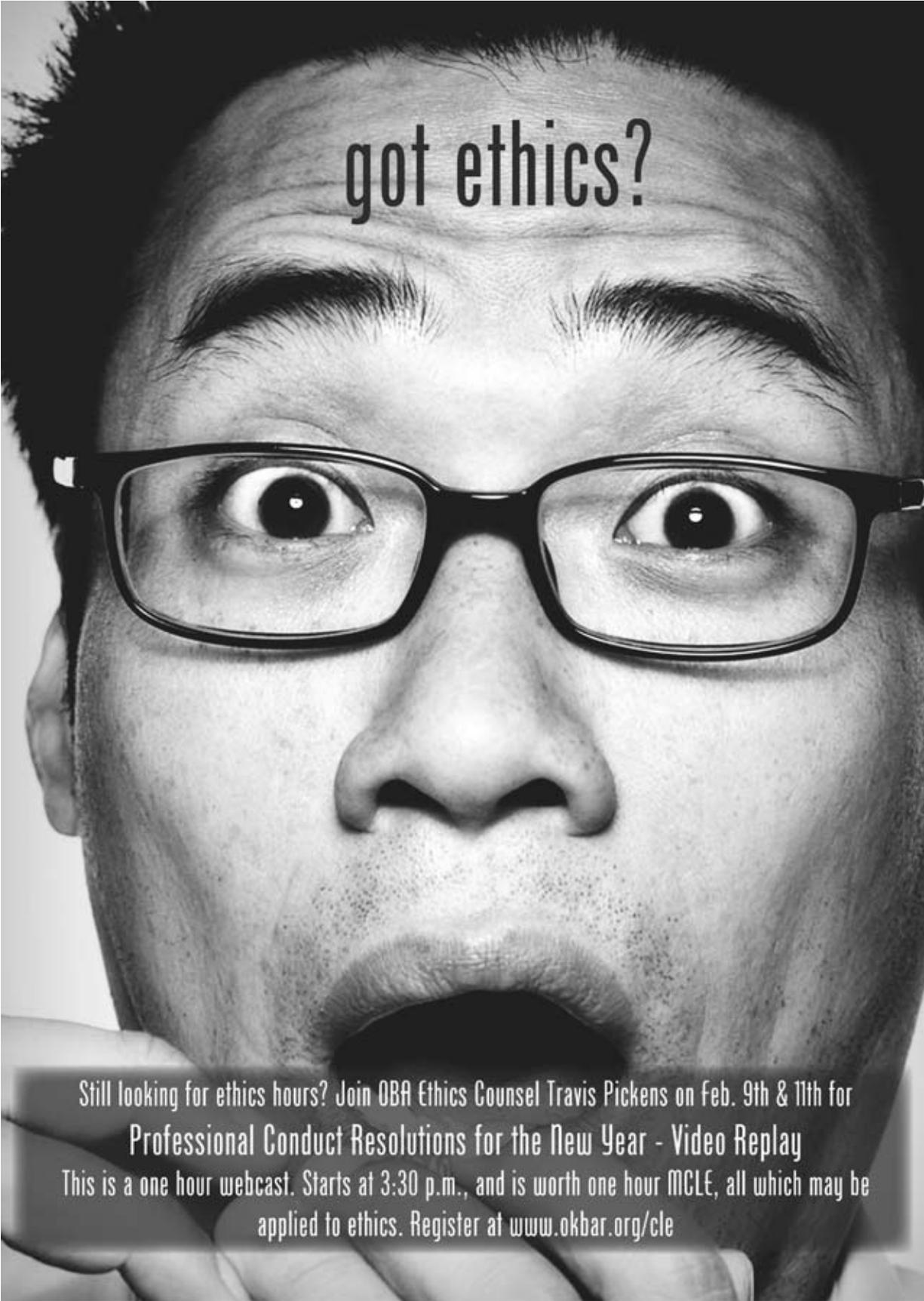
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# Recent Developments 2009 Video Fair

**Feb. 9 & 11, 2010 - Day 1 Program - Oklahoma Bar Center, OKC**

**Feb. 10 & 12, 2010 - Day 2 Program - Oklahoma Bar Center, OKC**

**Feb. 16, 2010 - Day 2 Program Only - Oklahoma Bar Center, OKC**

This course has been approved by the Oklahoma Bar Association Mandatory Continuing Legal Education Commission for 12 hours of mandatory CLE Credit, including 1 hour of ethics for both days; 6 hours of mandatory CLE credit, including 0 hours of ethics credit for Day I; 6 hours of mandatory CLE credit, including 1 hour of ethics credit for Day II.

\$275 (both days), \$150 (day one or day two), for early-bird registrations received with payment at least four full business days prior to the seminar date; \$300 (both days), \$175 (day one or day two), for registrations received within four full business days of the seminar date. To receive a \$10 discount register online.

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