

# THE Oklahoma Bar JOURNAL

Volume 81 ♦ No. 6 ♦ February 27, 2010



OBA/CLE  
Spring  
Webcasts

oba ♦ cle  
continuing legal education

## Business and Agency Governance from Compliance to Prosecution - What You Need to Know

Wednesday, March 3, 2010

### Topics:

- Ethical and Practical Realities of Representing Corporations and Public Bodies
- Liability of Officers and Directors
- Public Entity Corruption Prosecutions and/or Private Corporate Prosecutions
- The McNulty Memorandum and Cooperation During Investigation
- The Key Role of Compliance Programs, Internal Controls and Internal Audit
- What Good Corporate Citizens Should Know About the Federal Sentencing Guidelines
- False Claims Act

7.0 Total MCLE, 3.0 of which may be applied toward Ethics

## Medicine for Lawyers: The Ten Top Illnesses and Injuries of the Brain & Spine

Saturday, April 10, 2010

### Topics:

- Basic Anatomical Terms
- The Anatomy of the Back and Spine
- The Top Illnesses and Injuries— Causes, Symptoms, Diagnosis, and Treatment
- The Role of Diagnostic Testing in Trauma to the Brain and Spine

7.0 Total MCLE, (No ethics)

## Basics of E-Discovery

Tuesday, April 20, 2010

In this technologically modern era in which we live and work, virtually every document that has the potential to lead to discoverable evidence is stored in a digital format. Knowing how to access and preserve this electronic information is crucial. Failure to pursue electronic discovery limits the litigation arsenal and potentially exposes practitioners to malpractice liability. This brand new, back to basics seminar will provide you with an introduction to e-discovery. This program defines electronic discovery, explains how to search for discoverable information, shows you how to properly produce and preserve electronic documents and most importantly, shows you how to do all of this in a cost-effective manner.

5.0 Total MCLE (No Ethics)

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# EVENTS CALENDAR

## MARCH 2010

- 2 **OBA Day at the Capitol**; 8 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000  
**OBA High School Mock Trial Finals**; OU Law Center; Bell Courtroom; Norman, Oklahoma; Contact: Judy Spencer (405) 755-1066
- 3 **OBA Women in Law Committee Meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Renee DeMoss (918) 595-4800
- 4 **Oklahoma Uniform Jury Instructions Meeting**; 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Chuck Adams (918) 631-2437
- 5 **OBA Diversity Committee Meeting**; 11 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Marvin Lizama (918) 850-2048  
**OBA Law Day Committee Meeting**; 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Tina Izadi (405) 521-4274
- 11 **OBA Bench & Bar Committee Meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack Brown (918) 581-8211
- 12 **OBA Awards Committee Meeting**; 1 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: D. Renee Hildebrant (405) 713-1423  
**OBA Family Law Section Meeting**; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Kimberly K. Hays (918) 592-2800
- 15 **OBA Alternative Dispute Resolution Section Meeting**; 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Andrea Braeutigam (405) 640-2819
- 16 **OBA Volunteer Night at OETA**; 5:45 p.m.; OETA Studio, Oklahoma City; Contact: Jeff Kelton (405) 416-7018
- 17 **Oklahoma Council of Administrative Hearing Officials**; 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Carolyn Guthrie (405) 271-1269 Ext. 56212
- 18 **OBA Access to Justice Committee Meeting**; 10 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Kade A McClure (580) 248-4675
- 20 **OBA Title Examination Standards Committee Meeting**; 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Kraetli Epperson (405) 848-9100

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 — Rep. Scott Inman                              |
| 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)*

## 2010 OK 3

**Mark Rogers, Terry O'Rorke and William Wilson, on behalf of themselves and all others similiary situated Plaintiffs v. Quiktrip Corporation, Love's Travel Stops & Country Stores, Inc., and 7-Eleven, L.L.C. Defendants.**

**No. 106,684. February 4, 2010**

### ORDER REVISING OPINION

The court's opinion, filed herein on 19 January 2010, is **revised** to reflect correctly, by the text appearing below, the names of counsel for Quiktrip Corporation. The added text **is to be inserted between** the names of counsel for Love's Travel Stops & Country Stores, Inc. and for 7-Eleven L.L.C. now shown at page two of the manuscript on file.

Tristan L. Duncan, Holly Smith, Shook, Hardy & Bacon L.L.P., Kansas City, Missouri and John G. Canavan, Jr., Canavan & Associates, Shawnee, Oklahoma, for defendant Quiktrip Corporation

In all other respects the 19 January 2010 opinion shall remain unchanged.

DONE BY ORDER OF THE SUPREME COURT THIS 4th DAY OF FEBRUARY, 2010.

/s/ MARIAN P. OPALA  
JUSTICE

## 2009 OK 50

**Steven R. Blue, Plaintiff/Appellee, v. Board of Trustees of Employees' Retirement System of Tulsa County, Defendant/Apellant.**

**No. 104,967. February 9, 2010**

### **MEMORANDUM OPINION BY ORDER ON REHEARING**

¶1 Rehearing was granted in the above styled and numbered cause by order on January 21, 2010. Upon consideration of all party filings including the record, WE DETERMINE THAT:

1) The opinion promulgated by this Court on June 30, 2009 and denominated as 2009 OK 50 is withdrawn from publication and vacated.

2) The order granting certiorari entered in the above styled and numbered cause on February 18, 2009 is withdrawn as improvidently granted.

3) Certiorari is denied.

¶2 IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED THAT the opinion promulgated by this Court on June 30, 2009 and denominated as 2009 OK 50 is vacated and withdrawn, the order granting certiorari is withdrawn, and certiorari is denied.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 8th DAY OF FEBRUARY, 2010.

/s/ James E. Edmondson  
CHIEF JUSTICE

EDMONDSON, C.J., TAYLOR, V.C.J., HARGRAVE, OPALA, WATT, COLBERT, JJ. concur.

KAUGER, WINCHESTER, JJ. dissent.

REIF, J. not participating.

## 2010 OK 15

**Order for the Administrative Reinstatement of Certified and Licensed Shorthand Reporters for Failure to Report Continuing Education for Calendar Year 2009**

**S.C.A.D. No. 2010-10. February 22, 2010**

### **ORDER OF REINSTATEMENT**

The State Board of Examiners of Certified Shorthand Reporters has requested the reinstatement of the following persons as having now completed all requirements for reporting their annual Continuing Education for Calendar Year 2009.

The Court orders that the following persons are hereby reinstated from the suspension earlier imposed by S.C.A.D No. 2010-10:

#### **REPORTER**

#### **REINSTATEMENT EFFECTIVE:**

Rex Lear

February 17, 2010

Lisa Morgan

February 17, 2010

Kimberly Wilson

February 18, 2010

Done on this 22nd day of February, 2010.

/s/James E. Edmondson  
Chief Justice

2010 OK 13

**Order for the Administrative Suspension of Certified Shorthand Reporters for Failure to Comply with Continuing Education Requirements for Calendar Year 2009**

**Supreme Court Administrative Directive S.C.A.D. No. 2010-10. February 17, 2010**

The Oklahoma Board of Examiners of Official Shorthand Reporters has recommended to the Supreme Court of the State of Oklahoma the suspension of the certificate of each of the Oklahoma Certified Shorthand Court Reporters listed below for failure to comply with the Continuing Education requirements for calendar year 2009.

Pursuant to 20 O.S., Chapter 20, App. 1, Rule 23, failure to earn the required continuing education hours, to submit a completed compliance report, and/or to pay any applicable continuing education penalty fee on or before February 15 shall result in administrative suspension on that date. The persons listed below have failed to meet one or more of the applicable requirements.

IT IS THEREFORE ORDERED that the certificate of each of the court reporters named below is hereby administratively suspended. This suspension is effective February 15, 2010:

- |                    |                   |
|--------------------|-------------------|
| Lori Barnett       | Lisa Carpenter    |
| Crystal Chilton    | Lisa Cromley      |
| Nan Dickerson      | Cynthia Donald    |
| Tammy Eckles       | Jan Guelda        |
| Janice Hensley     | Kimberly Idleman  |
| Rex Lear           | Lisa Morgan       |
| Lynne Nicholson    | Myrna Parrish     |
| Chris Pierce       | James Porton      |
| Wendy Ragan Sugrue | Lori Roberts      |
| Laura Robertson    | Barbara Ross      |
| Jill Shaw          | Valerie Stallings |
| Susan Stotts       | Krista Wagner     |
| Kimberly Wilson    |                   |

Approved this 17th day of February, 2010.

/s/ James E. Edmondson  
CHIEF JUSTICE

**NOTICE CONCERNING AUTOMATIC REVOCATION OF CERTIFIED SHORTHAND REPORTERS**

**Case Number: SCAD-2009-78  
February 10, 2010**

Notice Concerning Automatic Revocation of Certified Shorthand Reporter Certificate for Failure to Fulfill License Renewal Requirements for Calendar Years 2009-2010

This matter comes before this Court upon a recommendation from the State Board of Examiners of Certified Shorthand Reporters to issue a Notice regarding the certificate revocation of certain Certified Shorthand Reporters. The Court finds as follows:

1. Each of the persons named in the attached Exhibit A failed to submit the bi-annual renewal fee for calendar years 2009 - 2010 with the Administrative Office of the Courts, and this Court issued an Order suspending their Oklahoma Certified Shorthand Reporter certificates effective August 13, 2009.

2. Pursuant to Rule 3 of the Rules Governing Disciplinary Proceedings of the State Board of Examiners of Certified Shorthand Reporters (20 O.S. Chapter 20, Appendix 2, Rule 3), the continued delinquency of renewal fees beyond four months from the date of the order suspending the reporter's license or certificate shall result in the revocation of the court reporter's license or certificate without further action of the Board or the Supreme Court.

3. Each of the persons named in the attached Exhibit A have failed to submit the required bi-annual license renewal within the four-month period provided in Rule 3. The Court hereby gives notice to all concerned that the certificate of each Certified Shorthand Court Reporter listed on the attached Exhibit A has been revoked, effective February 2, 2010.

4. The Court gives further notice that a person whose license or certificate has been revoked may not engage in shorthand reporting in this State (20 O.S. § 1503).

The Administrative Office of the Courts is directed to mail a copy of this notice to each person named in Exhibit A at the last known address of the person as provided to the Board, the Secretary of the Board, or the Administrative Office of the Courts.

Approved this 9th day of February, 2010.

/s/ James E. Edmondson  
Chief Justice

EXHIBIT A

COURT REPORTER LICENSE NUMBER  
Deborah Waldrop 999

**In the Matter of the Reinstatement of Ian Steedman to Membership in the Oklahoma Bar Association and to the Roll of Attorneys.**

**SCBD No. #5541. February 22, 2010**

**ORDER**

The petitioner, Ian Steedman (Steedman/petitioner), was stricken from the roll of Oklahoma attorneys in July of 2007. On August 11, 2009, Ian Steedman petitioned this Court for reinstatement as a member of the Oklahoma Bar Association. On October 22, 2009, a hearing was held before the Trial Panel of the Professional Responsibility Tribunal, and the tribunal recommended that the attorney be reinstated only upon completion of a bar exam review course. Upon consideration of the matter, we find:

- 1) The petitioner has met all the procedural requirements necessary for reinstatement in the Oklahoma Bar Association as set out in Rule 11, Rules Governing Disciplinary Proceedings, 5 O.S. 2001, ch.1, app. 1-A.
- 2) The petitioner has established by clear and convincing evidence that he: 1) has not engaged in the unauthorized practice of law in the State of Oklahoma; 2) possesses the competency and learning in the law required for reinstatement to the Oklahoma Bar Association; and 3) possesses, the good moral character which would entitle him to be reinstated to the Oklahoma Bar Association.
- 3) The petitioner is required to complete 12 hours of MCLE, including 1 hour of ethics for the calendar year 2010 to comply with Rule 3, Rules for Mandatory Continuing Legal Education, 5 O.S. 2001, ch.1, app. 1-B.

IT IS THEREFORE ORDERED that the petition of Ian Steedman for reinstatement be granted.

IT IS FURTHER ORDERED that Reinstatement is conditioned upon: 1) the payment of \$736.86 in costs associated with these proceedings; and 2) the payment of \$275.00 in dues for calendar year 2010. Because Steedman has previously paid \$900.00 in penalties, the \$736.86 in

costs and \$275.00 in dues shall be paid within 90 days of the date of this order, and reinstatement is conditioned upon such payment.

DONE BY ORDER OF THE SUPREME COURT THE 22nd DAY OF FEBRUARY, 2010.

/s/ James E. Edmondson  
CHIEF JUSTICE

ALL JUSTICES CONCUR.

2010 OK 17

**In the Matter of the Reinstatement of: ALISSA ANN SHADIX WHITE to membership in the Oklahoma Bar Association and to the Roll of Attorneys.**

**SCBD No. 5566. February 22, 2010**

**ORDER OF REINSTATEMENT TO THE OKLAHOMA BAR ASSOCIATION AND ROLL OF ATTORNEYS**

¶1 On September 29, 2009, Alisa Ann Shaddix White (petitioner) filed her petition for reinstatement to membership in the Oklahoma Bar Association (OBA) and to the Roll of Attorneys pursuant to Rule 11.1 of the Rules Governing Disciplinary Proceedings (RGDP), 5 O.S.2001, ch.1, app.1-A. No objection to the petition for reinstatement has been filed.

¶2 After an investigation was conducted pursuant to Rule 11.2 of the RGDP, a trial panel of the Professional Responsibility Tribunal (PRT) held an evidentiary hearing on December 3, 2009, on the petition for reinstatement in accordance with Rule 11.3 of the RGDP. In the PRT hearing, the OBA recommended that petitioner be reinstated.

¶3 On January 4, 2010, the PRT filed its report with the requisite findings in accordance with Rule 11.5 of the RGDP. The PRT unanimously recommended that petitioner be reinstated to membership in the OBA and that her name be reentered on the Roll of Attorneys without the necessity of examination. The OBA and petitioner waived their rights to file briefs.

¶4 This Court has exclusive jurisdiction over the licensing of attorneys. *In re Reinstatement of Kamins*, 1988 OK 32, ¶18, 752 P.2d 1125, 1129. The PRT's findings and recommendations to this Court are advisory in nature. *Id.* Accordingly, we consider the petition for reinstatement to membership in the OBA without deference to the PRT's findings or recommendations.

¶5 The record before us establishes the following facts. Petitioner graduated from the University of Oklahoma School of Law in May of 2001. On October 2, 2001, petitioner was admitted to membership in the OBA. Petitioner practiced law in Oklahoma until June 15, 2003, when she moved to Madison, Wisconsin because her husband had graduated from medical school and had accepted a residency position at the University of Wisconsin. On September 30, 2003, petitioner was admitted to the practice of law in Wisconsin after successfully passing its bar examination. On December 13, 2004, petitioner voluntarily resigned from membership in the OBA because she was no longer practicing law in Oklahoma. Her resignation was accepted and her name was administratively stricken from the roll of attorneys in Oklahoma.

¶6 Petitioner practiced law in Wisconsin from September 30, 2003 until June 24, 2008. On June 24, 2008, petitioner moved to Gainesville, Florida, because her husband had accepted a one-year position there. Because petitioner knew that she would be in Florida only a short time, she did not seek admission to the practice of law there. After her husband took at position in Oklahoma, petitioner moved back to Oklahoma on July 15, 2009.

¶7 Petitioner owes no money to the OBA, except for the costs of these proceedings as discussed below. In 2008 and 2009, petitioner had thirty-one hours of continuing legal education credits in Wisconsin and one hour in Oklahoma. She also reviewed the OBA's journals.

¶8 Several letters were submitted and several witnesses appeared on petitioner's behalf, all of which praised petitioner. The recommendations addressed her ethics, moral conduct, and competency. Based on the letters and testimony, petitioner has shown that she possesses the moral character and competency to be readmitted to the practice of law in Oklahoma.

¶9 The record further shows that the Client Security Fund has not expended any money on behalf of petitioner, *see* Rule 11.1(b) of the RGDP, and that petitioner has agreed to pay the costs of the investigation and the hearing on her petition for reinstatement. *See* Rule 11.1(c) of the RGDP. The OBA has requested costs be assessed in the total amount of \$661.04.

¶10 We find that petitioner has satisfied the requirements for reinstatement as required by Rule 11.5 of the RGDP and that petitioner has affirmatively established by clear and convinc-

ing evidence that she has the character and qualifications to conform to the high standards required of members of the OBA. *See* Rules 11.5 of the RGDP. The evidence clearly and convincingly demonstrates that she has not engaged in the unauthorized practice of law since her resignation from the OBA, and that she has the competency and learning to be readmitted to membership in the OBA without retaking the bar examination. *See id.*

¶11 **IT IS THEREFORE ORDERED** that Alisa Ann Shaddix White be reinstated to membership in the Oklahoma Bar Association and that her name be reinstated on the Roll of Attorneys licensed to practice law in the State of Oklahoma. It is further ordered that petitioner shall pay costs in the amount of \$661.04 within twenty (20) days from the date this order is filed with the Clerk of this Court. Reinstatement is conditioned upon payment of the costs.

¶12 **DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE** this 22nd day of February, 2010.

/s/ James E. Edmondson  
CHIEF JUSTICE

ALL JUSTICES CONCUR.

2010 OK 12

**KEOTA MILLS & ELEVATOR, Appellant/  
Plaintiff, v. OTHEL GAMBLE, JR. Appellee/  
Defendant.**

**No. 103,149. February 16, 2010**

**APPEAL FROM THE DISTRICT COURT OF  
LEFLORE COUNTY**

**Honorable Danita G. Williams, Trial Judge**

¶10 The appellant/plaintiff, Keota Mills (Keota), brought an action against the appellee/defendant, Othel Gamble, Jr. (Gamble), to recover from an alleged default on a promissory note executed in 1989. Gamble argued that the suit was time-barred by the five year limitation period of 12 O.S. 1981 §95, which was in effect when the note was executed. Keota insisted that the six year limitation period of 12A O.S. Supp. 1992 §3-118(a), which became effective January 1, 1992, was applicable. The parties stipulated to the issue and the facts. The trial court determined that the action was untimely, and Keota appealed. We hold that under the stipulated facts, payments made on the note for the

years 1999 through 2001, which were intended to apply towards the balance of the note, extended the limitations period pursuant to 12 O.S. 2001 §101. Consequently, the action which was brought within three months of the last payment in 2001, was timely under either statute.

**TRIAL COURT REVERSED; CAUSE  
REMANDED FOR PROCEEDINGS  
CONSISTENT WITH OUR  
PRONOUNCEMENT.**

Marc L. Brovos, Poteau, Oklahoma, for Plaintiff/Appellant.

Douglas W. Sanders, Poteau, Oklahoma, for Defendant/Appellee.

**KAUGER, J.:**

¶1 This cause concerns an attempt to recover on a defaulted promissory note. The dispositive question presented is whether partial payment on the note extended the time within which to bring an action. The parties stipulated that the issue was whether the suit was time-barred by the five year limitation period of 12 O.S. 1981 §95,<sup>1</sup> which was in effect in 1989 when the note was executed, or the six year limitation period of the Uniform Commercial Code (UCC) 12A O.S. Supp. 1992 §3-118(a),<sup>2</sup> which became effective January 1, 1992.

¶2 However, reliance on only these statutes fails to take into consideration 12 O.S. 2001 §101,<sup>3</sup> which has remained unchanged since its enactment in 1910 and which, pursuant to 12A O.S. 2001 §103,<sup>4</sup> supplements the UCC. Section 101 provides, in effect, that partial payment extends the time within which to bring an action in any case founded on contract. Therefore, we hold that the action was timely because it was brought within three months of the last partial payment in 2001.

**FACTS**

¶3 The plaintiff/appellant Keota Mills and Elevator (Keota) entered into a promissory note based on an open account balance with the defendant/appellee Othel Gamble, Jr., (Gamble) on January 6, 1989. The principal sum of the loan was \$100,000.00, and the interest rate was 15% per annum until paid for a total of \$115,000.00. The note also included a provision for attorney fees not in excess of 15% of the unpaid debt after default. The loan was for one year, and it was secured by 300 acres of spring spinach and the 1989 soybean crops.

¶4 The parties have stipulated that Gamble made sporadic payments on the note on the following dates, in the following amounts:

2/1/1990	\$20,000.00	5/10/2000	\$2,000.00
3/05/1991	\$20,000.00	6/12/2000	\$2,000.00
10/18/1996	\$25,000.00	7/5/2000	\$2,000.00
5/11/1999	\$2,000.00	8/25/2000	\$2,000.00
6/10/1999	\$2,000.00	10/10/2000	\$2,000.00
7/7/1999	\$2,000.00	11/22/2000	\$2,000.00
8/24/1999	\$2,000.00	3/29/2001	\$2,000.00
4/11/2000	\$2,000.00	5/22/2001	\$2,000.00
		6/13/2001	\$2,000.00 <sup>5</sup>

¶5 On September 28, 2001, three months after the last payment, Keota filed a lawsuit alleging that Gamble had defaulted on the note. Gamble responded with an answer and counter-claim, arguing, alternatively, that: 1) the payments did not toll the applicable statute of limitations; 2) if the limitations period had been tolled, there was an oral novation; and 3) in the absence of a novation, Keota, instead, owed Gamble.

¶6 On October 3, 2005, the parties stipulated that the threshold legal issue in this matter was which statute of limitations controlled — the five years under 12 O.S. 1981 §95,<sup>6</sup> which was in effect when the note was executed, or the six years under 12A O.S. Supp. 1992 §3-118(a), which did not become effective until January 1, 1992.<sup>7</sup>

¶7 The trial court held a hearing on November 17, 2005. It issued an order on January 6, 2006, determining that the action was time-barred by 12 O.S. 1981 §95.<sup>8</sup> Keota appealed on March 14, 2006, and the cause was assigned to this office on September 21, 2009.

**¶8 THE PAYMENTS MADE ON THE NOTE  
EXTENDED THE LIMITATIONS PERIOD.**

¶9 The parties have stipulated to the facts and issues in an apparent attempt to narrow the question before the Court. However, they also stipulated that the debtor continued to make payments on the note from 1999 until 2001. The clear implication of this stipulation is that such payments were voluntary and were to apply to the balance due on the note. We construe a petition in error in its entirety,<sup>9</sup> and we cannot ignore applicable, controlling law.<sup>10</sup> Rules of pleading both at trial and at appellate levels have been liberalized to allow the court to focus attention on the substantive merits of the dispute rather than upon procedural niceties.<sup>11</sup> Certainly, whether the continuation of

payments serves to toll or revive the statute of limitations is within the merits of the dispute and the issues raised and argued on appeal regardless of the parties' attempt at narrowing the issue by stipulation.

¶10 Since 1910, the general rule of law is that voluntary, partial payments made on a contractual debt extends or revives the statute of limitations. Title 12 O.S. 2001 §101, which was enacted in 1910 and has remained unchanged since, provides:

In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same shall have been made, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby.

¶11 Section 101 was borrowed from the 1889 statutes of the State of Kansas. The Kansas Supreme Court in Good v. Ehrlich, 67 Kan. 94, 72 P. 545, 546 (1903) addressed its version of the statute by acknowledging that pursuant to the common law and the statute, partial payment tolled the limitations period because it was an acknowledgment of an existing liability at the time the payment was made.<sup>12</sup>

¶12 This Court, in Berry v. Oklahoma State Bank, 1915 OK 590, 151 P. 210, applied the Kansas Court's rationale when it reviewed an action brought on behalf of a bank to recover on a defaulted note. The debtor alleged that the statute of limitations had expired, claiming the note was due more than five years prior to the filing of the suit. The bank had alleged that interest payments had been paid by the debtor, thereby tolling the statute of limitations. Although the Court did not specifically address the language of §101, it did rely on the Good Kansas case which had recognized that a partial payment, if made as part of the obligation by the debtor or someone at the debtor's direction, and under such circumstances amounted to an acknowledgment of an existing liability, extended or tolled the limitation period.<sup>13</sup>

¶13 Since 1915, this Court has had numerous opportunities to discuss and apply this statutorily codified, common law rule. In 1918, the Court recognized in Ross v. Lee, 1918 OK 222, ¶ 3,172 P. 444, a case involving a promissory

mortgage note, that it was well settled that when credit is made with the consent of and by agreement with the debtor, it will constitute payment and interrupt the statute of limitations. In Eichman v. Culver, 1934 OK 526, ¶11, 37 P.2d 640, the Court in an action on a promissory note held that partial payment by the debtor, in order to toll the statute of limitations must be voluntary, and made by the debtor or someone authorized on the debtor's behalf. The Court noted that the reason for this rule was because the partial payment constituted an acknowledgment of the existing debt.

¶14 In First State Bank of Loco v. Lucas, 1934 OK 340, ¶8, 33 P.2d 622, the Court held that in order for a partial payment to revive a debt barred by the statute of limitations, it must be made under circumstances warranting a clear inference that the debtor recognized the debt as an existing liability and indicating a willingness or at least an obligation to pay towards the balance. In other words, where the circumstances and events surrounding the partial payment clearly infer that the payment made was voluntary and intended to be made on the indebtedness, the limitation period is extended or revived.<sup>14</sup>

¶15 This partial payment rule has also been recognized in other states as well. In Johnson v. Johnson, 81 Mo. 311 (1884), the Supreme Court of Missouri, addressing the limitation period on a suit brought to foreclose a mortgage recognized that: 1) the running of the statute of limitations is suspended and its bar overcome by evidence of partial payment; and 2) partial payment on a note, after the bar of the statute has become complete will revive the cause of action upon it. Similarly, in Wadley v. Ward, 99 Ark. 212, 137 S.W. 808, 809 (1911), the Supreme Court of Arkansas, when addressing the limitations period on a defaulted mortgage stated:

It is well settled that, as against the debtor, partial payments made by him to his creditor will stop the running of the statute of limitations, and mark the time from which the statute then begins to run; and the general rule is that the partial payment of a debt, which will prevent the statute of limitations from running against it, will also prevent the statute from running against the remedy on the security. . . .<sup>15</sup>

¶16 We have also recognized the partial payment rule as applied to payments made on open accounts. Pitts v. Walter, 1940 OK 387,

¶13, 105 P.2d 760, involved an open account extending over a period of eight or nine years. The last payment was made within three years prior to the commencement of the action. The Court recognized that by the weight of authority, the statute commences to run on each item of an open running account at the time of the entry thereof. The same rationale has been applied to other open accounts,<sup>16</sup> payments continued on advancements on a contract for royalty interest,<sup>17</sup> and payments made on rental agreements.<sup>18</sup>

¶17 The parties reliance on only 12 O.S. 1981 §95,<sup>19</sup> or 12A O.S. Supp. 1992 §3-118(a),<sup>20</sup> fails to take into consideration 12 O.S. 2001 §101, which provides that partial payment extends or revives the statute of limitations and 12A O.S. 2001 §1-103,<sup>21</sup> which states that the general statutes and case law of the state shall supplement the UCC. Although we have not discussed the statutory trifecta of 12 O.S. 1981 §95,<sup>22</sup> 12A O.S. Supp. 1992 §3-118(a),<sup>23</sup> and 12 O.S. 2001 §101, the Court of Civil Appeals has previously recognized that §101 applies to the UCC and, because §103 provides for general statutes to supplement the UCC, we agree.<sup>24</sup>

¶18 The partial payment rule, that a voluntary partial payment on a note tolls or revives the statute of limitations, has been applied for centuries.<sup>25</sup> The stipulated facts show that even if the action lapsed, regardless of whether it lapsed under a five year period or a six year period, it was revived in 1999, and every year thereafter by the debtor's payments towards the debt.<sup>26</sup> Accordingly, we hold that the lawsuit is not time-barred because the payments made on the note for the years 1999 through 2001, which were intended to apply to the balance, extended the limitations period. The action, brought within three months of the last payment in 2001, was timely, regardless of whether the controlling statute of limitations was five years under 12 O.S. 1981 §95,<sup>27</sup> or six years under 12A O.S. Supp. 1992 §3-118(a).<sup>28</sup> Because we reverse the trial court's ruling regarding the timeliness of the action, we also reverse the trial court's award of attorney fees to the defendant, Gamble. Consequently, we need not review the reasonableness of the trial court's enhancement bonus.

### CONCLUSION

¶19 When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the par-

ties, but rather retains the independent power to identify and apply the proper construction of the governing law.<sup>29</sup> As the Court noted in the syllabus<sup>30</sup> of First Nat. Bank of Cordell v. City Guaranty Bank of Hobart et. al., 1935 OK 1105, ¶0, 51 P.2d 573:

"A stipulation between the parties or their counsel cannot control the action of the court in a matter of law, although they may stipulate respecting facts."<sup>31</sup>

Under the stipulated facts, the debtor continued to make partial payments, albeit sporadically, on a note executed in 1989 for twelve years. The effect of such payments extended or revived any limitation period which would have expired had no payments additional payments been made. It would be illogical and incongruous to foreclose a creditor from bringing an action because payments were made, then stopped, then reinstated for an extended period of time only to lull the creditor into thinking that the debt might eventually be paid without the creditor being forced to resort to legal action. The trial court is reversed, and the cause is remanded for proceedings consistent with this opinion.

### TRIAL COURT REVERSED; CAUSE REMANDED FOR PROCEEDINGS CONSISTENT WITH OUR PRONOUNCEMENT.

TAYLOR, V.C.J., HARGRAVE, OPALA, KAUGER, WINCHESTER, REIF, JJ., concur.

EDMONDSON, C.J., WATT, COLBERT, J.J., dissent.

1. Title 12 O.S. 1981 §95 provides in pertinent part:

A. Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

1. Within five (5) years: An action upon any contract, agreement, or promise in writing; . . .

2. Title 12A O.S. Supp. 1992 §3-118(a) provides:

(a) Except as provided in subsection (e) of this section, an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six (6) years after the due date or dates stated in the note or, if a due date is accelerated, within six (6) years after the accelerated due date.

The comment to this section also provides in pertinent part:

This is a new Section, introduced as part of the 1992 UCC revisions to gain greater uniformity than was present when the statute of limitations issue was left to other local law (e.g., in Oklahoma, 12 O.S. § 95 (amended 1992)). Pre-revision Section 3-122 only specified the point at which the statute of limitations began to run; that function in current Article 3 is accomplished by the specific liability sections and the agreement. See Official Comment 1 to this Section.

For the most part, the limitations period will be longer under Section 3-118: 6 years, rather than 5 years under 12 O.S. § 95 (First) (1992). See 12 O.S. § 92 (1910). . . .

3. Title 12 O.S. 2001 §101 provides:

In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an

existing liability, debt or claim, or any promise to pay the same shall have been made, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby.

4. Title 12A O.S. 2001 §1-103 provided:

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

It was enacted in 1961 and remained unchanged until 2006. The 2006 version of the statute provides:

a) The Uniform Commercial Code shall be liberally construed and applied to promote its underlying purposes and policies, which are:

(1) to simplify, clarify and modernize the law governing commercial transactions;

(2) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; and

(3) to make uniform the law among the various jurisdictions.

(b) Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

5. Trial transcript of September 15, 2005, and accompanying exhibits 1-8 which were stipulated. Of particular interest is p. 13-14. The dissent would address only one issue — that which the parties themselves submitted to the trial court in an agreed statement of facts: whether the statutory period of limitations applicable to the claim is that of five years (12 O.S. 1981 §95) or that of six years (12 O.S. Supp. 1992 §3-118(a)). These time bars are procedural and can be tolled, even after their expiration, by restarting the statutory period's running upon the obligor's each voluntary payment of the obligation. 12 O.S. 2001 §101. Procedural time bars may be arrested, suspended, interrupted and erased. *Reynolds v. Porter*, 1988 OK 88, ¶¶13-21, 760 P.2d 816, 821-24; *Stephens v. Household Finance Corp.*, 1977 OK 137, ¶¶15-16, 566 P.2d 1163; *Hiskett v. Wells*, 1959 OK 273, ¶0, syl.1, ¶¶11-15, 351 P.2d 300, 304. Black's Law Dictionary (7th ed. 1999) at page 1495 defines a tolling statute as one that "interrupts the running of a statute of limitations..." A contrary view of tolling was urged before the trial court by argument that no obligor's part payment would operate to breathe new life into a claim that stood expired. [Hearing on November 17, 2005, Tr. at p. 24.]

6. Title 12 O.S. 1981 §95 see note 1, supra

7. Title 12A O.S. Supp. 1992 §3-118(a), see note 2, supra.

8. Title 12 O.S. 1981 §95, see note 1, supra.

9. *Gray v. Holman*, 1995 OK 118, ¶10, 909 P.2d 776.

10. Title 12 O.S. 2001 §2201 provides:

A. Judicial notice shall be taken by the court of the common law, constitutions and public statutes in force in every state, territory and jurisdiction of the United States.

B. Judicial notice may be taken by the court of:

1. Private acts and resolutions of the Congress of the United States and of the Legislature of this state, and duly enacted ordinances and duly published regulations of governmental subdivisions or agencies of this state or the United States; and

2. The laws of foreign countries.

C. The determination by judicial notice of the applicability and the tenor of any matter of common law, constitutional law or of any statute, private act, resolution, ordinance or regulation shall be a matter for the judge and not for the jury.

11. *Whitehorse v. Johnson*, 2007 OK 11, ¶7 fn. 6, 156 P.3d 41; *Davis v. GHS Health Maintenance Org., Inc.*, 2001 OK 3, ¶25 fn. 35, 22 P.3d 1204; *Markwell v. Whinery's Real Estate, Inc.*, 1994 OK 24, ¶6, 869 P.2d 840.

12. *Good v. Ehrlich*, 67 Kan. 94, 72 P. 545, 546 (1903) stated:

... In *U. S. v. Wilder*, 13 Wall. 254, 20 L. Ed. 681, the same point was ruled as follows (page 256, 13 Wall., 20 L. Ed. 681): "The principle on which part payment takes a case out of the statute is that the party paying intended by it to acknowledge and admit the greater debt to be due. If it was not in the mind of the debtor to do this, then the statute, having begun to run, will not be stopped by reason of such payment." The same principle is announced in *Arnold v. Downing*, 11 Barb. 554, and *Butler v. Price*, 110 Mass. 97. See, also, 33 Cent. Dig. § 632. *Wood on Limitations* (3d Ed.) § 97, lays down the rule in the following language: "In order to make a money payment a part payment

within the statute, it must be shown to be a payment of a portion of an admitted debt, and paid to and accepted by the creditor as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment of more being due, from which a promise may be inferred to pay the remainder. \*\*\* Payment \*\*\* must be made under such circumstances as warrant a jury in finding an implied promise to pay the balance, and, if the payment was made under such circumstances as to rebut any such promise, it does not affect the operation of the statute." In section 101 it is further stated that such payment "must have been made by the debtor in person, or by some one authorized by him, to make a new promise on his behalf. And payment made by a third person, without authority from the debtor to make it, cannot remove the statute bar, because it does not imply any acknowledgment of the debt by the debtor." . . .

13. Title 12 O.S. 2001 §101, see note 3, supra, originated from the Kansas statutes of 1889.

14. See also, *Hoskins v. Stevens*, 1947 OK 311, ¶8, 185 P.2d 911, noting that "Section 101 is more than a tolling statute. It starts the statutory period to running anew." The partial payment rule has also been recognized and upheld in *Street v. Moore*, 1935 OK 583, ¶¶11-14, 45 P.2d 73 (promissory note); *James v. Wingate*, 1937 OK 127, ¶11, 65 P.2d 452 (mortgage loan); *Thomas v. Puett*, 1936 OK 355, ¶10, 57 P.2d 877 (action on promissory note barred where no partial payments had been made after limitation period expired). See also, *Abboud v. Abboud*, 2000 OK CIV APP 116, 14 P.3d 569 (summary judgment was precluded because genuine issues of material fact existed as to whether, pursuant to §101, the debtor made partial payments of the debt, so as to extend the statute of limitations).

15. See also, *Hewlett v. Schenck*, 82 N.C. 234 (1880); *Kaiser v. Ide-man*, 57 Or. 224, 108 P.193 (1910).

16. *Drakos v. Edwards*, 1963 OK 191, ¶11, 382 P.2d 459.

17. *McLaughlin v. Laffoon Oil Co.*, 1968 OK 69, ¶28, 446 P.2d 603.

18. *Harvey v. Frizzell*, 1950 OK 190, ¶0, 222 P.2d 752.

19. Title 12 O.S. 1981 §95, see note 1, supra.

20. Title 12A O.S. Supp. 1992 §3-118(a) see note 2, supra.

21. Title 12A O.S. 2001 §1-103, see note 4, supra.

22. Title 12 O.S. 1981 §95, see note 1, supra.

23. Title 12A O.S. Supp. 1992 §3-118(a) see note 2, supra.

24. In *Central National Bank & Trust Co. v. Stettinisch*, 1987 OK CIV APP 9, 821 P.2d 1066, the Court of Civil Appeals addressed the limitation period on a promissory note wherein partial payments had been made, the action was not brought within five years of the note, but it was brought within five years of the last partial payment. The Court, addressing the limitation period prescribed by the UCC at the time, stated in ¶¶6-8 that:

Under 12 O.S. § 95 a civil cause of action upon a written contract, agreement or promise must be brought within five (5) years after the cause of action shall have accrued. Under 12A O.S. 1981 § 3-122 (1)(b) a cause of action accrues against a maker of a demand instrument upon its date, or, if no date is stated, on the date of issue. Applying only these two statutes to the fact that the demand note was executed on August 25, 1980 and suit was filed on December 13, 1985, one could easily conclude that the claim was barred. However, reliance only on the two above statutory sections fails to take into consideration 12 O.S. 1981 § 101 which provides, in effect, that partial payment extends the time within which to bring an action in any case founded on contract, and 12A O.S. 1981 § 1-103 which provides that the general statutes and case law of the state shall supplement the Uniform Commercial Code.

There is no question that partial payment on an open account either tolls or revives the statute of limitations. *Drakos v. Edwards*, 385 P.2d 459 (Ok. 1963). See also, *McLaughlin v. Laffoon Oil Company*, 446 P.2d 603 (Ok. 1968).

The principle or theory on which part payment removes the bar of the statute is that the payment is an acknowledgment or admission of the existence of the indebtedness which raises an implied promise to pay the balance, or that the payment, by its own vigor, revives the debt, no matter how old the debt may be. The efficacy of a payment to avert the effect of the statute resides in the conscious and voluntary act of the debtor, and may be qualified and limited as a new promise may be. 54 C.J.S. § 321. This was and still is the law in Oklahoma.

25. According to the Restatement 2d of Contracts 5 ST NT (1981), nearly two-thirds of the jurisdictions in the United States have provisions substantially similar to Oklahoma's 12 O.S. 2001 §101, see note 3, supra and they all originated from Lord Tenterden's Act, 9 Geo. IV, c. 14 also known as the Statute of Frauds Amendment Act which was enacted in England in 1828.

26. Title 12 O.S. 2001 §101, see note 3, supra.

27. Title 12 O.S. 1981 §95, see note 1, supra.

28. Title 12A O.S. Supp. 1992 §3-118(a) see note 2, supra.

29. *Kamen v. Kemper Fin. Servs. Inc.*, 500 U.S. 90, 99, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991).

30. When this Court used “syllabus,” the syllabus contained the law of the case and the body of the opinion was merely dictum. *Robinson v. Oklahoma Nephrology Associates, Inc.* 2007 OK 2, ¶13, fn. 2, 154 P.3d 1250; *Corbin v. Wilkinson*, 1935 OK 977 ¶10, 52 P.2d 45. The reasoning of the court in the body of the decision was an aid to the interpretation of the law expressed in the syllabus. *Robinson*, supra.

31. Though parties can stipulate to certain facts, parties cannot stipulate to conclusions of law or the legal effect of stipulated facts. *Longhorn Partners Pipeline, L.P. v. KM Liquids Terminals, LLC*, 408 B.R. 90, 95 (Bkrtcy.S.D. Tex. 2009). See also *Saviano v. Commissioner of Internal Revenue*, 765 F.2d 643, 645 (7th Cir. 1985); *Rush v. Aroostook County*, 447 A.2d 478, 479 (Me. 1982); *Hussey v. Campbell*, 189 F.Supp. 54, 57-58 (S.D. Ga. 1960). Parties cannot stipulate as to the law applicable to a given set of facts and bind the court. *Word v. Motorola, Inc.*, 662 P.2d 1024, 1027 (Ariz. 1983).

## OPALA, J., with whom TAYLOR, V.C.J. and KAUGER, J., join, concurring

¶1 I write separately from the court to explain why its pronouncement in which I concur does not offend or intrude upon the common law’s traditional respect for the role of counsel in the adversarial forensic practice, trial and appellate.

¶2 Just as the law which is to govern first-instance proceedings is shaped exclusively by the trial judge who defines its state through pretrial rulings and those offered from the bench as well as through the instructions for the guidance of the jury,<sup>1</sup> so also the issues for the appellate pronouncement of the law are not formulated exclusively by the briefs of counsel but by the reviewing tribunal’s careful analysis of the record in light of the applicable law.<sup>2</sup>

¶3 No stipulation by counsel of legal issues for trial or on appeal may prevail over the judiciary’s exclusive power to formulate in and apply to a controversy the law that governs its disposition based on the record brought before the tribunal.<sup>3</sup> This and no other principle controls the correct division of forensic responsibility between the court and counsel for the parties in the adversarial regime of the common-law system.

¶4 In the allocation of functions for the proper operation of the adversarial forensic regime of the common law counsel for the parties **bear the responsibility to propose** the law that is to govern the controversy.<sup>4</sup> The court **settles the law** that will be applied. An agreement between (or among) counsel as to the applicable law does not change the division of responsibilities. **The court is never compelled to accept the agreement reached by counsel. Its duty is unchanged and remains undiminished at all times.**<sup>5</sup>

¶5 A parties’ agreement on issues of law in a case is not binding on the court when the record indicates otherwise.<sup>6</sup> Fidelity to the law that governs the dispute must be the court’s primary and exclusive concern. The parties are always free to stipulate the facts but they may not defeat the court’s exclusive control over the law by stipulating the law that is to govern their case. **The role of determining the norms of law to govern the facts in litigation is always assigned exclusively to the tribunal rather than to the parties’ counsel.** Simply stated, when counsel agree what law should be applied but the court does not accede to their view, the judge’s choice of law will prevail over that of the lawyers.<sup>7</sup>

¶6 In sum, the court’s pronouncement today remains faithful to the traditional Anglo-American notions of adversarial regime in the forensic practice by its insistence that the court must retain full control over the law that governs the appellate process of review and by not yielding to any departure based on contrary stipulation of counsel for the parties.

¶7 While a party’s concession of harmful facts is always detrimental, no legal detriment will necessarily follow from a stipulation of improvident or inapplicable law. It is not binding on the court. **Adversarial games cannot be played with the rules of law that are due a litigant.** There lies the largely inflexible line of common-law fairness in the administration of legal process. **Absent some extraordinary conduct** by one who seeks to be relieved of the adverse consequence from conceding inapplicable law, the common law is often utterly unyielding in protecting the improvident litigant.

¶8 Lastly, the dissenter’s verbal abuse of my concurrence must not escape mention but does not deserve an answer with detailed jurisprudential analysis. The dissent manufactures nonexistent inconsistencies to create an illusion of conflicting pronouncements authored by me in the past. Even if I were guilty of every inconsistency of which I am accused, the legal quality of this concurrence would remain unaffected. It stands on solid grounds for a pronouncement of common law’s adversarial litigation verity of ancient vintage. The attack aims at the messenger’s person rather than at the text of his message.<sup>8</sup> Expert readership of this Nation as well as in the world community of the Anglo-American legal system, I am confident, will doubtless prove more fit objectively to assess the value, if any, this contribution of

mine will make to jurisprudence of the case at hand than I may do myself in today's anger from an utterly unwarranted and unprovoked attack upon my intellectual prowess and professional integrity. Restraint born of composure will silence with calm dignity all noise generated by recklessly and irresponsibly thrown personal insults in a desperate attempt to demonstrate some strained signs of inconsistent rulings in past opinions of which I am the author.

1. It is the function of *nisi prius* courts to make first-instance determinations of fact or legal questions. *Broadway Clinic v. Liberty Mut. Ins. Co.*, 2006 OK 29, ¶ 26, 139 P.3d 873, 880; *Davis v. Gwaltney*, 1955 OK 362, ¶ 13, 291 P.2d 820, 824. A trial court has the duty, on its own motion, to instruct the jury properly as to all of the fundamental issues of the case as supported by the pleadings and evidence. *Young v. First State Bank*, 1981 OK 53, ¶19, 628 P.2d 707, 712; *Bradley Chevrolet, Inc. v. Goodson*, 1969 OK 25, ¶17, 450 P.2d 500, 503.

2. Issues of law are the province of courts, not of parties to a lawsuit. As the Court noted in *Estate of Sanford v. Commissioner*, 308 U.S. 39, 60 S.Ct. 51, 59, 84 L.Ed. 20 (1939): "We are not bound to accept as controlling, stipulations as to questions of law." *Cf. United States v. John J. Felin & Co.*, 334 U.S. 624, 640, 68 S. Ct.1238, 1246, 92 L. Ed. 1614 (1948) ("[e]ven where the parties to the litigation have stipulated as to the 'facts,' this Court will disregard the stipulation, accepted and applied by the courts below, if the stipulation obviously forecloses real questions of law"). "The effect of admitted facts is a question of law." *Nelson v. Montgomery Ward & Co.*, 312 U.S. 373, 376, 61 S.Ct. 593, 595, 85 L.Ed. 897 (1941).

3. The parties may settle a controversy and request a judgment conformable to the terms of their agreement. But they may not direct that a judgment be rendered according to their stipulation of facts or of law. The common law's adversarial forensic practice does not reduce the judiciary to a servant status. Neither a stipulation of facts nor one of law will prevail over the duty and power of the appellate judiciary to render that judgment which is dictated by the law to be applied to the record before the court. The parties press their positions but the appellate court is bound by the law and by the record before it in deciding what issue will govern the controversy and how these issues should be resolved.

See, e.g., *Swift & Co. v. Hocking Valley R. Co.*, 243 U.S. 281, 289-90, 37 S.Ct. 287, 289, 61 L.Ed. 722 (1917), where the Court held:

If the stipulation is to be treated as an agreement concerning the legal effect of admitted facts, it is obviously inoperative; since the court cannot be controlled by agreement of counsel on a subsidiary question of law.... 'The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. ... No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard.' *California v. San Pablo & T. R. Co.* 149 U. S. 308, 314, 37 L. ed. 747, 748, 13 Sup. Ct. Rep. 876. See *Mills v. Green*, 159 U. S. 651, 654, 40 L. ed. 293, 294, 16 Sup. Ct. Rep. 132.

4. According to one commentator, "[t]he jury is bound to decide the facts on the basis of legal instructions that, **while given by the judge, are initially proposed by the advocates.**" Geoffrey C. Hazard, Angelo Dondi, *Responsibilities of Judges and Advocates in Civil and Common Law: Some Lingering Misconceptions Concerning Civil Lawsuits*, 39 *Cornell Int'l L.J.* 59, 61 (2006) (emphasis supplied). As one commentator notes, "[i]t is still the American lawyer - not the court - that is responsible for gathering and presenting the proof. It is still the American lawyer - not the court - that is responsible for choosing the witnesses and for questioning and cross-examining them." Oscar G. Chase, *Legal Processes and National Culture*, 5 *Cardozo Journal of International and Comparative Law* 1, 6 (1997).

5. *United States v. John J. Felin & Co.*, *supra* note 2, 334 U.S. at 640, 68 S.Ct. at 1246; *Swift & Co. v. Hocking Valley R. Co.*, *supra* note 3, 243 U.S. at 289-90, 37 S.Ct. at 289; *California v. San Pablo & T. R. Co.*, *supra* note 3, 149 U.S. at 314, 13 S.Ct. at 878.

6. See, e.g., *Clark v. Munroe*, 407 So.2d 1036, 1037 (Fla.App. 1981). There the court held that while the parties may stipulate the use of summary judgment procedure, this does not authorize "the trial court to accept such a stipulation **where the record reveals** disputed issues

of material facts. **The parties cannot by stipulation control questions of law.**" *Id.*, citing *Massachusetts Bonding & Ins. Co. v. Bryant*, 175 So.2d 88 (Fla. 1st DCA 1965), *aff'd.*, 189 So.2d 614 (Fla.1966)(emphasis supplied).

7. The adversarial forensic practice of the Anglo-American law does not reduce appellate judges to the status of impotence comparable to that of eunuchs in the sultan's harem. When a parties' stipulation attempts to reduce judicial review of a case to a single question which, if answered, would not fully dispose of the case, the appellate court does not violate any rule of common-law adversarial system by extending its consideration beyond the frame of the stipulation to reach other issues necessary for a legally correct disposition of the case.

8. Interpersonal wars conducted in courts composed of multiple judges sitting in the same case, which inevitably move the focus of a legal controversy from its subject-matter to the personality traits of each combatant judge, tend to becloud and distort the issues under the court's consideration by injecting extraneous impurities into the decisional process.

## EDMONDSON, C.J., dissenting.

¶1 The majority has determined this matter on an issue — tolling under 12 O.S. 2001, §101 — which was not framed or argued by the parties. This 2001 action on a 1989 promissory note was submitted to the trial court by the parties as an agreed question of law on stipulated facts and we are not free to substitute our own issues for those issues which were actually presented below.

¶2 It is well settled that appellate courts are not free to raise issues *sua sponte* and address claims or defenses that the parties did not present in the court below. *Jordan v. Jordan*, 2006 OK 88, 151 P.3d 117, 120. Our decisions recognize that in a case such as this where the parties have submitted their case to the trial court on an agreed statement of facts, it is our duty on appeal to apply the law to those facts as a court of first instance and to direct judgment accordingly. *Rist v. Westhoma Oil Co.*, 1963 OK 126, 385 P.2d 791, 792; *Landy v. First National Bank & Trust Co. Of Tulsa*, 1962 OK 12, 368 P.2d 987, 989. A judgment based on an agreed statement of facts is a mere legal conclusion on such facts and the only question presented for review is the propriety of the judgment on the facts so agreed upon. *Anderson v. Keystone Supply Co.*, 1923 OK 410, 220 P. 605, 605-606.

¶3 In *Whitten v. Kroeger*, 183 OK 327, 82 P.2d 668, 671, an action brought to recover on a promissory note was submitted to the trial court upon an agreed statement of facts and we rejected the defendants' attempt to raise for the first time on appeal the defense of a statute of limitations which they had not raised by the agreed statement of facts. Another limitations statute had been raised below, but it was held inapplicable and not subject to review. Based on previous decisions, this Court found that where a case is submitted on an agreed state-

ment of facts, that agreed statement supersedes the pleadings and the only question which may be considered is whether such facts require judgment for plaintiff as a matter of law. *McGrath v. Rorem*, 123 OK 163, 252 P. 418, 419 - 420, followed the general rule that where facts are submitted to the court by agreement, it is necessary only for the court to apply the law to those facts; further, that only questions of law are raised for review on appeal. The Court concluded that such an agreement has the effect of waiving any error in the action of the court in its rulings on the pleadings. See also *Goodwin v. Kraft*, 23 OK 329, 101 P. 856, 859.

¶4 The parties before us agreed to their statement of facts and submitted to the trial court the legal issue of which statute of limitations applied to the action on the subject promissory note: was it five years under 12 O.S. 1981 §95, which was in effect when the note was executed, or six years under 12A O.S. Supp. 1992 §3 -118(a), which was enacted after the note was executed. The parties stipulated that the time period which was the focus of concern was March 5, 1991 to October 18, 1996, during which time defendant made no payments on the note. The parties agreed that if the five year general statute applied, plaintiff's cause of action would be time barred because defendant's October 18, 1996 payment was beyond five years from the March 5, 1991 payment. Conversely, if the six year limitation of 12A O.S. Supp. 1992 § 3 -118(a) should apply and be given retroactive application, the matter would proceed to trial on the merits as a result of defendant's October 18, 1996 payment, which was within the 6 year period from the prior March 5, 1991 payment, creating another 6 year period and making the September 28, 2001 filing of suit timely. Which limitations statute applied is the question the parties framed and submitted to the trial court and then to us. The trial court found that 12A O.S. Supp. 1992 §3-118(a) could not be applied retroactively and that the statute of limitations applicable to the action was five years under 12 O.S. § 95. The trial court accordingly dismissed Plaintiff's suit as time-barred as it was filed fewer than six years but more than five years after the 1996 payment, as agreed upon by the parties. In this appeal from an agreed question it is our duty to apply the law to the question submitted by the parties and answered by the trial court.

¶5 I believe the trial court's ruling that 12A O.S. Supp. 1992 3-118(a) could not be applied

retroactively was correct and I would affirm its judgment in favor of defendant.

#### **WATT, J. dissenting:**

¶1 The majority opinion not only calls into question, but essentially destroys, over ninety-five years of precedent laid down by this Court.<sup>1</sup> After publication of the majority's pronouncement, the practice of utilizing "trial stipulations" as we have known it and its effectiveness in streamlining the trial process will be forever lost. The opinion's change of the rules regarding trial preparation: blind sides the appellee/defendant, Othel Gambel, Jr. (Gamble), without any opportunity for a response to an issue first considered *sua sponte* on appeal; robs Gamble of the trial court's discretionary award of a lodestar and bonus fee where no abuse of discretion in allowing either award exists;<sup>2</sup> causes an unnecessary waste of judicial resources by creating a situation where the trial court must hear the testimony of witnesses in a situation where it was obvious previously that no such testimony was required;<sup>3</sup> and surprises the appellant/plaintiff, Keota Mills & Elevator (Keota), with a late Christmas present, tied up in ribbon and bows created out of whole cloth by the majority through the changing of all the rules and by declaring it the winner on grounds neither party thought were relevant or even part of the rule book.

¶2 The concurring opinion lends no credence to the majority position. Rather, it is a blatant demonstration of the lengths to which the majority will go to reach a result in an individual cause without giving any fidelity or allegiance to the importance of stipulation law as it has developed in Oklahoma over the last century.

¶3 Most certainly, if the majority prevails, the only appropriate manner in which to handle this cause is to make it prospective to this cause and in all others which may be in the appellate pipeline.<sup>4</sup> Otherwise, this Court has, through judicial fiat, set a snare for unsuspecting litigants, lawyers, and trial courts who were well versed in stipulation law as it stood throughout this litigation and by which they understood themselves to be governed. Failure to apply the majority opinion prospectively deprives those who have relied on this Court's pronouncements of due process protections.<sup>5</sup>

¶4 My allegiance to precedent carefully and thoughtfully crafted by this Court over almost a century and my oath of office prevent me

from participating in a decision which will have unwarranted legal ramifications and place this Court in the position of a "Supreme Trial Panel." Therefore, I dissent. The only way to keep from completely disrupting this cause and any other currently pending is to give absolute prospective application to the majority's surprising defection from well-settled stipulation law.<sup>6</sup>

### STIPULATED FACTS

¶5 **The only applicable facts in the instant cause are those to which the parties stipulated in a hearing scheduled before the trial court on September 12, 2005.** On the record, the parties agreed that whether the cause should proceed would be governed by a single issue: whether the five-year or the six-year statute of limitations should apply.<sup>7</sup> If as Gamble contended and the five-year statute of limitations governed the cause, the collection effort would be barred. Conversely, if Keota was successful in its attempt to apply the six-year statute of limitations, the cause would proceed for a determination of the balance due on the note along with associated issues.<sup>8</sup>

¶6 When argued to the trial court on November 17, 2005, the parties presented the statute of limitations as the "cruz" of the issue.<sup>9</sup> In preparing its order, filed on January 12, 2006, the trial court recognized that the cause was to be governed by the parties' binding stipulations and that the first step in the adjudication would be to determine the applicable statute of limitations period.<sup>10</sup> In ruling that the cause was governed by the five-year limitations period, the trial court again recognized the stipulations and agreement of the parties.<sup>11</sup>

### THE MAJORITY'S UNWARRANTED INTERVENTION

¶7 In Maule v. Independent School Dist. No. 9 of Tulsa County, 1985 OK 110, ¶7, 714 P.2d 198, we held the union and the employer to stipulations entered defining the bargaining unit on grounds that parties to a contract are bound by the stipulated terms thereof. In White v. Amoco Prod. Co., 1985 OK 55, ¶8, 704 P.2d 470, Neimeyer v. United States Fidelity & Guaranty Co., 1990 OK 32, ¶12, 789 P.2d 1318, and Mehdipour v. State ex rel. Dept. of Corrections, 2004 OK 19, ¶5 n. 9, 90 P.3d 546, not only did this Court not *sua sponte* raise issues not presented to the trial court on appeal, but also we refused to allow the parties to engage in the activity. In Westinghouse Elec. Corp. v. Grand

River Dam Auth., 1986 OK 20, ¶17 n. 11, 720 P.2d 713 and Tulsa County Budget Bd. v. Tulsa County Excise Bd., 2003 OK 103, ¶18 n. 31, 81 P.3d 662, we refused to issue advisory opinions. Furthermore, in Tulsa County, the Court acknowledged that it was bound by the record presented for review. **Inexplicably, the author of each of the above cited cases is the same Justice authoring the majority opinion here.**

¶8 Here, the majority ignores the teachings of all these causes. It throws out stipulations that the parties and the trial court agreed were determinative of the issue to be decided. The majority decides the cause on an issue which was never presented to the trial court and which it raises *sua sponte*. Finally, it issues an advisory opinion on an issue which can be found nowhere in the record presented either to the trial court or on appeal. The practical result of adopting the majority opinion is to overrule all the cases cited in ¶5 to the extent that they conflict with today's pronouncement.

### THE MAJORITY SIMPLY "MISSES THE POINT" AND MISREPRESENTS THE LAW BY QUOTING FROM AN ISOLATED CASE WITHOUT LOOKING AT THE CONTEXT.

¶9 The majority does not attack the opinions relied upon herein regarding the history of the sanctity of stipulations and their place in the resolution of issues before the trial court, **because it cannot.** Rather, the majority takes issue with the statement that "[t]he majority decides the cause on an issue which was never presented to the trial court and which it raises *sua sponte*." In so doing, it again "misses the point." The fact that the parties may have mentioned in closing arguments a statute **which their stipulations make inapplicable** will not justify the kind of judicial avarice represented by the majority's ignoring **the specific stipulations made and presented to the trier of fact as governing the cause.**

¶10 The majority's reference to the syllabus in First Nat'l Bank of Cordell v. City Guaranty Bank of Hobart, 1935 OK 1105, 51 P.2d 573 as standing for the proposition that parties may not affect the law applied to a cause by the Court through the utilization of stipulations is misplaced. In First Nat'l, the Court determined that the garnishee could not affect the jurisdiction of the trial court by stipulation. The holding in First Nat'l is consistent with case law which refused to allow parties' stipulations to confer jurisdiction where none existed.<sup>12</sup>

¶11 In a more recent decision, *State ex rel. State Ins. Fund v. JOA, Inc.*, 2003 OK 82, 78 P.3d 534, we held that the State Insurance Fund **would be bound by its stipulation during litigation that a specific attorney fee statute would apply to the action.** In so doing, we recognized that the Court was being presented with a stipulation of law. We also acknowledged that limitations existed on stipulations **involving the power and structure of government.**

¶12 The JOA Court relied heavily on a cause authored by Justice Opala, *Strelecki v. Oklahoma Tax Comm'n*, 1993 OK 122, 872 P.2d 910. In that case, we noted that the Tax Commission had entered a stipulation on an issue of law and taken inconsistent positions on issues of law. In addressing the extent to which the Tax Commission was bound by its counsel's argument in the litigation, the *Strelecki* Court stated the following:

A party on appeal cannot take a position inconsistent with that maintained before a trial tribunal. While **this court** may decide a public-law case on dispositive issues, **it will not relieve a party of a solemn commitment to a position argued both below and on appeal unless it is so contrary to the applicable law that it would amount to an *ultra vires* act. . . . *The Commission will not be heard* - at this late hour - to deny liability upon a *changed* interpretation of the state's remedial regime for refunds. The government stands before us on the footing of an *ordinary appellee*. It will not receive a more favorable treatment than that afforded other appellate litigants in a similar situation. [Footnotes omitted. "Bold" added for emphasis.]**

The above quotation is supported by authority recognizing that: **neither party on appeal will be allowed to change the theory of the case from that on which it was presented to the trial court;**<sup>13</sup> and, **parties are bound in the appellate court by the theories on which a case was tried below.**<sup>14</sup> Nevertheless, **the majority here strips private parties of the protections granted by this Court's jurisprudence on stipulations where it would not do so to a State agency.** There can be no justice in such a result.

## THE CONCURRING OPINION LEND NO CREDENCE TO THE MAJORITY POSITION.

¶13 For the most part, the concurring opinion is interesting in what it does not do. First, in its exposition on what it perceives as being the dividing line between the duties of a trial court and those of appellate adjudicator, it finds little support in Oklahoma law. It does rely upon an opinion authored by Justice Opala, *Broadway Clinic v. Liberty Mutual Ins. Co.*, 2006 OK 29, 139 P.3d 873, as one such cause which delineates the differences between a trial court's fact finding and this Court's appellate review. In that opinion, Justice Opala wrote the following:

**" . . . It is not the function of this court to make first-instance determinations of fact or legal questions which have been neither raised nor assessed at *nisi prius*. . . ." [Bold added.]**

As noted, the issue upon which the majority decides this cause was merely mentioned in arguments before the district court. It was not presented as a deciding factor for consideration by the trial tribunal.

¶14 The second thing which is interesting for its lack of discussion by the concurring opinion is any attempt to distinguish *Strelecki v. Oklahoma Tax Comm'n*, 1993 OK 122, 872 P.2d 910. Justice Opala authored *Strelecki* in which he emphasized that this Court will not relieve parties of the "solemn commitment" taken before the finder of fact.

## DUE PROCESS CALLS FOR ADEQUATE NOTICE TO A PARTY WHOSE RIGHTS MAY BE ADVERSELY AFFECTED BY JUDICIAL ACTION.

¶15 Even if the result which the majority proposes would be appropriate under its analysis, it cannot bind these parties. To do so would be patently unfair. It "changes the rules of the game" which, heretofore, had been settled by precedent-setting jurisprudence at the time the cause was heard by the trial court. Due process requires adequate notice to parties whose rights may be adversely affected by judicial action. As Justice Opala stated for the majority in footnote No. 21 of *McDanel v. Lynn Hickey Dodge, Inc.*, 1999 OK 30, 979 P.2d 252:

"The standard of fairness exacted by the Due Process Clause mandates that notice meeting minimum constitutional standards precede judicial action. . . . Notice must be

reasonably calculated to inform interested parties of every critical stage so as to afford them an opportunity to meet the issues at a meaningful time and in a meaningful manner. . . .” [Citations omitted.]

Here, all the parties, along with the trial court, will be amazed to discover that the rules they all thought were applicable are inapposite to this proceeding. Due process necessitates, just as it did in *McDaneld*, that the majority opinion be given completely prospective application.

## CONCLUSION

¶16 Before today, stipulations were solemn admissions binding on the parties and the court.<sup>15</sup> They were agreements between counsel concerning the business before the court and were a favored means to shorten, clarify or settle litigation.<sup>16</sup> Stipulations have served as evidentiary substitutes dispensing with the need to take testimony.<sup>17</sup> Through the use of stipulations, parties could expand or contract issues for determination. Having done so, they were bound by the same.<sup>18</sup> **That was the well-settled law in Oklahoma before today’s majority opinion.**

¶17 Today’s pronouncement is a death knell to trial practice and procedures as we and the practicing bar have known it for over nine decades. Every case, now in the appellate pipeline along with those to be appealed in the future will be adversely affected. No longer may trial stipulations be agreed to and faithfully followed, as did the trial court below, with any confidence. Instead, the parties, the sitting trial judges, and the practicing bar must realize that such stipulations are now “fresh meat” for any appellate court to carve up as it sees fit. Those tribunals are now free to go outside the stipulated records and “make it up as they go along.”

¶18 I cannot now nor shall I ever in the future turn this Court into a “Supreme Trial Court” with the unlimited ability to give “overs” where none have heretofore been allowed. To do so, would require that ninety-five years of precedent be trampled and result in my violating my oath of office. As I will do neither, I dissent.

¶19 The only way to guarantee that the litigants here and those who may have made stipulations upon which trial tribunals have relied in their decisions to be guaranteed the constitutional protections of due process is to

make the majority’s pronouncement completely prospective. In so doing, the change in stipulation practice forecasted by the majority opinion would have **no effect in the present cause or in those now pending in the appellate pipeline.**<sup>19</sup>

1. *State ex rel. State Ins. Fund v. IOA, Inc.*, 2003 OK 82, ¶6, 78 P.3d 534 [Stipulations governing applicability of statute bound the parties.]; *State ex rel. Dept. of Human Servs. v. Baggett*, 1999 OK 68, ¶21 n. 13, 990 P.2d 235 [Stipulations admitting or agreeing to certain facts for the purpose of trial are binding and conclusive on the parties during the progress of the trial and on appeal.] [**Kauger, J. concurring**]; *Bonner v. Oklahoma Rock Corp.*, 1993 OK 131, ¶5 n. 15, 863 P.2d 1176 [Stipulations are solemn admissions and are binding upon the parties and the court.]; *Strelecki v. Oklahoma Tax Comm’n*, 1993 OK 122, ¶17, 872 P.2d 910 [Tax Commission held to stipulations and would not be relieved of legal position inconsistent with that maintained before the trial tribunal.]; *State ex rel. Trimble v. City of Moore*, 1991 OK 97, ¶13 n. 14, 818 P.2d 889 [Stipulations filed in case are solemn admissions and binding and conclusive on the court.] [**Opinion by Kauger, J.**]; *Maule v. Independent School Dist. No. 2*, 1985 OK 110, ¶7, 714 P.2d 198 [Stipulation defining bargaining unit binding.] [**Opinion by Kauger, J.**]; *Nanonka v. Hoskins*, 1982 OK 53, ¶15, 645 P.2d 507 [**Stipulation admitting or agreeing to certain facts for the purpose of trial is binding and conclusive on the parties during trial and appeal.**]; *Frank v. National Printing & Office Supply Co.*, 1959 OK 108, ¶16, 343 P.2d 1085 [Even irregularly entered stipulations are binding on the parties and on appeal.]; *Elliott v. Hunt*, 1946 OK 233, ¶0, 172 P.2d 804 [Agreed stipulation on description of property would bind party on appeal.]; *Evans v. Raper*, 1939 OK 271, ¶0, 93 P.2d 754 [Litigants may stipulate concerning their respective rights and are bound thereby.]; *Callaway v. Sparks*, 1939 OK 180, ¶0, 89 P.2d 275 [Stipulation made in open court is binding and conclusive during trial and on appeal.]; *Yamie v. Willmott*, 1939 OK 130, ¶0, 88 P.2d 325 [Stipulations made in open court are binding and conclusive on parties during trial and on appeal.]; *Bruner v. Burch*, 1937 OK 63, ¶3, 65 P.2d 1215 [Stipulating that cause involved only one issue precluded consideration of issue of when limitations would run.]; *Ray v. Ridpath*, 1930 OK 413, ¶12, 291 P. 546 [Stipulation is a pleading which binds the party.]; *First Nat’l Bank of Oklahoma City v. Foster*, 1924 OK 1054, ¶3, 233 P. 762 [Bank held to stipulations on settlement of indebtedness.]; *Skein v. Junction Oil & Gas Co.*, 1920 OK 365, ¶9, 193 P. 988 [Where a party admits or stipulates to certain facts, the court cannot indulge in inferences for the purpose of avoiding the binding effect of the admission or stipulation.]; *Loman v. Paullin*, 1915 OK 661, ¶0, 152 P. 73 [Stipulations are the equivalent of judicial admissions.]; *Reeves Realty Co. v. Brown*, 1915 OK 126, ¶4, 147 P. 318 [Parties by stipulations make the law for any legal proceedings to which they are parties, which not only bind them, but which the courts are bound to enforce.]

2. A trial court’s attorney fee award is reviewed for an abuse of discretion. 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. *Spencer v. Oklahoma Gas & Elec. Co.*, 2007 OK 76, ¶13, 171 P.3d 890.

3. Transcript of Hearing on Defendant’s Application for Attorney Fee and Bonus Award, held on April 27, 2006, and providing in pertinent part at p. 35:

“ . . . THE COURT: The case was set for nonjury trial and then the parties entered into lengthy written stipulations and then presented their oral argument, because after stipulating to the facts, there was no call for witnesses. . . .”

4. *Gomes v. Hameed, M.D.*, 2008 OK 3, 184 P.3d 479, in which **Justice Opala’s dissent** takes issue with the majority’s having declared and given retrospective effect to a new rule of Oklahoma common law thus depriving the parties of due process. The exact action the Court takes in the instant cause.

5. *McDaneld v. Lynn Hickey Dodge, Inc.*, 1999 OK 30, 979 P.2d 252, in which **Justice Opala authored the opinion** giving prospective application to the cause in order to avoid an unpatently unfair result, as well as one which would be offensive to due process standards, by “changing the rules” after the cause was finally determined.

6. *McDaneld v. Lynn Hickey Dodge, Inc.*, see note 5, supra.

7. Transcript of Scheduling Hearing Regarding Briefing and Oral Argument of the Parties, September 12, 2005, providing in pertinent part at pp. 5-6:

“ . . . MR. MERRITT: Your Honor, if I might. We have — I guess this case turns on as Dougal said, whether or not a five or six-

year statute of limitations is applicable in this case. If the Court were to rule that a six-year statute is applicable, we would proceed. . . . However, if the Court were to rule that a five-year statute is applicable, we would just want that — the order to be a final order or a journal entry would be our request.

MR. SANDERS: . . . What we are getting into, Judge, is that if you rule it's a five-year for the defendant, that ruling is going to mean that suit on the promissory note is time-barred . . ."

8. Transcript of Scheduling Hearing Regarding Briefing and Oral Argument of the Parties, September 12, 2005, providing in pertinent part at pp. 10-11:

" . . . THE COURT: So, for the purposes of today's argument, the both of you stipulate that a \$20,000 payment was made on or about February 1st, 1990 and that an approximate sum of \$3972.60 was applied to the principal and \$16,927.40 was applied to the interest and Mr. Sanders stipulated that if the six-year statute of limitations were to be the finding of the Court, that these figures will not be carved in stone as to the balance due at trial on the issue of the balance due.

MR. SANDERS: Exactly.

THE COURT: Is that the stipulation of both parties?

MR. MERRITT: Yes, Your Honor. . . .

MR. SANDERS: Yes, that's it exactly. . . ."

9. Transcript of Oral Argument to the Court, November 17, 2005, providing in pertinent part:

at p. 5

" . . . MR. SANDERS: . . . As stipulated, the promissory note at issue was executed on 1-6 of '89. At that point in time Title 12A, OS 3-118 did not address the statute of limitations and only spoke as to when it commenced to run. It did not provide a prescriptive period. The law in effect when this promissory note was executed on 1-6-89 is the law advanced by plaintiff [sic] at Title 12A - Title 12, Section 95 A-1, that being a five-year statute of limitations period. The parties have stipulated that this is the crux of the issue due to a time period that exists from March 5th of 1991 when, when a \$20,000 payment was paid, no payments occurring again until 10-18 of 1996 when a \$25,000 payment was made. Within that time period you are in excess of five years but less than six, and that's what brings us before the Court today. . . ."

at pp. 19-20

" . . . MR. MERRITT: . . . Your Honor, as plaintiff - I'm sorry. As defendant's counsel has previously said, the main issue that we are asking the Court to rule upon today is whether or not the six-year statute of limitations in Title 12A, Section 3-118A governs which provides for a six-year limitations period or alternatively whether 12 OS 95 governs which is the general contract statute and that statute, Your Honor, is the five-year statute of limitations. In this case in the present matter, more than five but less than six years passed between the March 5th, 1991 \$20,000 payment that had been made and the October 18, 1996 \$25,000 payment that they then made. . . ."

10. Order of the trial court filed on January 12, 2006, appearing at p. 110 of the record on appeal and providing in pertinent part:

" . . . 1. The Parties herein have agreed that the first step in this case is adjudication of the applicable statute of limitation period. . . ."

11. Journal entry of judgement filed on February 15, 2006, appearing at pp. 117-18 of the record on appeal and providing in pertinent part:

" . . . The parties stipulated and agreed on the record that the Court's adjudication of Title 12 O.S. § 95 (A) (1) as the applicable statute of limitations herein, would result in a time bar of Plaintiff's action and that final journal entry of judgement should thereupon be entered. The Parties stipulated and agreed on the record that the Court's adjudication of Title 12 A.O.S. § 3-118(a) as the applicable statute of limitations herein, would result in the case proceeding to Trial on the remaining issues. . . ."

The Court upon review of all the parties stipulations of record, the exhibits admitted into evidence by stipulation on the record, the Briefs of the parties and the parties oral arguments on the statute of limitations issue does now hereby ORDER, ADJUDGE and DECREE as final judgement here that Title 12 O.S. §95 (A)(1) is the applicable statute of limitations on Plaintiff's promissory note action and that Plaintiff's action is time barred. . . ."

12. *Jacobs v. Real Estate Mort. Trust Co.*, 1926 OK 620, 249 P. 930; *Continental Baking Co. v. Campbell*, 1936 OK 200, 55 P.2d 114; *Pinkston Hardware Co. v. Hart*, 1935 OK 674, 46 P.2d 501.

13. *Agricultural Ins. Co. v. Kouba*, 1956 OK 70, 294 P.2d 583.

14. *Chrysler Corp. v. Walter E. Allen, Inc.*, 1962 OK 189, 375 P.2d 878; *Griswold v. Public Serv. Co. of Oklahoma*, 1951 OK 342, 238 P.2d 322.

15. *Bonner v. Oklahoma Rock Corp.*, see note 1, supra; *State ex rel. Trimble v. City of Moore*, see note 1, supra.

16. *Nanonka v. Hoskins*, see note 1, supra.

17. *State v. Torres*, 2004 OK 12, ¶29, 87 P.3d 572.

18. *Bruner v. Burch*, see note 1, supra.

19. *McDanel v. Lynn Hickey Dodge, Inc.*, see note 5, supra

2010 OK 10

**DONALD EARL DEWEESE and PAMELA DEWEESE, Plaintiffs/Appellees/Petitioners, v. PATTERSON UTI DRILLING COMPANY,a Limited Partnership, Defendant/Appellant/Respondent.**

**No. 101,686. February 9, 2010**

**ON CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION II**

¶0 In a negligence action brought against a drilling contractor to recover for injuries suffered when a component of a drilling rig fell on the bulldozer operated by plaintiff during the rigging-up operation, the District Court of Blaine County, Hon. Mark A. Moore, Judge, entered judgment on the jury verdict in favor of plaintiffs. The Court of Civil Appeals found the trial court erred in instructing the jury on *res ipsa loquitur*. On certiorari previously granted,

**OPINION OF THE COURT OF CIVIL APPEALS VACATED; JUDGMENT OF THE TRIAL COURT AFFIRMED**

Donald R. Liles, Aaron R. Sims, Liles & Sims, P. L. L.C., Woodward, Oklahoma, for Plaintiffs/Appellees

Richard E. Hornbeek, Kevin E. Krahl, James S. Daniel, Hornbeek, Krahl Vitali & Braun, P.L.L.C., Oklahoma City, Oklahoma, for Defendants/Appellants

EDMONDSON, C.J.

¶1 The issue on certiorari is whether the Court of Civil Appeals erred when it reversed the judgment entered upon a jury verdict in favor of plaintiffs, Donald Deweese and his wife, Pamela, because the trial court instructed on *res ipsa loquitur*.<sup>1</sup> Plaintiffs contend the appellate court reached its erroneous decision by weighing the evidence and substituting its judgment on contested factual matters for that of the jury. Upon certiorari previously granted, we reverse the decision of the Court of Appeals and reinstate and affirm the judgment of the trial court.

¶2 Donald Deweese was seriously injured on July 1, 2001, while he was working as an independent contractor providing bulldozing ser-

vices to Patterson Drilling Company (Patterson) in a “rigging-up” operation. Patterson owned the drilling rig and its various components and had contracted with Lane Motor Freight Lines (Lane) to move all the components from an old drilling site to the new one. The move required that all the rig components be taken apart (“rigged down”) at the old location, then loaded onto trucks and moved to the new location and reassembled (“rigged up”). Lane contracted with Eller Trucking (Eller) for the use of a tandem truck to move the rig and for the services of Mr. Eller as its operator.

¶3 The rigging-up procedure required moving two sets of rig substructures, each consisting of a bottom “pony” sub and an upper “top” sub, from the truck and stacking the top subs onto the pony subs. These substructures are massive iron pieces which must be strong enough to support the derrick and other rig components; they are approximately 47 feet long, 11 feet tall and weigh more than 50,000 pounds each. At the time of the accident, Mr. Deweese was the operator of the dozer and was assisting a forklift driver and the Eller truck driver in an effort to place a top sub onto a pony sub when the top sub toppled off the pony sub and fell onto the cab of the bulldozer, crushing the cab and severely injuring Mr. Deweese.

## II.

¶4 The Deweeses brought suit in negligence for damages against the independent contractors, Lane and Eller, and also against Patterson, the drilling contractor and rig owner. The Deweeses settled with the independent contractors prior to trial. Proceeding to jury trial against Patterson alone, they presented evidence to show that Patterson had control of all activities at the work site; owned, maintained and controlled all the rig components, including the top sub and the pony sub involved in the accident; and failed to adequately plan, supervise and manage the rigging-up procedure.

¶5 Their evidence, though controverted, included the following: (1) Patterson’s toolpusher was the overall supervisor and had ultimate authority, the “final say,” on all matters including safety; (2) on the day of the accident, the toolpusher was not present to supervise the operation even though stacking the subs was the most dangerous part of the rigging-up procedure; (3) Patterson’s “relief” tool-

pusher on duty that day was unfamiliar with the rig, the location and the people involved, and was not present during the stacking effort; (4) Patterson did not include the rigging-up procedure in its safety manual and did not have a safety meeting regarding the process; and (5) though aware that the safest method to stack the subs was by using a crane, Patterson did not require or allow for the expense of a crane, accepting instead the lowest bid from rig movers.

¶6 Further: (6) Patterson had provided a location which was too small and cramped for the normal procedure of using two gin trucks to lift the top sub from the tandem truck with their winches; (7) the derrick had been assembled too close to the location, so there was not adequate space for the trucks to work, necessitating that smaller vehicles — the forklift and Mr. Deweese’s dozer — were used instead; (8) the pony sub was an unsafe instrumentality because it did not have full-length channel iron guides which would have prevented the top sub from falling; and (9) the top runners of the pony sub should have been cleaned and lubricated. The last two points were offered to show that Patterson should have altered the pony sub by preparing and equipping it with full-length channel guides into which the bottom rails of the top sub could have been placed in order to safely slide the top sub into stable position. Testimony was presented to show this modification could have been accomplished easily and inexpensively and would have prevented the accident from happening.

¶7 Over defendant’s objection, the trial court instructed the jury on *res ipsa loquitur*. The jury found in favor of the Deweeses and fixed their damages at \$3,200,000. In light of the settlement previously reached between the Deweeses and Eller and Lane, the trial court granted Patterson a setoff in the amount of \$1,000,000. Patterson appealed.

## III.

¶8 Based on its analysis of the evidence, the Court of Civil Appeals concluded that the *res ipsa loquitur* instruction was not warranted and reversed the matter for new trial. First, it found that plaintiffs failed to establish “who or what” had caused the accident; that while plaintiffs had presented evidence supporting several possible theories of fault, including a combination of negligence on the part of the independent contractors together with the defective

condition of the pony sub, they never “pointed to one actor or precise act that caused the sub to fall” nor had they “decided on one cause of the accident.” (Opinion, pp.12-13.) Second, it found the evidence showed, as a matter of fact, that Patterson had no control over the equipment used in the process, stating that Patterson “did not have exclusive control over the instrumentality that caused the accident; in fact, it apparently had no control over any instrumentality involved in the accident;” further it viewed the evidence as showing that the independent contractor, Lane, was in control of the subs during their move and that Donald Deweese had “more control of the instrumentality than Patterson.” (Opinion, p. 13 -14.)

¶9 That court’s unpublished opinion expressly recognizes that there was evidence before the jury which showed that Patterson had responsibility for, and control over, the entire operation and that Patterson failed to use due care in conducting the operation. The court related that testimony was elicited to show plaintiff’s injury may have been attributable in part to actions of other independent contractors, but that the accident “would not have happened if there had been full channel guides on the pony subs; if a crane had been used; ‘if Patterson had had the foresight to perhaps clean and lubricate the top runners on the pony sub’; if the top sub ‘hadn’t gone a little bit crooked and perhaps hit a guide and kicked up on the sub and then slid off’; or ‘if perhaps the tool pusher for Patterson had been there and had a safety meeting before they started and said here’s the way we need to put those subs together’.” (Opinion, p.9.)

#### IV.

¶10 On certiorari, plaintiffs argue that *res ipsa loquitur* is applicable under the facts of this case and that the Court of Civil Appeals reached its erroneous conclusions by intruding into the exclusive province of the jury and substituting its own judgment on contested factual issues for that of the jury. They contend that in doing so the appellate court also disregarded established decisions of this Court governing proper application of *res ipsa loquitur*.

¶11 Plaintiffs argue first that the court erred in its requirement of proof of a single identifiable negligent act and actor which caused the injury, because the purpose of *res ipsa loquitur* is to allow a jury to infer negligence from an injurious occurrence without the aid of circumstances

pointing to the responsible cause. *Jackson v. Oklahoma Memorial Hospital*, 1995 OK 112, 909 P.2d 765, 770. Additionally, they correctly point out that the Oklahoma Pleading Code does not require a plaintiff to choose between alternate fact versions in the pursuit of a claim. *Qualls v. U.S. Elevator Corp.*, 1993 OK 135, 863 P.2d 457, 463.

¶12 Plaintiffs point out that the record before the trial court is replete with competent evidence that Patterson did have exclusive control over the entire rigging-up operation and the rig components, including the one which proximately caused Donald Deweese’s injury when it fell onto his bulldozer. They contend there was ample evidence before the jury from which it could conclude that Patterson had exclusive control over the instrumentality that caused the accident and that the accident arose from Patterson’s want of due care.

¶13 In an appeal from a case tried by jury, an appellate court is not to weigh the evidence and determine which side produced evidence of greater weight. That job is reposed in the jury and the jury’s verdict is conclusive as to all disputed facts and conflicting statements. *Johnson v. Ford Motor Co.* 2002 OK 24, 45 P.3d 86, 94; *Stroud v. Arthur Andersen & Co.*, 2001 OK 76, 37 P.3d 783, 787-788. “In an action of legal cognizance, the credibility of witnesses and the weight and value of their testimony are questions exclusively for the jury to pass upon, and where there is any competent evidence reasonably tending to support the verdict, such verdict and judgment pronounced thereon will be sustained.” *Pine Island RV Resort, Inc. v. Resort Management, Inc.*, 1996 OK 83 922 P.2d 609, 613.

¶14 Plaintiffs next argue that the appellate court’s finding that Patterson did not have exclusive control over the instrumentality that caused the accident invaded the province of the jury and conflicts with our authority governing *res ipsa loquitur*.

¶15 In *Qualls*, plaintiff was injured when the hospital elevator in which she was riding suddenly fell. She brought a negligence action against the hospital which owned the elevator and the company which had a contract to maintain it. The case against both defendants was submitted to the jury with an instruction on *res ipsa loquitur* given over the defendants’ objections. Plaintiff prevailed against only the elevator company, which appealed. The Court of Civil Appeals reversed the trial court’s judgment, finding that a *res ipsa loquitur* instruction

was not warranted because plaintiff failed to prove the defendant elevator maintenance company had exclusive control of the hospital elevator when it fell and did not choose between alternate versions of asserted facts.

¶16 We granted certiorari and reversed the Court of Civil Appeals, finding that the fact that the elevator was owned by the hospital and used by its employees did not preclude finding that the elevator was within the maintenance company's exclusive control required for application of *res ipsa loquitur*, and that the plaintiff was not required to choose between alternative versions of facts. *Qualls* controls the instant case:

The doctrine of *res ipsa loquitur* is a pattern of proof which may be applied to an injury that does not occur in the usual course of everyday conduct unless a person who controls the instrumentality likely to produce injury fails to exercise due care to prevent its occurrence. With the aid of *res ipsa loquitur* negligence may be inferred from the harm without the aid of circumstances pointing to the responsible human cause. The fundamental element of this evidentiary process is the "control of the instrumentality" which caused the damage. Whether a case is fit for the application of *res ipsa loquitur* presents a question of law; it is a judicial function to determine if a certain set of circumstances permits a given inference. *Qualls v. U.S. Elevator Corp.*, 1993 OK 135, 863 P.2d 457, 460.

¶17 Addressing issues concerning evidence of the element of exclusive control sufficient to support a *res ipsa loquitur* instruction, including that the question is one for for the trier of fact, we stated:

Whether a defendant at the critical point in contest had 'exclusive control' of an instrumentality in the *res ipsa loquitur* sense often constitutes a mixed question of law and fact. At the threshold the issue is one of law for the judge. It calls for the trial court to decide whether the evidence may lead reasonable persons to reach different conclusions. If the proof is not so overwhelmingly one-sided as to make the control element a matter of law, the question must go to the jury. Where there is *any* competent evidence to support the verdict, the judgment will be affirmed unless otherwise shown to be contrary to law. *Id.* at 461.

\* \* \*

Exclusive control, which is a flexible concept, ... does no more than eliminate, within reason, all explanations for the injurious event other than the defendant's negligence — i.e., it shows that defendant's negligence probably caused the accident. The required control element may be shifted and, under some circumstances, it may be shared. In short, control may rest in one who assumes responsibility for the fitness of an instrumentality for its intended use. *Id.* at 462.

¶18 Recognizing that our flexible interpretation of the exclusive control requirement is consistent with mainstream jurisprudence, we noted the Restatement (Second) of Torts §328D requires only that other reasonably probable causes be sufficiently eliminated by the evidence, and Comment (g) to that section "explains that '[e]xclusive control is merely one fact which establishes the responsibility of the defendant; and if it can be established otherwise, exclusive control is not essential to a *res ipsa loquitur* case.' " *Id.* note 20 at 462.

¶19 In *Harder v. F.C. Clinton, Inc.* 1997 OK 137, 948 P.2d 298, we followed *Qualls* in recognizing that "whether the control element is satisfied presents a question for the trier of fact." *Id.* note 37 at 306. And we stated that it becomes the jury's function, not the trial court's to weigh conflicting evidence and "ultimately to choose whether the inference of the defendant's negligence is to be preferred over other competing inferences. . . ." *Id.* note 19 at 304. We further explained:

The effect of the *res ipsa loquitur* evidentiary rule is merely to raise a rebuttable inference which allows a plaintiff to take the case to the jury and thus avoid a directed verdict for the defendant. Where the *proof is conflicting or subject to different inferences*, some of which are in favor of and others against the applicability of *res ipsa loquitur*, the question must be left to the jury. *Id.* at 303-304.

¶20 For these reasons, the trial court did not err by instructing the jury on *res ipsa loquitur*. The jury's verdict is supported by competent evidence, the opinion of the Court of Civil Appeals is VACATED, and the judgment of the trial court is REINSTATED and AFFIRMED.

¶21 EDMONDSON, C.J., OPALA, KAUGER, WATT, COLBERT, JJ. — Concur

¶22 TAYLOR, V.C.J., HARGRAVE, WINCHESTER, REIF, JJ. — Dissent

1. The instruction reads: In addition to the rules which have been stated with respect to negligence, there are situations in which a jury may, but is not required to, find negligence from the mere fact that an accident occurred.

Plaintiffs contend that this case involves such a situation, and consequently has the burden of proving each of the two following propositions: 1. That the injury was caused by the falling of the oil rig substructure which was under the exclusive control and management of the Defendant Patterson UTI; and 2. That the event causing the injury to Plaintiff was of a kind which ordinarily does not occur in the absence of negligence on the part of the persons in control of the instrumentality.

If you find that each of these propositions is more probably true than not true, then you are permitted, but not required, to find that Patterson UTI was negligent. (OUJI 9.13)

**REIF, J., dissenting:**

¶1 I respectfully dissent.

¶2 As the record discloses, the assembly of the oil rig at the well site in question was an activity that required special skill, expertise and heightened care by *all* of those involved in the activity. It was obvious from the size and weight of the components being moved and assembled that there was great danger and imminent risk of injury if the equipment or techniques employed were inadequate, or were not properly directed and coordinated. Given the driller's complete control of the place where the rig was to be assembled, as well as the employment of contractors to perform the dangerous work at the well site, the duty to safely move and assemble the rig at the well site remained the nondelegable duty of the driller independent of the activity of the parties actually moving and assembling the equipment.

¶3 A nondelegable duty means that an employer of an independent contractor, by assigning work consequent to a duty, is not relieved from liability arising from the delegated duties negligently performed. *Kime v. Hobbs*, 562 N.W.2d 705, 713-14 (Neb. 1997). One such nondelegable duty is the duty of care imposed on an employer of an independent contractor when the contractor's work involves special risks or dangers, including work that is inherently dangerous in the absence of special precautions. *Id.* at 417. A special or peculiar risk is one that differs from the common risks to which persons in general are commonly subjected by ordinary forms of negligence which are usual to the community [and] involve[s] some special hazard resulting from the nature of the work being done, which calls for special

precautions." *Id.* This Court has said the issue of whether a duty is nondelegable is a question of law. *Bouzen v. Alfalfa Electric Cooperative, Inc.*, 2000 OK 50, 16 P.3d 450.

¶4 I would hold that the driller's liability for the injury in question turns on nondelegable duty and not whether the driller exercised "exclusive control" over the components, equipment or personnel moving them. In short, this is not a proper case of *res ipsa loquitur*, but of vicarious liability based on a nondelegable duty.

2010 OK 8

**In Re: Rules for District Courts of Oklahoma**

**S.C.B.D. No. 4553. February 9, 2010**

**ORDER AMENDING RULE 5 OF  
THE RULES FOR DISTRICT COURTS  
OF OKLAHOMA**

This matter comes on before this Court upon an Application to amend Rule 5 of the Rules for District Courts of Oklahoma. This Court finds that it has jurisdiction over this matter, and that an Order should enter as follows:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Application of John Morris Williams, custodian of the records of the Oklahoma Bar Association House of Delegates, for an Order amending Rule 5 of the Rules for District Courts of Oklahoma is hereby granted, and that said Rules are hereby amended as set out in the attached Exhibit "A".

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that publication of this amendment to Rule 5 of the Rules for District Courts of Oklahoma shall appear three times in the Oklahoma Bar Journal within 60 days of the execution of this Order.

DONE BY ORDER OF THE SUPREME COURT this 4th day of February, 2010.

/S/ JAMES E. EDMONDSON  
CHIEF JUSTICE

ALL JUSTICES CONCUR.

**EXHIBIT "A"**

RULES FOR DISTRICT COURTS OF OKLAHOMA PROPOSED CHANGES FOR CONSIDERATION BY THE OKLAHOMA SUPREME COURT FOLLOWING ADOPTION BY THE OKLAHOMA BAR ASSOCIATION HOUSE OF DELEGATES

Rules 1 through 4 - No changes.

Rule 5. Pretrial proceedings

A. Docket. A pretrial conference shall be held in all civil actions except:

1. where the defendant is in default; or,
2. where the defendant has waived his right to appear or plead; or,
3. in an action for the recovery of money or personal property where the amount or value in controversy is less than \$5000.00; or,
4. in actions for forcible entry and detainer where a jury has been waived,
5. actions under the small claims procedure.

The judge is not required to hold pretrial conference in cases where jury has been waived but he may do so. A judge may hold more than one pretrial conference in any case, or he may excuse a case from the pretrial docket.

B. Notice. At least twenty (20) days' notice of the setting of a case for an initial pretrial conference shall be given to the parties and to the attorneys of record by the court clerk.

C. Scheduling. As soon as any civil case is at issue, the Court may schedule any conference it deems appropriate and enter a scheduling order which establishes, insofar as feasible, the time:

1. to join other parties and to amend the pleadings; and,
2. to file and hear motions; and,
3. to complete discovery; and,
4. to have a medical examination of a party; and,
5. for conferences before trial, a pretrial conference, and trial; and,
6. to file proposed findings of fact and conclusions of law (non-jury); and,
7. for accomplishing any other matters appropriate in the circumstances of the case.

The scheduling order shall issue as soon as feasible after the case is at issue. A schedule shall not be modified except upon written application by counsel and by leave of the judge assigned to the case upon a showing of good cause.

D. Judge Presiding. Unless waived by the parties, the pretrial conference shall be conducted by the judge who will try the case. Unless waived by the parties, the judge shall take an active part in the conference and shall conduct it in an informal manner in chambers whenever possible.

E. Scheduling and Pretrial Conferences; Objectives. The scheduling and conduct of the conferences and the scheduling of matters to be accomplished should be designed to:

1. expedite the disposition of the action;
2. establish early and continuing control so that the case will not be protracted because of lack of management;
3. discourage wasteful pretrial activities;
4. improve the quality of the trial through more thorough preparation; and,
5. facilitate the settlement of the case.

F. General Guidelines for Conducting Pretrial Conference. The following guidelines should be followed by counsel and District Court in preparing and conducting a complete and adequate pretrial conference:

1. Attorneys shall confer prior to the pretrial conference and prepare a single suggested pretrial order for use during the pretrial conference;
2. Whenever feasible, all amendments to pleadings and stipulations should be filed in the case before the pretrial conference;
3. Stipulate in writing to as many facts and issues as possible;
4. List in writing the facts and law that are disputed;
5. Discuss the possibility of settlement;
6. Attorneys for the parties should be prepared to advise the trial judge at the pretrial conference as to whether a settlement judge is requested.

G. Subjects to be Discussed at Scheduling and Pretrial Conferences. In accordance with the objectives of a scheduling or pretrial conference, the participants under this rule should be prepared to address, or have taken action to:

1. the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

2. the necessity or desirability of amendments to the pleadings;

3. the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding authenticity of documents, and advance rulings from the Court on the admissibility of evidence;

4. the avoidance of unnecessary proof and of cumulative evidence;

5. the need for orders controlling or scheduling discovery, including orders affecting disclosures and discovery under Section 3226 of Title 12 and Sections 3229 through 3237 of Title 12;

6. the need for adopting any special procedures or protocols addressing the discovery of electronically-stored information;

7. the need for including in a scheduling order or other pretrial order any agreements that the parties have reached for asserting claims of privilege or of work-product protection after such information has been produced;

8. the need for orders addressing the preservation of potentially discoverable information;

9. the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

10. the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

11. the form and substance of the pretrial order;

12. the disposition of pending motions;

13. the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and,

14. such other matters as may aid in the disposition of the action .

H. Final Pretrial Conference. Any final pretrial conference shall be held as close to the time of trial as is reasonable under the circumstances. The participants at any such conference shall formulate a plan that will streamline the trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attor-

neys who will conduct the trial for each of the parties, unless a substitute attorney is authorized by the Court, and by any unrepresented parties.

I. Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice. The form adopted by the Oklahoma Supreme Court for pretrial conference orders shall be used by the District Court. If the judge deviates from the form, he or she shall in writing show to the Supreme Court the reasons for such deviation.

The pretrial order shall include the results of the conference and advice to the court regarding the factual and legal issues, including details of material evidence to be presented. The order shall also present all questions of law in the case. All exhibits must be marked, listed and identified in the pretrial order. If there is objection to the admission of any exhibits, the grounds for the objection must be specifically stated. Absent proper objection, the listed exhibit is admitted when offered at trial or other proceeding. Attorneys for all parties will approve the order. The order shall be presented to the District Court for signature. The contents of the pretrial order shall supersede the pleadings and govern the trial of the case unless departure therefrom is permitted by the Court to prevent manifest injustice. Proposed pretrial order shall not be filed.

J. Default. Failure to prepare and file a scheduling order or pretrial order, failure to appear at a conference, appearance at a conference substantially unprepared, or failure to participate in good faith may result in any of the following sanctions:

1. the striking of the pleading;

2. a preclusion order;

3. staying the proceeding;

4. default judgment;

5. assessment of expenses and fees (either against a party or the attorney individually);

6. or such other order as the Court may deem just and appropriate.

K. After Pretrial. After pretrial, if additional exhibits or writings are discovered, the party intending to use them shall immediately mark them for identification and furnish copies to opposing counsel. These shall be deemed admitted unless written objection is served and filed within ten (10) days of receipt, stating the specified grounds for objection. If additional witnesses are discovered, opposing counsel shall be notified immediately in writing and furnished their names, addresses and the nature of the testimony. Copies of the additional documents, exhibits, writings, or list of witnesses shall also be mailed to the Clerk of the Court to be filed in the case. No exhibit or witness may be added to the final pretrial order once the same has been prepared and signed and filed by the Court without a showing to the Court that manifest injustice would be created if the party requesting the addition of such evidence or testimony was not permitted to add such final pretrial order.

L. Settlement Conferences. The Court, may upon its own motion or at the request of any of the parties, order a settlement conference at a time and place to be fixed by the Court. A judge other than the trial judge will normally preside at such settlement conference. At least one attorney for each of the parties who is fully familiar with the case and who has complete authority to settle the case shall appear for each party. If no attorney has complete settlement authority, the party or person with full settlement authority shall also attend the settlement conference. The settlement conference judge may allow the party having full settlement authority to be telephonically available, if justifiable cause is shown why attendance in person would constitute a hardship. The parties, their representatives and attorneys are required to be completely candid with the settlement conference judge so that he may properly guide settlement discussions, and the failure to attend a settlement conference or the refusal to cooperate fully within the spirit of this Rule may result in the imposition of any of the sanctions mentioned in Paragraph J of this Rule. The judge presiding over the settlement conference may make such other and additional requirements of the parties as to him shall seem proper in order to expedite an amicable resolution of the case. The settlement judge will not discuss the substance of the conference with anyone, including the judge to whom the case is assigned.

SCHEDULING ORDER

IN THE DISTRICT COURT, \_\_\_\_\_  
 JUDICIAL DISTRICT, \_\_\_\_\_  
 COUNTY \_\_\_\_\_  
 STATE OF OKLAHOMA

\_\_\_\_\_ )  
 \_\_\_\_\_ Plaintiff, )  
 \_\_\_\_\_ ) No. \_\_\_\_\_  
 v. )  
 \_\_\_\_\_ )  
 \_\_\_\_\_ Defendant.

SCHEDULING ORDER

IT IS ORDERED that the following must be completed within the time fixed:

1. ADDITIONAL PARTIES to be joined and AMENDED PLEADINGS to be filed by:  
\_\_\_\_\_.
2. Parties shall exchange PRELIMINARY LISTS OF WITNESSES AND EXHIBITS by:  
\_\_\_\_\_.
3. DISCOVERY must be completed by  
\_\_\_\_\_.
4. DISPOSITIVE MOTIONS will not be considered if filed after: \_\_\_\_\_.
5. SETTLEMENT CONFERENCE OR MEDIATION DATE & TIME : \_\_\_\_\_.
6. PRE-TRIAL CONFERENCE DATE & TIME: \_\_\_\_\_.
7. TRIAL DATE: \_\_\_\_\_.
8. ESTIMATED TIME FOR TRIAL: \_\_\_\_\_.
9. REQUESTED JURY INSTRUCTIONS must be filed by: \_\_\_\_\_.
10. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW (Non-Jury) must be filed by: \_\_\_\_\_.
11. TRIAL BRIEF must be filed by: \_\_\_\_\_.
12. ADDITIONAL ORDERS:  
 MEDICAL EXAMINATION of \_\_\_\_\_ shall be completed no later than \_\_\_\_\_.

THE MEDICAL EXAMINER shall submit the report to counsel requesting the examination,

who shall submit a complete copy to all counsel, no later than \_\_\_\_\_.

No date set by this Order can be changed except for good cause and upon written Order of this Court.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of the District Court

We have presented to the Court our views of time requirements established by this Scheduling Order.

\_\_\_\_\_

\_\_\_\_\_

Attorney for Plaintiff

\_\_\_\_\_

\_\_\_\_\_

Attorney for Defendant

\_\_\_\_\_

\_\_\_\_\_

Attorney for \_\_\_\_\_

PRE-TRIAL CONFERENCE ORDER

IN THE DISTRICT COURT, \_\_\_\_\_  
JUDICIAL DISTRICT, \_\_\_\_\_

COUNTY  
STATE OF OKLAHOMA

\_\_\_\_\_ )

\_\_\_\_\_ Plaintiff,  
 ) No. \_\_\_\_\_

v. )

\_\_\_\_\_ )

\_\_\_\_\_ Defendant.

PRE-TRIAL CONFERENCE ORDER

1. Appearances:

2. General Statement of Facts:

3. Plaintiff's Contentions:

A. List All Theories of Recovery and the Applicable Statutes, Ordinances, and Common Law Rules Relied Upon.

B. List Damages or Relief Sought.

4. Defendant's Contentions:

List All Theories of Defense and the Applicable Statutes, Ordinances, and Common Law Rules Relied Upon.

5. Defendant's Claims for Relief:

List Any Claims of Relief Sought (By Cross-Claim, Counterclaim, or Set-Off), and the Applicable Statutes, Ordinances, and Common Law Rules Relied Upon.

6. Miscellaneous:

A. Is Jury Waived?

B. Is Additional Discovery Requested?

C. A trial brief (is/is not) required by the Court.

Due by: \_\_\_\_\_.

D. Other Matters:

7. Plaintiff's Exhibits:

A. List by Number and Description.

B. As to Each Numbered Exhibit, State Any Objection and Its Basis.

8. Defendant's Exhibits:

A. List by Number and Description.

B. As to Each Numbered Exhibit, State Any Objection and Its Basis.

9. Plaintiff's Witnesses: List Names, Addresses, and Substance of Testimony.

10. Defendant's Witnesses: List Names, Addresses, and Substance of Testimony.

11. Requested Jury Instructions Due By: \_\_\_\_\_

12. Estimated Trial Time:

13. Stipulations:

14. Settlement: Has the Possibility of Settlement Been Explored?

15. TRIAL DATE SET FOR: \_\_\_\_\_ .m.,  
\_\_\_\_\_, 20\_\_.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of the District Court

Approved:

\_\_\_\_\_

\_\_\_\_\_

Attorney for Plaintiff

\_\_\_\_\_  
\_\_\_\_\_  
Attorney for Defendant  
\_\_\_\_\_  
\_\_\_\_\_

Attorney for \_\_\_\_\_  
Rules 6 through 30 — No changes.

2010 OK 7

**SHANNON JENNINGS and BRANDY CRAWFORD, Individually and as Parents and Natural Guardians of Shelby Jennings, a minor, Plaintiffs/Appellants, v. BLAKE ALLEN BADGETT, M.D., Individually, and d/b/a BLAKE ALLEN BADGETT, M.D., P.C., and INTEGRIS BAPTIST MEDICAL CENTER, INC., a domestic not for profit corporation, Defendants, and STEPHEN D. SCHLINKE, M.D., Defendant/Appellee.**

No. 105,745. February 9, 2010

ON CERTIORARI FROM THE COURT OF CIVIL APPEALS, DIVISION II

¶0 Plaintiffs filed a medical malpractice action against medical providers, including a non-treating physician who had a conversation with the treating physician concerning the pregnant plaintiff's history and complications. The district court granted summary judgment in the non-treating physician's favor and certified the order pursuant to 12 O.S.2001, § 994(A). The Court of Civil Appeals affirmed. This Court granted the writ of certiorari.

**COURT OF CIVIL APPEALS' OPINION VACATED; CERTIFIED INTERLOCUTORY ORDER AFFIRMED; CAUSE REMANDED FOR FURTHER PROCEEDINGS.**

Benjamin J. Butts, Butts & Marrs, P.L.L.C., Oklahoma City, Oklahoma, for the appellants.

John Wiggins and Erin A. Renegar, Wiggins Sewell & Ogletree, Oklahoma City, Oklahoma, for the appellee.

**TAYLOR, V.C.J.**

¶1 Two questions are presented for our review. The first question, one of first impression, is whether a physician-patient relationship is an indispensable element of a medical malpractice claim against a physician. The second question is whether a physician-patient

relationship between the plaintiffs and the appellee doctor exists as a matter of law. We answer the first question in the affirmative and the second question in the negative.

## I. PROCEDURAL HISTORY

¶2 On April 25, 2007, Shannon Jennings and Brandy Crawford (Crawford), individually and as parents and natural guardians of Shelby Jennings (Shelby), filed a petition in the District Court of Oklahoma County against Blade Allen Badgett, M.D. (Dr. Badgett); Stephen D. Schlinke, M.D. (Dr. Schlinke); and Integris Baptist Medical Center, Inc., for the alleged negligent delivery, care, and treatment of Shelby on November 21, 2003. Dr. Schlinke moved for summary judgment. The plaintiffs objected to the motion, and Dr. Schlinke replied.

¶3 On December 26, 2007, the district court granted summary judgment in Dr. Schlinke's favor.<sup>1</sup> In conformity with Title 12, Section 994(A) of the Oklahoma Statutes, on March 14, 2008, the district court declared its December 26, 2007 order to be final, found that there was no just reason for delay, and expressly directed the filing of the final order. On April 7, 2008, the plaintiffs filed a petition in error appealing the district court's judgment in Dr. Schlinke's favor. On May 6, 2009, the Court of Civil Appeals affirmed the district court. On May 26, 2009, the plaintiffs filed their petition for certiorari. This Court granted certiorari.

## II. SUMMARY JUDGMENT AND STANDARD OF REVIEW

¶4 Under Rule 13(a) of the Rules of District Courts, 12 O.S.2001, ch. 2, app. (Rules of District Courts), a party may move for summary judgment or summary disposition of any issue when the evidentiary materials filed in support of the motion show that there is no genuine issue of any material fact. The moving party must support the motion by attaching and referencing evidentiary materials supporting the party's statement of undisputed facts. *Id.* The opposing party must state the material facts which the party contends are disputed and attach supporting evidentiary materials. *Id.* The court shall grant judgment to one of the parties if it appears that there is no substantial controversy as to any material fact and that one party is entitled to judgment as a matter of law. *Id.* at Rule 13(e). All reasonable inferences are taken in favor of the opposing party. *Wittenberg v. Fid. Bank, N.A.*, 1992 OK 165, ¶ 2, 844 P.2d 155, 156. The party opposing the motion can-

not, on appeal, rely on any fact or evidentiary material not included or referenced in its statement of disputed facts. Rules of District Courts at Rule 13(b).

¶5 Summary judgment settles only questions of law. *Rox Petrol., L.L.C. v. New Dominion, L.L.C.*, 2008 OK 13, ¶ 2, 184 P.3d 502, 504. We review rulings on issues of law by a *de novo* standard pursuant to the plenary power of the appellate courts without deference to the trial court. *Glasco v. State ex rel. Okla. Dept. of Corrections*, 2008 OK 65, ¶ 8, 188 P.3d 177, 181. Thus, summary judgments are reviewed *de novo*. *Id.*

### III. PARTIES' ALLEGATIONS AND CONTENTIONS

¶6 The plaintiffs alleged in the petition filed in Oklahoma County District Court that Shelby was born on November 21, 2003. Drs. Badgett and Schlinke negligently caused Shelby to be delivered prematurely resulting in respiratory distress syndrome and in hospitalization in Integris Baptist Medical Center's neonatal intensive care unit. While in the intensive care unit, the hospital's employees negligently caused Shelby to develop vertebral osteomyelitis. Because of the vertebral osteomyelitis, Shelby has required numerous surgeries and suffers severe, permanent spinal deformity.

¶7 The plaintiffs contend that Dr. Badgett contacted Dr. Schlinke for an opinion concerning Crawford's care. Based on Dr. Schlinke's opinion, Dr. Badgett caused Shelby to be delivered prematurely and, but for Dr. Schlinke's opinion, Shelby would not have been prematurely delivered. Dr. Schlinke knew or should have known that Dr. Badgett would rely on his opinion. Dr. Schlinke's negligence caused or contributed to Shelby's injuries and, thus, Dr. Schlinke is also liable for the injuries.

¶8 Dr. Schlinke's position is that in order to maintain a medical malpractice action against a physician, there must be a physician-patient relationship. He contends that under the facts no physician-patient relationship was formed. Thus, he had no duty to the plaintiffs and cannot be held liable for Shelby's injuries.

### IV. UNDISPUTED FACTS

¶9 The undisputed facts presented in the evidentiary materials on summary judgment and viewed in the light most favorable to the plaintiffs are as follows. Dr. Badgett called Dr. Schlinke seeking an opinion which Dr. Badgett

incorporated into his decision on how to care for Crawford. Dr. Badgett made it clear to Dr. Schlinke, and Dr. Schlinke knew, that Dr. Badgett would be relying on the opinion in determining Crawford's care. Dr. Badgett gave Dr. Schlinke an appropriate history and report on Crawford's then current complications. But for Dr. Schlinke's advice, Dr. Badgett would not have delivered Shelby on November 21, 2003, but would have "pushed to term." However, it was Dr. Badgett's sole decision regarding Shelby's delivery. Although Dr. Badgett sometimes refers patients to Dr. Schlinke, he did not refer Crawford to Dr. Schlinke.

¶10 Further undisputed facts in the evidentiary materials are as follows. Dr. Badgett never asked Dr. Schlinke to enter into a physician-patient relationship with any of the plaintiffs and did not request Dr. Schlinke to co-manage Crawford or Shelby's case. Dr. Schlinke never talked to or saw any of the plaintiffs, did not charge them for professional services, did not provide or attempt to provide them medical care or treatment, was not asked to provide them with medical care or treatment, and did not agree to provide them with medical care or treatment. Dr. Schlinke did not examine any of the plaintiffs, consult with any of the plaintiffs, and did not have access to or look at Crawford's medical chart or records. Dr. Schlinke recognizes that his "informal" opinions may be relied upon by other doctors, that his advice could result in harm to a patient, and that he wants to give the best information that he can to other physicians, but the other physicians have to combine his opinion with the clinical scenario and make the final decision.

### V. NECESSITY OF PHYSICIAN-PATIENT RELATIONSHIP

¶11 Medical malpractice involves matters of medical science and occurs when "those engag[ed] in the practice of the healing arts," 76 O.S.2001, § 20.1, fail to "exercise ordinary care in delivery of professional services" when a duty is owed the plaintiff. *Franklin v. Toal*, 2000 OK 79, ¶ 14, 19 P.3d 834, 837. Plaintiffs have alleged that Dr. Schlinke was negligent in rendering professional services and, in so doing, have brought a medical malpractice action against Dr. Schlinke.

¶12 The elements of a medical malpractice action, as with other negligence actions, are (1) a duty of care owed by the defendant to the plaintiff, (2) a breach of that duty, (3) an injury,

and (4) causation. *Franklin*, 2000 OK 79 at ¶ 14, 19 P.3d at 837. In other words, the plaintiff must show that the defendant breached a duty owed the plaintiff which caused the plaintiff's injuries. The issue of the existence of duty is a question of law for the court. *Lowery v. Echostar Satellite Corp.*, 2007 OK 38, ¶ 12, 160 P.3d 959, 964. This Court has not directly confronted the issue of whether a physician-patient relationship is essential for imposition of a duty in a medical malpractice action.

¶13 An action for malpractice is based on an employment contract. *Funnell v. Jones*, 1985 OK 73, ¶ 5, 737 P.2d 105, 107, cert. denied, 484 U.S. 853 (1987). To receive the professional services, the patient agrees to be treated, *Scott v. Bradford*, 1979 OK 165, ¶ 8-12, 606 P.2d 554, 556-557, and if the patient is unable to give consent, the consent may be implied. *Rolater v. Strain*, 1913 OK 634, 137 P. 96. Otherwise, a physician may be liable for assault and battery. *Scott*, 1979 OK 165 at ¶ 8-12, 606 P.2d at 556-557. Because in Oklahoma a physician is not under a general duty to provide professional services to others, see *Jackson v. Mercy Health Ctr., Inc.*, 1993 OK 155, ¶ 5, 864 P.2d 839, 842, the physician must consent to provide the services. The agreement of the physician to treat and the patient to receive treatment is the basis of the employment contract.

¶14 Unless the contract expresses otherwise, the law will imply as a contractual term that the physician possesses "that reasonable degree of learning, skill, and experience which is ordinarily possessed by others of [the] profession, that [the physician] will use reasonable and ordinary care and diligence in the treatment of the case which [the physician] undertakes, and that [the physician] will use his [or her] best judgment in all cases of doubt as to the proper course of treatment." *Muckleroy v. McHenry*, 1932 OK 671, ¶¶ 0, 14, 16 P.2d 123 (Syllabus by the Court). Thus, "the law imposes a duty in the context of a relationship born of a contract [for which] a person injured by substandard performance of [the] duty may bring an action" for medical malpractice and a claim for breach of contract. *Great Plains Fed. Sav. and Loan Ass'n v. Dabney*, 1993 OK 4, ¶ 2, 846 P.2d 1088, 1095 (Opala, J. concurring). Because the duty in a medical malpractice action is born out of a physician-patient contract, the relationship is essential to an action for a breach of the duty giving rise to the malpractice action.

¶15 Most courts addressing the issue have likewise required a physician-patient relationship as a prerequisite to medical malpractice liability. *Oliver v. Brock*, 342 So.2d 1, 3-4 (Ala. 1977); *Chatman v. Millis*, 517 S.W.2d 504, 506 (Ark. 1975) (but would not say that the relationship must be predicated upon a contractual agreement); *Bradley Center, Inc. v. Wessner*, 296 S.E.2d 693, 695 (Ga. 1982); *Flynn v. Bausch, M.D.*, 469 N.W.2d 125, 128 (Neb. 1991); *Easter v. Lexington Memorial Hospital, Inc.*, 278 S.E.2d 253, 255 (N.C. 1981); *Lownsbury v. Van Buren*, 762 N.E.2d 354, 357-358 (Ohio 2002); *Roberts v. Hunter*, 426 S.E.2d 797, 799 (S.C. 1993); *Kelley v. Middle Tenn. Emergency Physicians, P.C.*, 133 S.W.3d 587, 593-594 (Tenn. 2004); *St. John v. Pope*, 901 S.W.2d 420, 423 (Tex. 1995); *Didato v. Strehler, M.D.*, 554 S.E.2d 42, 47 (Va. 2001); *Rand v. Miller*, 408 S.E.2d 655, 656 (W.Va. 1991); James L. Rigelhaupt, Jr., Annotation, What Constitutes Physician-Patient Relationship for Malpractice Purposes, 17 A.L.R.4th 132 (1982 & Supp. 2009), cases cited therein (hereinafter 17 A.L.R.4th). But see *Stanley v. McCarver*, 92 P.3d 849 (Ariz. 2004) (imposing on physician, who was employed by business to conduct a pre-employment tuberculosis screening, a duty to make known other medical abnormalities based on it being foreseeable that the plaintiff would want to know).

¶16 While this issue is a matter of first impression in Oklahoma, our resolution is foreshadowed by our previous decisions addressing legal malpractice. We have continuously required that a plaintiff claiming legal malpractice prove an attorney-client relationship. *Worsham v. Nix*, 2006 OK 67, ¶ 31, 145 P.3d 1055, 1065 (citing *Manley v. Brown*, 1999 OK 79, 989 P.2d 448) (a plaintiff in a legal malpractice action must prove, among other things, an attorney-client relationship); *Norton v. Hughes*, 2000 OK 32, ¶ 11, 5 P.3d 588, 591 (A plaintiff claiming legal malpractice must prove "the existence of an attorney-client relationship."); *Haney v. State*, 1993 OK 41, 4, 850 P.2d 1087, 1089 ("One of the requisite elements of a legal malpractice claim is the existence of an attorney-client relationship."); *Allred v. Rabon*, 1977 OK 216, ¶ 11, 572 P.2d 979, 981 (A plaintiff claiming legal malpractice must prove "the existence of the relationship of attorney and client between himself and the defendant.").

¶17 By finding the element of duty in a medical malpractice action requires a physician-patient relationship, we are not disallow-

ing a cause of action for medical malpractice by a third-party beneficiary, such as a child, based on negligent prenatal care or a negligent delivery. Part of the purpose of a contract for medical care of a pregnant female is to insure the health of the child. In *Nealis v. Baird*, 1999 OK 98, 996 P.2d 438, we recognized that the parents of a prematurely-born child could bring a wrongful death action on the child's behalf against the mother's treating physicians. In *Graham v. Keuchel*, 1993 OK 6, 847 P.2d 342, we allowed that a wrongful death claim could be brought on behalf of an infant for a physician's failure to administer a drug after a previous delivery which would have prevented the mother's Rh-positive sensitization. In this regard, this Court allowed that the intended beneficiaries of a will could bring a legal malpractice claim or contract claim against the attorney drafting the will. *Leak-Gilbert v. Fahle*, 2002 OK 66, ¶ 27, 55 P.3d 1054, 1062.

#### VI. THE EXISTENCE OF A PHYSICIAN-PATIENT RELATIONSHIP

¶18 The next question is whether the undisputed facts were sufficient to prove the existence of a physician-patient relationship between Dr. Schlinke and Crawford. Although the question of duty is one for the courts, *Lowery*, 2007 OK 38 at ¶12, 160 P.3d at 964, the question of the formation of a physician-patient relationship "is a question of fact, turning upon a determination of whether the patient entrusted his treatment to the physician and the physician accepted the case." *Fruiterman v. Granata*, 668 S.E.2d 127, 135 (Va. 2008) (citing *Lyons v. Grether*, 239 S.E.2d 103, 105 (Va. 1977)); *Irvine v. Smith*, 31 P.3d 934, 940-941 (Kan. 2001). On a motion for summary judgment when the material facts are undisputed and the evidentiary materials and facts show one party is entitled to judgment, the court may decide the issue as a matter of law. See *Glasco*, 2008 OK 65 at ¶ 36, 188 P.3d at 188.

¶19 It is unquestioned in Oklahoma and other jurisdictions that an attending or treating physician has the requisite connections with the patient to create a physician-patient relationship. See *Jackson v. Okla. Mem'l Hosp.*, 1995 OK 112, ¶ 12, 909 P.2d 765, 772. In *Jackson*, this Court set out evidence in that case which showed that the defendant doctor, a faculty physician at a teaching hospital, was the plaintiff's attending physician. *Id.* at ¶ 11, 909 P.2d at 771-772. This Court concluded that the defendant doctor was the attending physician and,

as such, could be held liable for medical malpractice. In other medical malpractice cases previously decided by this Court, treating physicians were implicitly deemed to have the requisite relationship with a patient necessary to maintain a medical malpractice action against them. *Franklin*, 2000 OK 79, 19 P.3d 834; *Smith v. Karen S. Reisig, M.D., Inc.*, 1984 OK 56, 686 P.2d 285. In the present case, the plaintiffs do not assert, and there is no evidentiary material supporting a finding, that Dr. Schlinke was the plaintiffs' attending or treating physician. Thus, we turn to other indicia of a physician-patient relationship.

¶20 This Court has not addressed whether a physician-patient relationship exists when the physician has not examined, diagnosed, or treated the patient. However, courts generally agree that, under similar facts to those before us, a physician's discussion with a treating physician concerning a patient, without more, does not create a physician-patient relationship and, thus, does not create a duty on the part of the non-treating physician. *Adams v. Via Christi Reg'l Med. Ctr.*, 19 P.3d 132, 139-140 (Kan. 2001), and cases cited therein; *Flynn v. Bausch*, 469 N.W.2d 125, 128 (Neb. 1991), and cases cited therein; *Diggs v. Ariz. Cardiologists, LTD.*, 8 P.3d 386, 389, 391 ("Generally, where a physician has been informally consulted, the courts deny recovery for negligence[, and] where treating physician exercises independent judgment in determining whether to accept or reject such advice, few policy considerations favor imposing a duty on the advising physician.").

¶21 In *Oliver v. Brock*, 342 So.2d 1 (Ala. 1977), the Alabama Supreme Court addressed the question of the existence of a physician-patient relationship which would support a medical malpractice action. *Id.* at 3. The facts were (1) the defendant doctor had never seen the plaintiff, (2) neither the plaintiff's parents nor her treating doctor had ever requested or engaged the defendant to serve as a consultant in the plaintiff's treatment, (3) the treating doctor called the defendant about another patient; during the conversation, described the plaintiff's injuries and the type of treatment being administered; did not ask for advice about the treatment; and was told by the defendant that he was treating the injuries correctly, (4) the conversation was gratuitous, and (5) the attending doctor did not employ the defendant to treat the plaintiff. *Id.* The court found that there was no evidence from which it could conclude

that the defendant had consented to treat the plaintiff. *Id.* at 4-5.

¶22 The evidence in *Flynn v. Bausch*, 469 N.W.2d 125 (Neb. 1991), is more compelling of the existence of a physician-patient relationship than the evidence before this Court here. Nonetheless, the Nebraska Supreme Court found that the record did not support a physician-patient relationship between the defendant doctor and the plaintiff. *Id.* at 129. In *Flynn*, the defendant doctor and the plaintiff's treating doctor had a conversation about the plaintiff in the hospital nursery where the plaintiff was at the time. *Id.* at 127. The two doctors agreed that additional tests on the plaintiff were needed. *Id.* The defendant did not look at the plaintiff's chart or any test results and was not aware of the plaintiff's name. *Id.* Although the defendant did look at the plaintiff in the nursery, he did not examine the plaintiff but noticed that he appeared jaundiced and had a rash. *Id.* The defendant advised the treating doctor to wait on test results before performing a blood-exchange transfusion. *Id.* The plaintiff alleged that he suffered brain damage and other injuries which could have been avoided had he received the transfusion earlier. *Id.* at 128. The court concluded that summary judgment in the defendant's favor was proper notwithstanding he had looked at the plaintiff in the nursery and had advised the transfusion be delayed, which it was. The court reasoned that the inferences were too general to support a finding that the defendant had undertaken to participate in the plaintiff's care. *Id.* at 129.

¶23 In *St. John v. Pope*, 901 S.W.2d 420 (Tex. 1995), the Texas Supreme Court faced the question of whether a physician-patient relationship existed under the facts in that case. *Id.* at 421. The defendant doctor was on call at the hospital when the plaintiff was being treated in the emergency room. *Id.* at 421-422. When the emergency room doctor consulted the defendant by telephone, the defendant opined that the patient should be transferred to another facility. *Id.* at 422.

¶24 The plaintiff in *St. John* sued the defendant for medical malpractice. *See id.* The court surveyed the history of medical malpractice and concluded that a physician-patient relationship was necessary to maintain a medical malpractice action. *Id.* at 423. It did not dispute that a physician's agreement with a hospital might require an on-call physician to

treat the hospital's patients, but the fact that a physician is on call does not in itself impose such a duty. *Id.* at 424. The court found that the defendant had established the lack of a physician-patient relationship in his motion for summary judgment as a matter of law. *Id.* The court further noted that after the defendant had submitted evidence that he never agreed to treat the plaintiff "it was incumbent on [the plaintiff] to present [evidence of an agreement] in order to preclude summary judgment for the doctor." *Id.*

¶25 Here, Dr. Schlinke did not render medical advice to the plaintiffs; did not provide services to the treating physician on behalf of Shelby or Crawford; took no affirmative action to treat Shelby or Crawford; spoke only with Dr. Badgett and not to the Crawford or Jennings; did not examine Shelby or Crawford; did not receive a referral of Shelby or Crawford for treatment or consultation; was not employed by Dr. Badgett and had not been asked or contracted by Dr. Badgett to provide medical treatment to Shelby or Crawford; and had not reviewed any work, conducted any laboratory tests, reviewed any test results, prepared any reports, or billed the plaintiffs. Further, none of the plaintiffs agreed that Dr. Schlinke could treat Crawford or Shelby. Even though Dr. Badgett chose to rely on Dr. Schlinke's opinion, Dr. Badgett was free to exercise his independent judgment.

¶26 Dr. Schlinke submitted evidentiary materials supporting a finding that he did not have a physician-patient relationship with the plaintiffs. It was then incumbent on the plaintiffs to come forth with evidentiary materials to support the formation of the essential physician-patient relationship. The plaintiffs relied on the fact that Dr. Badgett would not have allowed Crawford to deliver early but for Dr. Schlinke's recommendation. This is insufficient to create a physician-patient relationship. The facts before us fail to show that Dr. Schlinke agreed to treat the plaintiffs or undertook treatment of any of the plaintiffs. Thus, there was not the physician-patient relationship necessary for a medical malpractice action. The district court correctly granted judgment in Dr. Schlinke's favor.

## VII. CONCLUSION

¶27 A medical malpractice action is one of negligence wherein the duty is born from a contractual relationship. In a medical mal-

practice action, the plaintiff must prove a physician-patient relationship in order to establish a duty owed by the defendant. A telephone conversation between a non-treating physician and the treating physician concerning the patient, even when the treating physician relies on the non-treating physician's opinion, without more, is insufficient to establish a physician-patient relationship. Based on the record before us, we conclude that Dr. Schlinke did not agree to or undertake to treat Crawford or Shelby and did not form a physician-patient relationship with the plaintiffs as a matter of law.

¶28 We find that the district court correctly rendered summary judgment in favor of Dr. Schlinke. The Court of Civil Appeals' opinion is vacated, the trial court's order awarding summary judgment in favor of Dr. Schlinke is affirmed, and the cause is remanded for further proceeding.

**COURT OF CIVIL APPEALS' OPINION VACATED; CERTIFIED INTERLOCUTORY ORDER AFFIRMED; CAUSE REMANDED FOR FURTHER PROCEEDINGS.**

Edmondson, C.J., Taylor, V.C.J., and Hargrave, Opala, and Winchester, and Reif, JJ., concur.

Watt and Colbert, JJ., dissent.

Kauger, J., not participating..

**2010 OK 6**

**BAYTIDE PETROLEUM, INC., Plaintiff/Appellant, v. CONTINENTAL RESOURCES, INC., Defendant/Appellee, and THE ALINE OSWEGO UNIT, Intervenor/Appellee.**

**No. 106,117. February 9, 2010**

**CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION I**

¶0 The defendant/appellee, Continental Resources, Inc. [Continental/operator], obtained top leases covering two oil and gas wells which were then under lease to and being operated by the plaintiff/appellant, Baytide Petroleum, Inc. [Baytide]. Continental filed an action in Alfalfa County seeking to have Baytide's lease terminated for failure to produce in paying quantities. In the same year, on Continental's application, the Oklahoma Corporation Commission [Commission] established a drilling and spacing unit, the Aline Oswego Unit [Unit, also denominated as the

intervenor/appellee], which included the wells. Continental obtained a court order directing Baytide to comply with the plan of unitization. Shortly thereafter, the Alfalfa County court determined that Baytide's lease had terminated for failure to produce in paying quantities. Baytide filed the present action in Garfield County asserting that it was not a lessee when the Unit was formed and that its oil and gas equipment located on the wells had been wrongfully converted, along with claims of unjust enrichment and misuse of process. Considering opposing motions of the parties, the district court entered final judgment in favor of Continental and the Unit. The COCA affirmed finding that Baytide remained a lessee when the Unit was formed because, prior thereto, no court order had entered terminating the lease for failure to produce in paying quantities. We hold that: 1) although a court order may be necessary to adjudicate the rights of the parties when allegations are that a lease has terminated for failure to produce in paying quantities, a lease terminates not because of the order but for failure to produce in paying quantities under the lease's habendum clause; and 2) under the facts presented, where Baytide agreed to the valuation method and the value assigned to its property, it is bound by the agreement to accept \$13,200.00 for the lease equipment.

**COURT OF CIVIL APPEALS' OPINION VACATED; TRIAL COURT AFFIRMED.**

Richard D. Gibbon, Gibbon, Barron & Barron, PLLC, P. Craig Bailey, Young Bowden Baily, P. C., Tulsa, Oklahoma, for plaintiff/appellant.

Glenn Allen Devoll, Julia Christina Rieman, Enid, Oklahoma, for defendant/appellee and intervenor/appellee.

**WATT, J.:**

¶1 We granted certiorari to consider an issue of first impression: whether an oil and gas lease sought to be terminated for failure to produce in paying quantities during the secondary term remains effective until the lease has been judicially cancelled? We hold that it is not the court order which terminates the lease. Rather, it is the failure to produce in paying quantities under the habendum clause during the lease's secondary term. In the instant cause, the lease

terminated by its own terms before the Alfalfa County court issued its order.<sup>1</sup>

¶2 Our determination that the date of termination may precede the date of adjudication and did so here, necessitates that we also address Baytide's assertion that it should not be held to the legal obligations arising based on its status as a lessee in the Unit. Specifically, Baytide insists that it should not be bound by its agreement to accept \$13,200.00 for its equipment located on the lease.

¶3 Baytide voted to approve the method of valuation of the equipment and the values assigned thereto, totaling \$13,200.00 for the two Ford wells.<sup>2</sup> Under these facts,<sup>3</sup> Baytide is bound by its agreement to accept \$13,200.00 for the lease equipment.<sup>4</sup>

### FACTUAL AND PROCEDURAL HISTORY

¶4 The cause arises from a tortured procedural and factual background involving litigation in two counties and before the Corporation Commission giving rise to three appeals. Two of the matters were decided by unpublished Court of Civil Appeals opinions and the third was dismissed.<sup>5</sup>

¶5 In 2000, Baytide acquired the equipment and working interests in two wells operated in Alfalfa County and known as the Ford B #1 and the Ford B #2. The following year, Continental obtained top leases<sup>6</sup> covering the two oil and gas wells. In July of 2001, Continental filed an action in Alfalfa County seeking to have Baytide's base lease terminated for failure to produce in paying quantities. In September of the same year, while the termination cause remained pending, the Commission established a Plan of Unitization creating the Aline Oswego Unit and designating Continental as the unit operator. The Unit includes the Ford wells. Under the plan, each lessee had the option to participate. The existing oil and gas equipment on the leases was to be evaluated, and its owner given credit for the appraised value of the same.

¶6 In November of 2001, the Alfalfa County court granted Continental's request for a temporary injunction. Baytide was ordered to comply with the plan and to deliver the two wells and all operating equipment to Continental along with production and well records. **The order did not require that Baytide participate in the unit's operation or set a price for the sale of the operating equipment.**<sup>7</sup>

¶7 The Alfalfa County court issued its order in favor of Continental on November 19, 2002 finding that Baytide's lease had terminated under the habendum clause for failure to produce in paying quantities. Until that date and thereafter in a subsequently dismissed appeal, Baytide contended that its leases were valid.<sup>8</sup> Nevertheless, the trial court found that: Continental was not claiming that Baytide's leases automatically terminated; there was a twenty-eight (28) month cessation of production during which time Baytide made no effort to restore production; Baytide presented no reasonable basis for the cessation of production; **the leases expired by their own terms by reason of cessation of production for an unreasonable period of time (28 months);** and the underlying lease should be canceled for failure to produce in paying quantities.<sup>9</sup> Baytide appealed, but dismissed the cause on May 2, 2006.

¶8 Baytide filed the present action in Garfield County in April of 2006 asserting that it was not a lessee when the Unit was formed and that its oil and gas equipment located on the Ford wells had been wrongfully converted and Continental had been unjustly enriched. The petition was amended on May 12th to add a misuse of process allegation. Through a series of orders, the Garfield County district court: quieted title in the equipment in the Unit; awarded Baytide \$13,200 for the equipment, including the heater treater; and determined there was no evidence of misuse of process.

¶9 Baytide filed its appeal on July 18, 2008. In May of 2009, the Court of Civil Appeals affirmed finding that Baytide remained a lessee when the Unit was formed because, prior thereto, no court order had been entered terminating the lease for failure to produce in paying quantities. We granted certiorari on October 5, 2009.

### DISCUSSION

**¶10 a. A court order may be necessary to adjudicate the rights of the parties when allegations are that a lease has terminated for failure to produce in paying quantities.**

**Nevertheless, the lease is not cancelled because of the entrance of the court order.**

**The lease terminates for the failure to produce in paying quantities under its own terms pursuant to the habendum clause.**

¶11 Baytide asserts that cessation of production in paying quantities in the secondary term of a lease for an unexplained or unreasonable

period of time results in the lease's expiration. Under such circumstances, Baytide contends that it is the period of time found to have exceeded the bounds of reasonableness which fixes the date of lease cancellation rather than the date a court decree enters cancelling the lease contract. Continental argues that a lease expires for lack of production in paying quantities only upon the date a court order enters cancelling the same. We disagree with Continental's argument.

¶12 Both parties find support in our pronouncement in *Stewart v. Amerada Hess Corp.*, 1979 OK 145, 604 P.2d 854. *Stewart* made it clear that, in Oklahoma, the cessation of production during the secondary term of a lease is not in and of itself sufficient to automatically terminate a lease. Rather, a lease remains viable so long as the interruption of production in paying quantities does not extend for an unreasonable period which is not justifiable in light of all the circumstances. Under *Stewart*, a decree of cancellation may issue where the record supports a determination that a lease is not held by production in paying quantities and no compelling circumstances justify continued production from the unprofitable well operations. Nevertheless, *Stewart* does not hold, as Continental argues, that a lease will expire for lack of production in paying quantities only upon the issuance of a judicial decree.

¶13 *Smith v. Marshall Oil Corp.*, 2004 OK 10, 85 P.3d 830 is instructive. In *Smith*, two issues were presented. The first was whether the evidence was sufficient to support the determination that the subject leases expired due to lack of production in paying quantities. The second, involved the issue of whether the equipment left on the premises had been in place for a sufficient period of time to vest ownership in the surface owner. We answered both issues in the affirmative.<sup>10</sup>

¶14 The trial court in *Smith* directed verdict in favor of Marshall Oil on August 2, 2001 finding that the oil and gas leases expired by their own terms. On certiorari, we acknowledged that in the absence of compelling equitable considerations to justify a cessation in paying quantities over a period spanning three years, **the leases would terminate under the terms of the habendum clauses.** Determining that no extenuating circumstances occurred justifying the failure to produce in paying quantities, **we**

**held that the leases expired by the terms of their own habendum clauses.**<sup>11</sup>

¶15 The leases at issue in *Smith* contained a provision allowing the lessor six months to recover equipment from the lease premises following a cessation of production. Nevertheless, **the *Smith* Court held that the period in which the well ceased to produce in paying quantities indisputably triggered the six-month period for *Smith* to remove his equipment.** The opinion goes on to provide in pertinent part at ¶22:

“. . . Both *Smith's* actions and inaction with regard to the equipment he left on the subject leases supports a determination that ownership vested in the surface owner, under the specific lease provision . . .”

The trial court decided the quiet title issue on August 2, 2001. The period of cessation of production occurred between 1996 and 1998. If, as Continental contends, a lease expires only upon the issuance of a court order or judgment, *Smith* should have had six months from the date of the decree to remove his equipment from the well site. Instead, the *Smith* opinion makes it clear that the failure to present evidence regarding inclement weather to preclude removal, or any other variable for equitable consideration, *Smith's* failure to remove the equipment during the six-month period immediately following cessation of production, occurring some two-and-one-half years prior to the entrance of the court order, resulted in ownership of the equipment vesting in the surface owner.<sup>12</sup>

¶16 *Stewart* provides that a lease will not expire for lack of production in and of itself. However, it does not hold that only a judicial determination may end a lease for lack of production in paying quantities. *Smith's* pronouncement makes it clear that it is the unreasonable cessation of production that causes the lease to terminate. Therefore, in conformance with *Smith* and *Stewart*, we determine that it is the failure to produce in paying quantities during the lease's secondary term rather than the entrance of a court order which terminates a lease. In the instant cause, the lease terminated by its own terms before the Alfalfa County court issued its order.<sup>13</sup>

¶17 A federal court reached the same result we do today upon parallel reasoning. The Western District Court of Oklahoma determined in *Enfield v. Atlantic Richfield*, 778 F.

Supp. 33 (W.D.Okla. 1989) that a decree of court is not required to terminate an oil and gas lease containing a habendum clause. The Enfield court looked at our opinion in Stewart and concluded that, under Oklahoma law, such leases may expire under their own terms under the habendum clause for failure to produce in paying quantities. **The federal court acknowledged that once the leases terminated pursuant to the habendum clauses, the entrance of a judicial decree becomes necessary, not for the purpose of cancelling the lease, but to adjudicate the appropriate remedy.** Here, the remedy afforded Baytide was payment for its equipment totaling \$13,200.00, an amount it previously agreed to accept.<sup>14</sup> Continental was granted the acknowledgment of the viability of its lease.

¶18 Two non-precedential<sup>15</sup> Court of Civil Appeals' opinions have visited the issue of whether a judicial determination is required to terminate a lease under a habendum clause for failure to produce in paying quantities. Texxon Resources, Inc. v. Star West Petroleum, Inc., 1999 OK CIV APP 135, 994 P.2d 1192, promulgated by Division IV, provides that an action must be brought to cause forfeiture of the leasehold estate. The second opinion, Duerson v. Mills, 1982 OK CIV APP 14, 648 P.2d 1276, indicates that this Court "has held it requires a court order to cancel a lease." To the extent Texxon and Duerson fail to conform with the principles announced today, they are hereby expressly overruled.

**¶19 b. Baytide agreed to the valuation method and the value assigned to its property. It is bound by its agreement to accept \$13,200.00 for the lease equipment.**

¶20 Baytide alleges that it was constrained to participate by court order in the Unit and to accept the value assigned to its equipment by the operator. Continental argues that the temporary injunction that ordered Baytide to turn over the wells and comply with the Unit did not require it to elect to participate in the cost of forming, installing and operating the Unit, nor did it require Baytide to approve the values assigned by the working interest owners' committee to the equipment on the wells. The operator insists that Baytide is bound by its agreement to accept \$13,200.00 as the value assigned to equipment located on the lease. We agree with Continental's contention.

¶21 The order granting the temporary injunction was filed in the district court of Alfalfa County on November 2, 2001. It provides in pertinent part:

“. . . CRI's [Continental's] Second Motion for Temporary Injunction is granted and Baytide is ordered to comply with the Plan of Unitization and immediately deliver to CRI [Continental] the Luther Ford B No. 1 and the Luther Ford B No. 2 Wells; the casing of the Wells; the tubing in the Wells; the wellhead connections for the Wells; all other lease and operating equipment that is used in the operation; and a copy of all production and well records pertaining to the Wells. . . ."

There is no provision in the order requiring Baytide to agree to a method of valuation or to accept the value assigned to its equipment by Continental. Nevertheless, in a meeting of working interest owners held on June 5, 2002, **Baytide voted to approve the valuation method and the value assigned to its equipment.** Under these facts, Baytide is bound by the agreement to accept \$13,200.00 for the lease equipment.<sup>16</sup>

## CONCLUSION

¶22 The gravamen of Baytide's arguments all center around its contentions that it was somehow coerced by the play of events and the dates upon which determinations were made in the various proceedings both to become involved in the Unit and to release its equipment to Continental. Undoubtedly, Baytide was aware of the factors which would be considered by the Alfalfa County Court in the lease termination cause. It could have avoided extended litigation and associated expenses by filing a release of lien. Furthermore, it was neither required to agree to the valuation methods nor to accept the \$13,200.00 for the lease equipment. Nevertheless, it did so.

¶23 Our prior decisions make it clear that although a court order may be necessary to adjudicate the rights of the parties when allegations are that a lease has terminated for failure to produce in paying quantities, a lease terminates not because of the entrance of a court order but for failure to produce in paying quantities under the lease's habendum clause. Furthermore, under the facts presented, where Baytide agreed to the valuation method and the value assigned to its property, it is bound

by the agreement to accept \$13,200.00 for the lease equipment.

## COURT OF CIVIL APPEALS' OPINION VACATED; TRIAL COURT AFFIRMED.

ALL JUSTICES CONCUR.

1. The Alfalfa County court issued its order in favor of Continental on November 19, 2002 determining that Baytide's lease had terminated under the habendum clause for failure to produce in paying during a twenty-eight (28) month period where no efforts were made to restore production. The order of the Garfield County Court filed on February 1, 2007, attachment A-1 of the petition in error, provides in pertinent part:

"... On November 19, 2002, the District Court of Alfalfa County cancelled the leases held by Baytide. As a result of its leases obtained on April 21-23, 2001, CRI became both the working interest owner and unit operator of the Ford wells. . . ."

2. Record on accelerated appeal, filed on July 18, 2008, Volume I, Exhibit D to Item 4, minutes from the meeting of the working interest owners held on June 5, 2002 providing in pertinent part:

"... Tom asked for a vote to approve the method of valuation of the equipment and the subsequent values assigned to the equipment from each well.

CRI-Yes, Scoggins-Yes, Baytide - Yes . . ."

Record on accelerated appeal, filed on July 18, 2008, Volume I, Exhibit D to Item 4, Aline Oswego Unit Equipment Valuation for the Luther Ford B 1-36, \$6,600 and for the Luther Ford B 2-36, \$6,600.

3. Baytide's other actions are also of interest. It opposed the unitization order issued by the Corporation Commission [The unitization order was affirmed in *Continental Resources, Inc. v. Baytide Petroleum, Inc.*, No. 96,932 (Okla.Civ.App. 2003) (unpublished).]; it appealed the temporary injunction ordering it to comply with the unitization plan [The injunction was affirmed in *Continental Resources, Inc. v. Baytide Petroleum, Inc.*, No. 97,104 (Okla.Civ.App. 2003) (unpublished).]; it asserted its lessee status vigorously defending the action to quiet title to its interests in the two wells located in the Unit [On December 6, 2005, Baytide appealed the decision terminating the lease for failure to produce in paying quantities. Appeal No. 102,846 was dismissed on Baytide's motion on May 1, 2006.]; and it elected to participate in the cost of forming the Unit, its installation and operation [Record on accelerated appeal, filed on July 18, 2008, Volume I, Exhibit C to Item 4, a letter dated November 21, 2001, signed by Michael J. Murphy, President, Baytide Petroleum, Inc., providing in pertinent part:

"... Baytide does hereby elect to participate in the cost of forming the Unit and installation and operation of the Unit, even though it is our position that this requirement is in violation of Oklahoma law. . . ."]

4. Likewise, we are unconvinced that the \$13,200.00 figure did not include Baytide's heater-treater. The affidavit of Jeff B. Hume, found as an attachment to Item 8 of the record on accelerated appeal, filed on July 18, 2008, Volume III, providing in pertinent part:

"... At the time the Aline-Owesgo Unit held its meeting in 2001 to approve the valuation of equipment to be acquired by the Unit, the associated equipment located at the LACT Unit serving the Ford B-1 and B-2 wells (hereinafter the 'Wells') was comprised of one 300 barrel tank, a 4' x 12.5' heater treater and was included in the equipment valuation for these two Wells, such valuation totaling \$13,200.00. . . ."

Exhibit A to the affidavit is the well equipment inventory for the Luther Ford B-2 well. It includes a vertical heater-treater manufactured by Sivalis in 1965 with dimensions of 4' x 12.5' and a serial number of 15669.

5. The unitization order was affirmed in *Continental Resources, Inc. v. Baytide Petroleum, Inc.*, No. 96,932, see note 3, supra; the injunction was affirmed in *Continental Resources, Inc. v. Baytide Petroleum, Inc.*, No. 97,104, see note 3, supra; and Appeal No. 102,846 was dismissed on Baytide's motion on May 1, 2006.

6. Top leases take effect only if the pre-existing lease expires or is terminated. The earlier leases are commonly referred to as base leases. *Smith v. Marshall Oil Corp.*, 2004 OK 10, fn. 4, 85 P.3d 830; *Voiles v. Santa Fe Minerals, Inc.*, 1996 OK 13, ¶11, 911 P.2d 1205.

7. Record on accelerated appeal, Volume II, Document 8, Exhibit 4, filed July 18, 2008 providing in pertinent part:

"... CRI's Second Motion for Temporary Injunction is granted and Baytide is ordered to comply with the Plan of Unitization and immediately deliver to CRI the Luther Ford B No. 1 and the Luther Ford B No. 2 Wells; the casing of the Wells; the tubing in the Wells; the wellhead connections for the Wells; and all other

lease and operating equipment that is used in the operation; and a copy of all production and well records that pertain to the Wells. . . ."

8. Transcript of proceedings, June 6, 2007, providing in pertinent part at p. 23:

"... THE COURT: The plaintiffs were contesting. You didn't admit at that time, never did admit until the Court's order that the lease ceased.

MR. GIBBON: Well, I that [sic] it that my answer to that would have to be in the affirmative. We had an answer filed saying that we thought our lease was good and the Court determined though on November the 2nd that in all probability it wasn't and ordered us to get out of the picture and we complied with that and we did all the other things that the Court ordered us to do..."

9. Record on accelerated appeal, Volume III, Document 15, Exhibit A, filed July 18, 2008.

10. On first blush the Court of Civil Appeals opinion in *Danne v. Texaco Exploration & Prod. Inc.*, 1994 OK CIV APP 138, ¶9, 883 P.2d 210, holding that an oil and gas lease did not automatically terminate, after more than four years of no production from a gas well for failure to produce gas in paying quantities after the lessee had produced gas from the well so as to move the lease from its primary term into its secondary term might appear to be contrary to both *Smith v. Marshall*, see note 6, supra and to our determination here. However, *Smith* distinguished *Danne*, this note, supra, on the same grounds that it differs from the facts and the law in this cause. The *Smith* opinion providing in pertinent part:

"Danne is distinguishable on its facts as well as one of its legal theories — a claim that the lessee breached the implied covenant to market the product with due diligence. The instant matter is not a claim for breach of the implied covenant to market the product. It is a claim to quiet title under the theory that Smith's leases expired under their own terms, contained in the habendum clause. . . ."

11. Similar determinations have been made in: *Hunter v. Clarkson*, 1967 OK 114, ¶¶6 and 9, 428 P.2d 210 [Lease terminated by its own terms by virtue of voluntary cessation of production.]; *Townsend v. Creekmore-Roomey Co.*, 1958 OK 265, ¶6, 332 P.2d 35; *Anthis v. Sullivan Oil & Gas Co.*, 1921 OK 321, ¶0, 203 P. 187 [Lease sought to be cancelled for failure to produce terminated by its own terms.].

12. See also, *Fisher v. Dixon*, 1940 OK 378, ¶14, 105 P.2d 776. In *Fisher*, suit was filed on September 6, 1938 alleging that the lease had expired for failure to produce in paying quantities. This Court concluded that the trial court was justified in deciding that the least terminated on June 28, 1938, some three months before judgment was entered. It is clear under *Fisher* as it is under *Smith v. Marshall Oil Corp.*, see note 6, supra, that the event terminating the lease preceded the entrance of judgment.

13. See note 10, supra.

14. See note 2, supra.

15. Opinions released for publication by order of the Court of Civil Appeals are persuasive only and lack precedential effect. Rule 1.200, Supreme Court Rules, 12 O.S. 2001, Ch. 15, App. 1; 20 O.S. 2001 §§30.5 and 30.14.

16. See notes 2 and 4, supra.

2010 OK 9

### CRUZ MORALES, as Mother and Next Friend of Alma Morales, a Minor, Plaintiff/ Appellant, v. THE CITY OF OKLAHOMA CITY, a Political Subdivision of the State of Oklahoma, ex rel. THE OKLAHOMA CITY POLICE DEPARTMENT, a Department of the City of Oklahoma City, Defendant/ Appellee

Case No. 105,552. February 9, 2010

### ON APPEAL FROM THE DISTRICT COURT IN OKLAHOMA COUNTY

¶0 Plaintiff brought this action against the City of Oklahoma City to recover damages for injuries allegedly sustained by her minor

daughter during an arrest by an Oklahoma City police officer. The District Court in Oklahoma County, Patricia G. Parrish, trial judge, gave summary judgment to City based on the exemption from the general rule of legislatively mandated governmental tort accountability provided by §155(4) of the Governmental Tort Claims Act.<sup>1</sup> Plaintiff's appeal stands retained for this court's disposition.

**THE TRIAL COURT'S JUDGMENT IS REVERSED AND THE CAUSE IS REMANDED FOR FURTHER PROCEEDINGS TO BE CONSISTENT WITH TODAY'S PRONOUNCEMENT.**

Travis W. Watkins, MULINIX OGDEN HALL ANDREWS & LUDLAM, PLLC, Oklahoma City, Oklahoma, for Plaintiff/Appellant

Kenneth Jordan, Municipal Counselor, Richard C. Smith, Litigation Division Head, and Paula A. Kelly, Assistant Municipal Counselor, Oklahoma City, Oklahoma, Attorneys for Defendant/Appellee<sup>2</sup>

**OPALA, J.**

¶1 The dispositive issue tendered on appeal is whether the trial court erred in giving summary judgment to City. We answer in the affirmative.

**I  
THE ANATOMY OF LITIGATION**

¶2 On 21 September 2005, Oklahoma City police officer Mitchell McCoy was on duty at Roosevelt Middle School when a fight broke out in the school's cafeteria between twelve-year-old Alma Morales ("Alma") and another female student. Officer McCoy stepped in to assist two teachers in breaking up the fight. After removing Alma from the proximity of the other student and restraining her, Officer McCoy placed her under arrest. At some point during the incident, Alma's left wrist was broken and her left elbow injured.

¶3 Plaintiff, Alma's mother, presented a written notice of claim for Alma's injuries to the City of Oklahoma City relying on the Governmental Tort Claims Act ("GTCA").<sup>3</sup> Because the claim was not approved within ninety days after it was filed, it was deemed denied under the terms of §157(A) of the GTCA.<sup>4</sup> Plaintiff then brought in the District Court in Oklahoma County a personal injury action against City on Alma's behalf.

¶4 In her initial petition plaintiff alleged that Officer McCoy, acting within the scope of his employment, used excessive force, acted negligently, intentionally, maliciously, and in reckless disregard of her daughter's safety. City responded with a motion to dismiss on the grounds that the allegations of intentional, malicious, and reckless conduct on their face took Officer McCoy's conduct outside the scope of his employment, thereby relieving City of any liability for his actions.<sup>5</sup> Plaintiff then amended her petition, removing all descriptive allegations of Officer McCoy's conduct and replacing them with a non-specific allegation of tort-inflicted damage to Alma caused by Officer McCoy's actions taken within the scope of his employment. City admits that Officer McCoy was acting within the scope of his employment during the incident, but denies both that his conduct was tortious and that his actions caused Alma's injuries.

¶5 City moved for summary judgment, arguing that (1) the undisputed material facts of record support no other conclusion than that Officer McCoy's use of force to restrain and arrest Alma was objectively reasonable and hence statutorily privileged; and (2) even if Officer McCoy's conduct caused Alma delictual harm, City is immune from liability for his conduct under three of the statutory exemptions from governmental tort accountability created by the GTCA.<sup>6</sup> The trial court agreed that City was immune from liability under one of the three exemptions, 51 O.S. Supp. 2004 §155(4),<sup>7</sup> and gave judgment to City. Plaintiff appealed. Upon City's motion, the appeal was retained by this court. We now reverse the judgment and remand the cause for further proceedings to be consistent with this opinion.

**II  
STANDARD OF REVIEW**

¶6 Summary process — a special pretrial procedural track pursued with the aid of acceptable probative substitutes<sup>8</sup> — is a search for undisputed material facts which, without resort to forensic combat, may be utilized in the judicial decision-making process.<sup>9</sup> The moving party stands entitled to judgment as a matter of law when neither genuine issues of material fact nor conflicting inferences that may be drawn from uncontested facts are in dispute and the law favors the moving party's claim or liability-defeating defense.<sup>10</sup> Only those evidentiary materials which eliminate from trial some or all fact issues on the merits

of the claim or of the defense afford legitimate support for a trial court's use of summary process for a claim's adjudication.<sup>11</sup>

¶7 The purpose of summary process is not to deprive parties of their right to have the disputed facts of the case tried by a jury, but rather to decide the legal sufficiency of the evidentiary materials presented to determine whether a triable case is tendered.<sup>12</sup> *The use of summary process may not be extended to swallow triable issues of fact.*<sup>13</sup> Inclusion of the latter within that process would violate a party's fundamental right either to a trial by jury at common law or due process by orderly trial before a court in equity.<sup>14</sup> The scalpel of summary judgment may be wielded to terminate litigation only when, as a matter of law, no material facts offered by the parties are in discord.

¶8 Issues in summary process stand before us for *de novo* review.<sup>15</sup> All facts and inferences in a summary proceeding must be viewed in the light most favorable to the non-movant.<sup>16</sup> Just as trial courts must decide in the first instance whether summary judgment is proper, so too must appellate courts undertake an independent and non-deferential *de novo* review when testing the legal sufficiency of all evidentiary materials proffered by the parties in their quest for or in their defense against summary relief.<sup>17</sup> If no material fact or inference derived from the evidentiary materials stands in dispute and if the law favors the moving party's claim or liability-defeating defense, summary judgment is the latter party's due.

¶9 Although the trial court gave City summary judgment solely because of the exemption from liability provided to governmental employers by the provisions of 51 O.S. Supp. 2004 §155(4), City is now free to defend its judgment on any ground pressed below but left unresolved by the trial tribunal. When a trial court reaches the correct result for the wrong reason, its judgment is not subject to reversal.<sup>18</sup>

### III SUMMARY RELIEF IS NOT CITY'S DUE BASED ON ITS STATUTORY EXEMPTION DEFENSES

¶10 Relying on three exemptions from the general rule of governmental tort accountability provided by the GTCA, City argues it cannot be held liable for Officer McCoy's actions even if they could be considered negligent. The

trial court gave judgment to City on the basis of the exemption provided by §155(4) of the GTCA, the pertinent portion of which shields a municipality from liability if a loss or claim arises from the enforcement of a law.<sup>19</sup> City urges this court to affirm the judgment on that basis or, alternatively, on the basis of either or both of the other two GTCA provisions City urged below but which were left unaddressed and uninvoked by the trial court's decision.<sup>20</sup> We conclude in this case that none of the three provisions cited may shield City from liability.

#### A. The Exemption from Liability Provided by GTCA §155(4).

¶11 The provisions of §155(4) of the GTCA state that a political subdivision shall not be liable for a loss or claim that results from:

4. Adoption or enforcement of or failure to adopt or enforce a law, whether valid or invalid, including, but not limited to, any statute, charter provision, ordinance, resolution, rule, regulation or written policy; ...

City argues that even if Officer McCoy was negligent and injured Alma, it [City] cannot be held liable because the injuries occurred while Officer McCoy was enforcing a law. In essence, City poses for our adoption a construction of §155(4) that would provide a blanket immunity to a municipality for claims arising from law enforcement. We recently rejected just such an argument by City in *Tuffy's Inc. v. City of Oklahoma City*,<sup>21</sup> in which we said,

"To construe §155(4) as providing blanket immunity to political subdivisions for any claim arising from law enforcement would not conform to established precedent. We have consistently held that a municipality is liable for the tortious acts of police officers committed within the scope of employment as defined by the GTCA."<sup>22</sup>

¶12 The purpose of §155(4) is to protect the discretionary acts of law enforcement officers in deciding whether a given situation calls for enforcing a law or not. That choice, whichever way it goes, may result in a detriment visited upon either the person with whom the officer is engaged or upon a third person.<sup>23</sup> It is the exercise of that discretion which is protected by this exemption. **Once an officer makes the decision to enforce a law by making an arrest, he or she must do so in a lawful manner.** If a tort is committed in the process of making an arrest, §155(4) does not provide immunity

from suit to the officer's governmental employer for the resulting damages.

¶13 Whether a governmental agency is ultimately liable depends, of course, on whether its police officer employee committed the tort of which he or she is accused. Unless the infliction of delictual harm is determinable as a matter of law, governmental liability or exoneration for loss caused by the manner of effecting arrest must await a jury's resolution. In short, we reject City's contention that in enacting §155(4) the Legislature intended to provide municipalities with *a priori* immunity where a plaintiff seeks recovery for allegedly *tortious* acts of law enforcement personnel in the use of force to effect an arrest.

### **B. The Exemption from Liability Provided by GTCA §155(6).**

¶14 The provisions of §155(6) of the GTCA state in pertinent part that a political subdivision shall not be liable for a loss or claim that results from "the method of providing, police, law enforcement or fire protection; . . ." In *Salazar v. City of Oklahoma City*,<sup>24</sup> we held that protection is the key word in construing §155(6).<sup>25</sup>

"The exemption in that subsection is invocable when the tort arises while a municipality is rendering services that fall into some category of police protection, law enforcement protection or fire protection. In short, a governmental subdivision is not liable for deficiency of protective services extended by its police, law enforcement or fire fighting components."<sup>26</sup>

City argues that Officer McCoy was providing protective services to Alma as well as engaging in a law enforcement activity when he subdued and arrested her.

¶15 To accept City's characterization of Officer McCoy's conduct would do away with the distinction between protective services by police and law enforcement activities. Officer McCoy testified in his deposition that the first thing he saw when he turned toward the fight was Alma hitting the other student in the back as that student was walking away. He said he grabbed Alma because she would not stop fighting. From Officer McCoy's viewpoint, it is clear that his role in breaking up the fight and arresting Alma was that of a law enforcer. Nothing in the record suggests that Alma was seeking protection from Officer McCoy. She did not summon him to protect her. The court

in *Salazar* specifically characterized the act of making an arrest as a law enforcement function.<sup>27</sup> **Plaintiff's claim is for the negligent performance of that function, not for a deficiency in providing protective services.** The provisions of §155(6) do not apply to Officer McCoy's conduct in suit.

### **C. The Exemption Provided by GTCA §155(16).**

¶16 The provisions of §155(16) of the GTCA state that a political subdivision shall not be liable for a loss or claim that results from "any claim which is limited or barred by any other law;..." City argues that plaintiff's claim is limited or barred by the provisions of 21 O.S. 2001 §643, thereby exempting City from liability.

¶17 The relevant provisions of §643 are:

"To use or to attempt to offer to use force or violence upon or toward the person of another is not unlawful in the following cases:

1. When necessarily committed by a public officer in the performance of any legal duty, or by any other person assisting such officer or acting by such officer's direction;
2. When necessarily committed by any person in arresting one who has committed any felony, and delivering such person to a public officer competent to receive such person in custody;

\* \* \* \* \*

4. When committed by a parent or the authorized agent of any parent, or by any guardian, master or teacher, in the exercise of a lawful authority to restrain or correct such person's child, ward, apprentice or scholar, provided restraint or correction has been rendered necessary by the misconduct of such child, ward, apprentice or scholar, or by the child's refusal to obey the lawful command of such parent or authorized agent or guardian, master or teacher, and the force or violence used is reasonable in manner and moderate in degree; . . ."

City argues that all three of the above-quoted subdivisions of §643 apply to the incident at issue. Because these provisions would provide Officer McCoy with a defense to criminal liability for his conduct, City would have us hold that they also constitute a law that limits or

bars a civil claim against Officer McCoy, thereby destroying the foundation of plaintiff's claim against City, which requires a claim against the governmental employee-actor that is neither barred nor limited by any other law. Plaintiff counters that the terms of §643 provide a defense to a criminal charge, not to a negligence claim, and hence do not affect City's liability for Officer McCoy's conduct in suit.

¶18 We reject City's argument that §643, in conjunction with §155(16), renders City immune from suit. To hold otherwise would mean the Legislature intended to immunize a governmental agency from suit *ab initio* simply because a law arguably creates an affirmative defense to liability invocable by the agency's employee.<sup>28</sup> Instead, we interpret §155(16) to bar suit against a governmental employer only if, and to the extent that, a law outside the GTCA would prevent a suit from being brought against the employee-tortfeasor. Just as in the case of private-entity *respondeat superior*, the liability of a governmental employer is derivative and dependent upon the employee's liability, assuming no independent or concurrent tortious act on the part of the employer. The provisions of §155(16) ensure that a governmental employer has the same defenses to and limitations on liability as would be available to a private employer under similar circumstances. Thus, for example, if the law does not recognize a claim against the employee, if the employee has immunity from suit under a statute other than the GTCA or under the common law, or if a law limits the amount of damages assessable against the employee, the terms of §155(16) should ordinarily extend those laws' benefits to the governmental employer.

¶19 Neither the provisions of §643 nor any other statute or common law norm (other than the GTCA itself) prevents plaintiff from bringing a negligence action against Officer McCoy.<sup>29</sup> A police officer's privilege to use reasonable force in making an arrest, sometimes conceptualized as providing a qualified immunity, should not be confused with an immunity that bars a suit *ab initio*. The privilege merely provides a defense to liability, the availability of which to City is by virtue of §155(16) commensurate with its availability to Officer McCoy. City is clearly not entitled to judgment of exoneration based on §155(16).

#### IV

#### THE EXISTENCE OF TRIABLE ISSUES OF FACT PRECLUDE THE USE OF SUMMARY

#### PROCESS TO TERMINATE THIS LITIGATION

¶20 City also argues that it is entitled to judgment as a matter of law because the evidentiary materials tendered below present no triable issues of fact. City contends the evidentiary materials support no other conclusion than that Officer McCoy's conduct conformed to the applicable standard of care. **We disagree that the evidentiary materials are legally sufficient to warrant withholding this case from a jury's deliberations.**

¶21 The threshold question in any negligence action is whether the defendant owed a duty of care to the plaintiff.<sup>30</sup> While the question of duty is usually presented in terms of the actor's obligation, "the essential question [is] whether the plaintiff's interests are entitled to protection against the defendant's conduct."<sup>31</sup> One of the most important considerations used in determining whether a duty exists is the foreseeability of injury to the plaintiff.<sup>32</sup> A defendant is generally said to owe "a duty of care to all persons who are foreseeably endangered by his conduct with respect to all risks that make the conduct unreasonably dangerous."<sup>33</sup> The outer limits beyond which the law will not find a foreseeable risk of harm to a particular plaintiff that entitles him (her) to protection are set by reason and good sense.<sup>34</sup> Because City does not dispute that it owed a duty of care to Alma, we will assume for purposes of this decision, without deciding, that a police officer owes a negligence-based duty of care to an arrestee to protect the arrestee from injury.<sup>35</sup>

¶22 The standard of care prescribes how a person must act or not act in order to satisfy the duty of care.<sup>36</sup> The parties disagree on the precise formulation of the standard of care applicable to a police officer making an arrest. That standard of care which is owed by a law enforcement officer in civil law to a suspect incident to arrest presents a question of first impression for this court.<sup>37</sup>

¶23 We begin by noting the obvious: a police officer does not stand in the same shoes as an ordinary citizen when it comes to using force against another person which exposes that person to a risk of injury. This much stands clearly recognized in the state's criminal law. In making a lawful arrest, a police officer in Oklahoma is statutorily relieved of *criminal liability* for *assault and battery* as long as the act of force is "necessarily committed by the officer in the

performance of a legal duty.”<sup>38</sup> At the same time, an officer is “subject to the criminal laws of this state to the same degree as any other citizen” if *excessive force* is used.<sup>39</sup> Excessive force is statutorily defined as “physical force which exceeds the degree of physical force permitted by law or the policies and guidelines of the law enforcement entity.”<sup>40</sup>

¶24 The legislature has directed the state’s police departments to adopt policies and guidelines that outline the outer limit of permissible use of force.<sup>41</sup> The Oklahoma City Police Department has adopted such policies, which are set out in its Operations Manual. The Manual instructs officers to use only such force as is “reasonable and necessary” under the circumstances, including such force as is “reasonably necessary” to effect a lawful arrest and prevent the escape of a person lawfully arrested.<sup>42</sup> The Manual defines “reasonably necessary” force as force used when “all other reasonable means to accomplish the desired action have been exhausted or would clearly be ineffective under the circumstances.”<sup>43</sup> The Manual also provides that *constitutional* violations by its officers in using force are to be assessed under a standard of “objective reasonableness.”<sup>44</sup> Although the Manual acknowledges that police officers are subject to the civil-law consequences of using *excessive force*, nothing in the Manual addresses the application of negligence principles to the force used during an arrest.

¶25 The traditional centuries-old common-law rule recognized in Oklahoma holds that whenever one person is by circumstances placed in such a position with regard to another, that, if he (she) did not use ordinary care and skill in his (her) own conduct, he (she) would cause danger of injury to the person or property of another, a duty arises to use ordinary care and skill to avoid such danger.<sup>45</sup> This basic formulation of the standard of care is not directly applicable to a police officer making an arrest where exposure of the suspect to injury is an inherent part of the activity. All arrests involve the use of some form of restraint, interference with the arrestee’s liberty and the exercise of custodial control over another person. Each of these actions poses some risk of harm to the arrestee. Even when an arrest is accomplished with minimal force, an offensive contact takes place. **If police officers were exposed to suit every time the risk of harm inherent in an arrest culminated in actual harm, law enforcement would grind to a halt.** The stan-

dard of care must hence recognize that the use of force and a concomitant risk of injury are inherent in the performance of a law enforcement officer’s duty to arrest those suspected of breaking the law. Ordinary citizens have no comparable leeway in their duty to avoid injury to others.

¶26 We therefore hold that a police officer has a special dispensation from the duty of ordinary care not to endanger others. **A police officer’s duty is very specific: it is to use only such force in making an arrest as a reasonably prudent police officer would use in light of the objective circumstances confronting the officer at the time of the arrest.** In applying this standard, an officer’s subjective mistake of fact or law is irrelevant, including whether he (she) is acting in good faith or bad.<sup>46</sup> The question is whether the objective facts support the degree of force employed.<sup>47</sup>

¶27 Among the factors that may be considered in evaluating the objective reasonableness of an officer’s use of force in making an arrest are: (1) the severity of the crime of which the arrestee is suspected; (2) whether the suspect poses an immediate threat to the safety of the officers or others, (3) whether the suspect is actively resisting arrest or attempting to evade arrest; (4) the known character of the arrestee; (5) the existence of alternative methods of accomplishing the arrest; (6) the physical size, strength and weaponry of the officers compared to those of the suspect; and (7) the exigency of the moment.<sup>48</sup>

¶28 City argues that the objective reasonableness standard applicable to police use of force creates a fixed standard of care that may be applied by the court without a jury.<sup>49</sup> A fixed standard of care is one that is firmly and precisely defined by law.<sup>50</sup> A variable standard is one that shifts with the circumstances.<sup>51</sup> Plaintiff’s negligence claim in this case rests on the allegation of a breached obligation that is to be measured by a standard that has no fixed dimensions but shifts with the circumstances.<sup>52</sup> The fact that objective criteria are to be used to assess conformance with that standard does not make the standard fixed.<sup>53</sup> City’s reference to federal law on the role of judge and jury in deciding the issue of qualified immunity in federal civil rights actions notwithstanding, where in a negligence action the parameters of duty are undefined as a matter of law and shift with the circumstances, a classic case for jury resolution stands presented.<sup>54</sup>

¶29 City next argues that summary judgment is its due as a matter of law because reasonable people could not draw different conclusions respecting the question of Officer McCoy's negligence. According to the applicable rule, where the evidence permits of no other conclusion than that a defendant has or has not met the standard of care imposed by law, the court may remove the issue from the jury and decide the question of negligence on its own.<sup>55</sup> **We conclude that in this case triable issues are present and preclude summary judgment.**<sup>56</sup>

¶30 It is undisputed that Officer McCoy removed Alma from a fight with another student. He accomplished this by grabbing Alma's neck with his right hand and, with his left hand holding her left hand, leading her about twelve feet to a wall. He then held her up against the wall with his body. Alma testified in her deposition that when Officer McCoy held her against the wall, he placed all of his force into her left side where her left hand got squished and was broken. Officer McCoy's deposition material tendered for the trial court's consideration does not include any estimation of the amount of force he used, but he repeatedly denied that the force he used would have caused Alma's broken wrist. Alma admits that she kept moving her left hand toward her neck, where Officer McCoy was holding her. Officer McCoy's deposition material contains a reading from his contemporaneous incident report, in which he stated that he perceived Alma's actions at the time as demonstrating her unwillingness to stop fighting. He testified that her actions were not sufficiently extreme to cause him to consider her to be resisting arrest, but she needed to be restrained.

¶31 Viewing the evidence as we must in a light most favorable to the party opposing summary judgment,<sup>57</sup> we conclude that a jury could find Officer McCoy used more force than was necessary or reasonable to subdue and arrest Alma. The only evidence in the record describing the amount of force used by Officer McCoy comes from Alma who claims the officer used all of his weight to hold her against a wall. The record shows that Officer McCoy weighed 275 lb. at the time of the incident in question and Alma weighed 110 lb. Whether such force, if used, was reasonably necessary cannot be resolved as a matter of law, given the evidence that Alma may not have been willing to submit to Officer McCoy's authority and

was attempting instead to continue the fight. Moreover, the record is devoid of any testimony regarding restraint and arrest techniques under these circumstances, what alternatives were available to Officer McCoy to subdue Alma, and what the potential dangers might be to a struggling child had he used an alternative technique. Accordingly, we hold that City is not entitled to judgment as a matter of law based on its view that Officer McCoy's conduct should be accepted as objectively reasonable.

## V SUMMARY

¶32 Plaintiff seeks to recover damages for personal injury to her minor daughter by the alleged negligence of an Oklahoma City police officer in subduing and arresting the child. The existence of disputed material facts and/or inferences that call for resolution by a jury makes summary relief impermissible. **It cannot be determined that as a matter of law Officer McCoy either was or was not negligent in the performance of his duty.** In addition, the immunity defenses tendered by City are unavailable under the circumstances of this case and cannot legally support judgment in City's favor. **Plaintiff is constitutionally entitled to her day in court before a panel of petit jurors sworn to try her case.**

### ¶33 THE TRIAL COURT'S JUDGMENT IS REVERSED AND THE CAUSE IS REMANDED FOR FURTHER PROCEEDINGS TO BE CONSISTENT WITH TODAY'S PRONOUNCEMENT.

¶34 Edmondson, C.J., Hargrave, Opala, Kauger, Watt, and Colbert, JJ., CONCUR.

¶35 Taylor, V.C.J., Winchester and Reif, JJ., DISSENT.

1. The Governmental Tort Claims Act, 51 O.S. Supp. 2004 §151 *et seq.*, extends governmental accountability to all torts for which a private person or entity would be liable subject only to the Act's specific limitations and exceptions.

2. Identified herein are only those counsel for the parties who have entered an appearance in this cause (as required by Okla. Sup. Ct. Rule 1.5(a), 12 O.S. 2001, Ch. 15, App.1) and whose names appear on the appellate paperwork.

3. The pertinent provisions of 51 O.S. Supp. 2003 §156 state:

A. Any person having a claim against the state or a political subdivision within the scope of Section 151 *et seq.* of this title shall present a claim to the state or political subdivision for any appropriate relief including the award of money damages.

B. Except as provided in subsection H of this section, claims against the state or a political subdivision are to be presented within one (1) year of the date the loss occurs. A claim against the state or a political subdivision shall be forever barred unless notice thereof is presented within one (1) year after the loss occurs.

4. The pertinent provisions of 51 O.S. 2001 §157(A) deem a claim to be denied if the governmental agency fails to approve it in its entirety within ninety days.

5. Under the GTCA, City cannot be held liable for acts or omissions of its employees acting outside the scope of their employment. *Speight v. Presley*, 2008 OK 99, ¶11, 203 P.3d 173, 176.

6. The provisions of 51 O.S. Supp. 2004 §155, in force when this cause of action accrued, set forth thirty-three exemptions from liability for governmental agencies. The pertinent provisions state:

"The state or a political subdivision shall not be liable if a loss or claim results from:

\*\*\*\*\*

4. Adoption or enforcement of or failure to adopt or enforce a law, whether valid or invalid, including, but not limited to, any statute, charter provision, ordinance, resolution, rule, regulation or written policy;

\*\*\*\*\*

6. Civil disobedience, riot, insurrection or rebellion or the failure to provide, or the method of providing, police, law enforcement or fire protection;

\*\*\*\*\*

16. Any claim which is limited or barred by any other law;..."

The statute was amended in 2009 to provide thirty-five exceptions, 2009 Okla. Sess. Laws, ch. 98, §12, eff. Nov. 1, 2009.

7. *See id.*

8. " 'Acceptable probative substitutes' are those which may be used as 'evidentiary materials' in the summary process of adjudication." *Jackson v. Okla. Mem'l Hosp.*, 1995 OK 112, ¶15, n. 35, 909 P.2d 765, 773, n. 35. *See also* *Seitsinger v. Dockum Pontiac, Inc.*, 1995 OK 29, ¶¶16-17, 894 P.2d 1077, 1080-81; *Davis v. Leitner*, 1989 OK 146, ¶15, 782 P.2d 924, 927.

9. The focus in summary process is not on the facts which might be proven at trial, but rather on whether the evidentiary material in the record tendered in support of summary disposition reveals only undisputed material facts supporting but a single inference that favors the movant's quest for relief. *Polymer Fabricating, Inc. v. Employers Workers' Comp. Ass'n*, 1998 OK 113, ¶8, 980 P.2d 109, 113; *Hulsey v. Mid-America Preferred Ins. Co.*, 1989 OK 107, ¶8, n. 15, 777 P.2d 932, 936, n. 15.

10. In determining the appropriateness of summary relief the court may consider, in addition to the pleadings, items such as depositions, affidavits, admissions, and answers to interrogatories, as well as other evidentiary materials which are offered in acceptable form without objection from other parties or are admitted over the challenging exception. *Polymer Fabricating, Inc. v. Employers Workers' Comp. Ass'n*, *supra*, note 9, at ¶8, at 113. *See also* *Seitsinger v. Dockum Pontiac, Inc.*, *supra*, note 8, at ¶¶16-17, at 1080-81.

11. *Russell v. Bd. of County Comm'rs*, 1997 OK 80, ¶7, 952 P.2d 492, 497. *See also* *Gray v. Holman*, 1995 OK 118, ¶11, 909 P.2d 776, 781.

12. *See State ex rel. Fent v. State ex rel. Okla. Water Res. Bd.*, 2003 OK 29, ¶14, n. 31, 66 P.3d 432, 440, n. 31; *Bowers v. Wimberly*, 1997 OK 24, ¶18, 933 P.2d 312, 316; *Stuckey v. Young Exploration Co.*, 1978 OK 128, ¶15, 586 P.2d 726, 730. *In re Peterson*, 253 U.S. 300, 310, 40 S. Ct. 543, 546, 64 L. Ed. 919 (1920) ("No one is entitled in a civil case to trial by jury, unless and except so far as there are issues of fact to be determined.")

13. *Bowman v. Presley*, 2009 OK 48, ¶32, 212 P.3d 1210, 1222-23. *See also* Art. 2 § 19 and Art. 2 § 7, OKLA. CONST. *See also* Arthur R. Miller, *The Ascent of Summary Judgment and Its Consequences for State Courts and State Law* (paper delivered at Pound Civil Justice Institute 2008 Forum for State Appellate Court Judges) (cautioning against the erosion of a party's fundamental right to jury trial and due process rights through the overuse of summary process in the pursuit of "efficiency").

14. *Bowman*, *supra*, note 13; *Miller*, *supra*, note 13; Art. 2 § 19 and Art. 2 § 7, OKLA. CONST.

15. An order granting summary relief, in whole or in part, disposes solely of questions of law reviewable by a *de novo* standard. *Brown v. Nicholson*, 1997 OK 32, ¶5, 935 P.2d 319, 321. "Issues of law are reviewable by a *de novo* standard and an appellate court claims for itself plenary independent and non-deferential authority to reexamine a trial court's legal rulings." *Kluser v. Weatherford Hosp. Auth.*, 1993 OK 85, ¶14, 859 P.2d 1081, 1084 (citing *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231, 111 S. Ct. 1217, 1221, 113 L. Ed.2d 190 (1991)).

16. *Carmichael v. Beller*, 1996 OK 48, ¶2, 914 P.2d 1051, 1053.

17. *Spirgis v. Circle K Stores, Inc.*, 1987 OK CIV APP 45, ¶10, 743 P.2d 682, 685 (approved for publication by the Okla. Supreme Court).

18. *Jacobs Ranch, L.L.C. v. Smith*, 2006 OK 34, ¶58, 148 P.3d 842, 857; *Dixon v. Bhuiyan*, 2000 OK 56, ¶9, 10 P.3d 888, 891; *McMinn v. City*

of Okla. City, 1997 OK 154, ¶11, 952 P.2d 517, 521; *In the Matter of the Estate of Bartlett*, 1984 OK 9, ¶4, 680 P.2d 369, 374.

19. *See supra* note 6.

20. *Id.*

21. 2009 OK 4, 212 P.3d 1158.

22. *Id.* at ¶20, at 1167.

23. The lawfulness of a law enforcement operation does not preclude loss to the person or persons at whom the operation is directed or to others. *See, e.g., Williams v. City of Warr Acres*, 1985 OK 11, 695 P.2d 519, (decided under the Political Subdivision Tort Claims Act, 51 O.S. 1981 §151 *et seq.*).

24. 1999 OK 20, 976 P.2d 1056.

25. *Id.* at ¶26, at 1066.

26. *Id.*

27. *Id.* at ¶27, at 1066.

28. We have held that the provisions of §643 afford a defense to a civil claim for assault and battery, *Boston v. Muncy*, 1951 OK 175, ¶10, 233 P.2d 300, 302, but we have never applied its terms to a negligence claim.

29. The GTCA bars separate suit against an agency's employee when the agency stands liable in accordance with the terms of the GTCA. *See*, the provisions of 51 O.S. 2001 §153 B., which state: "The liability of the state or political subdivision under this act shall be exclusive and in place of all other liability of the state, a political subdivision or employee at common law or otherwise."

30. *Lowery v. Echostar Satellite Corp.*, 2007 OK 38, ¶12, 160 P.3d 959, 964, A duty of care is an obligation owed by one person to act so as not to cause harm to another. *Id.* *See* 76 O.S.2001 §1.

31. *Wofford v. Eastern State Hosp.*, 1990 OK 77, ¶10, 795 P.2d 516, 519, quoting *Prosser, LAW OF TORTS* [3d ed. 1964] at 332-333.

32. *Iglehart v. Bd. of County Comm'rs of Rogers County*, 2002 OK 76, ¶10, 60 P.3d 497, 502. In addition to foreseeability, other factors to be considered in the foreseeability analysis are: (a) degree of certainty of harm to the plaintiff, (b) moral blame attached to defendant's conduct, (c) need to prevent future harm, (d) extent of the burden to the defendant and consequences to the community of imposing the duty on defendant, and (e) availability of insurance for the risk involved. *See Lowery*, *supra*, note 30 at ¶14, n. 4, at 964, n. 4.

33. *Iglehart*, *supra*, note 32; *Wofford*, *supra*, note 31 at ¶11, at 519.

34. *Lowery*, *supra*, note 30 at ¶14, at 964; *Rose v. Sapulpa Rural Water Co.*, 1981 OK 85, ¶22, 631 P.2d 752, 757.

35. Although some jurisdictions reject negligence as a theory of liability for the use of excessive force by law enforcement, *see City of Miami v. Sanders*, 672 So.2d 46 (Fla. App. 1996); *Cameron County v. Ortega*, 291 S.W.3d 495 (Tex. App. 2009); *Love v. City of Clinton*, 524 N.E.2d 166 (Ohio 1988); *District of Columbia v. Chinn*, 839 A.2d 701 (D.C. App. 2003), there is no necessity in this case for us to choose between delictual theories. If the privilege to use reasonable force to effect an arrest was exceeded by Officer McCoy, it matters not what nomenclature is assigned to the plaintiff's claim.

36. *Lowery*, *supra*, note 30 at ¶12, n. 3, at 964, n. 3 (explaining that the provisions of 76 O.S.2001 §1 impose a non-contractual legal duty upon every person to refrain from injuring the person or property of another and that how a person satisfies this duty to avoid injury to another constitutes the standard of care).

37. Although we have previously decided cases in which the underlying claim was one for police negligence incident to arrest, the precise issues raised in those cases have always been tangential to the elements of the tort itself. Hence, we have never addressed the applicable standard of care for police officers making an arrest. *See e.g., Nail v. City of Henryetta*, 1996 OK 12, 911 P.2d 914 (holding that it was for the jury to decide whether police officer was acting within the scope of his employment when he shoved an intoxicated fifteen-year-old person who had already been arrested, was handcuffed, and was not resisting the officer); *Tuffy's Inc. v. City of Okla. City*, 2009 OK 4, 212 P.3d 1158 (holding that tortious acts of police officers may fall within the scope of their employment for purposes of holding their municipal employers liable under the GTCA).

38. *See* the provisions of 21 O.S. 2001 §643, which state in pertinent part:

"To use or to attempt to offer to use force or violence upon or toward the person of another is not unlawful in the following cases: 1. When necessarily committed by a public officer in the performance of any legal duty. . . ."

39. *See* the provisions of 22 O.S. 2001 §34.1, which state in pertinent part:

"A. Any peace officer, as defined in Section 648 of Title 21 of the Oklahoma Statutes, who uses excessive force in pursuance of such officer's law enforcement duties shall be subject to the criminal laws of this state to the same degree as any other citizen."

40. *Id.* (“B. As used in this act, [citation omitted] ‘excessive force’ means physical force which exceeds the degree of physical force permitted by law or the policies and guidelines of the law enforcement entity.”).

41. *Id.* (“C. Each law enforcement entity which employs any peace officer shall adopt policies or guidelines concerning the use of force by peace officers which shall be complied with by peace officers in carrying out the duties of such officers within the jurisdiction of the law enforcement entity.”).

42. OCPD Police Operations Manual, §554.20.

43. *Id.* at §554.10.

44. *Id.* at §554.20.

45. Iglehart, *supra*, note 32 at ¶10, at 502.

46. See *Virginia Elec. and Power Co. v. Dungee*, 520 S.E.2d 164, 174 (Va. 1999) (“The difference between an objective and subjective test, in the context of negligence, is that, in an objective test, the actor’s conduct is measured against what a reasonable person would do in similar circumstances, regardless of that particular actor’s individual feelings, thoughts, perceptions, or prejudices. In a subjective test, by contrast, the actor’s actual knowledge and perception is the ultimate issue.”).

47. The objective reasonableness test to assess adherence to the standard of care set out in today’s pronouncement is like that employed by the United States Supreme Court in §1983 civil rights claims of excessive force, but the ultimate inquiries differ. In a constitutional tort, the objective reasonableness inquiry is designed to “balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.” *Scott v. Harris*, 550 U.S. 372, 383, 127 S. Ct. 1769, 1778, 167 L. Ed.2d 686 (2007). Striking a balance between an individual’s constitutional rights and countervailing governmental interests is not a consideration in a negligence action where the question is simply whether the applicable standard of care has been met or not.

48. The first three factors are those enumerated by the United States Supreme Court for application of the objective reasonableness test to claims of excessive force in violation of the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 1872, 104 L. Ed.2d 443 (1989). The remaining four factors were identified by the Louisiana Supreme Court in *Kyle v. City of New Orleans*, 353 So.2d 969, 973 (La. 1977). While no list can exhaust the possible considerations in a totality-of-the-circumstances evaluation, the factors suggested in the text are fairly illustrative of those that should be considered in assessing what a reasonable police officer would do under the circumstances.

49. *Salazar v. City of Okla. City*, 1999 OK 20, ¶20, 976 P.2d 1056, 1064 (stating that where a fixed standard is employed, the court may be warranted in taking the case from the jury).

50. *Id.* For example, traffic laws, including statutes, regulations, and local ordinances, often set a fixed standard for the conduct of a reasonable person in operating a vehicle and require a finding of negligence in a tort action if the plaintiff can prove that the defendant committed an unexcused violation of the standard.

51. *Id.*

52. *Id.*

53. *Walters v. J. C. Penney Co., Inc.*, 2003 OK 100, ¶13, 82 P.3d 578, 584.

54. *Salazar, supra*, note 49 at ¶20, at 1064.

55. *City of Cushing v. Stanley*, 1918 OK 122, ¶5, 172 P. 628, 628.

56. The presence of some undisputed facts does not *per se* indicate that the case presents no triable issues. When different inferences may be drawn from uncontroverted facts, the dispute must be submitted for a trier’s resolution. *Flanders v. Crane Co.*, 1984 OK 88, ¶10, 693 P.2d 602, 605, *citing* *Northrip v. Montgomery Ward and Co.*, 1974 OK 142, ¶11, 529 P.2d 489, 493, and *Flick v. Crouch*, 1967 OK 131, ¶17, 434 P.2d 256, 262, *superseded on other grounds* by constitutional amendment as recognized in *Jernigan v. Jernigan*, 2006 OK 22, ¶16, n. 16, 138 P.3d 539, 545, n. 16.

57. Carmichael, *supra* note 16.

2010 OK 16

Case Numbers 104004; 104161; 104262  
(Consol. w/104304); 105682

February 23, 2010

OKLAHOMA DEPARTMENT OF  
SECURITIES ex rel. IRVING L. FAUGHT,  
Administrator, and DOUGLAS L.

JACKSON, in his capacity as the court  
appointed receiver for the investors and  
creditors of Schubert & Assoc. and for the  
assets of Marsha Schubert, individually, and  
doing business as Schubert & Associates,  
and for Schubert & Associates, Plaintiffs/  
Appellees, v. R. KURT BLAIR, WENDY B.  
BLAIR, NEIL SHEEHAN, and ROBERT  
RAINS, Defendants/Appellants, v. ROBERT  
W. MATTHEWS, ET AL., Defendants.

No. 104,004

OKLAHOMA DEPARTMENT OF  
SECURITIES ex rel. IRVING L. FAUGHT,  
Administrator, and DOUGLAS L.

JACKSON, in his capacity as the court  
appointed receiver for the investors and  
creditors of Schubert & Associates. and for  
the assets of Marsha Schubert, individually,  
and doing business as Schubert &  
Associates, and for Schubert & Associates,  
Plaintiffs/Appellees, v. KENNETH YOUNG,  
LESLIE YOUNG, K. R. LARUE, DANA  
LARUE, SCOTT WILCOX, RODNEY  
MARTIN, WANDA MARTIN, RAYMOND  
LAUBACH, DAN JACKSON and CRYSTAL  
JACKSON, Defendants/Appellants, v.  
ROBERT W. MATTHEWS, ET AL.,  
Defendants.

No. 104,161

OKLAHOMA DEPARTMENT OF  
SECURITIES ex rel. IRVING L. FAUGHT,  
Administrator, and DOUGLAS L.

JACKSON, in his capacity as the court  
appointed receiver for the investors and  
creditors of Schubert & Associates. and for  
the assets of Marsha Schubert, individually,  
and doing business as Schubert &  
Associates, and for Schubert & Associates,  
Plaintiffs/Appellees, v. KENNETH LARUE,  
ARTHUR PLATT, YVONNE PLATT,  
MARVIN WILCOX, and PAMELA WILCOX,  
Defendants/Appellants, v. ROBERT W.  
MATTHEWS, ET AL., Defendants.

No. 104,262 (Cons. w/104,304)

OKLAHOMA DEPARTMENT OF  
SECURITIES ex rel. IRVING L. FAUGHT,  
Administrator Plaintiff/Respondent, v.  
BARRY POLLARD and ROXANNE  
POLLARD, Defendants/Petitioners.

No. 105,682

ON CERTIORARI TO THE OKLAHOMA  
COURT OF CIVIL APPEALS, DIVISION I,

**IN APPEALS NO. 104,004; NO. 104,161; and  
NO. 104,262/ No. 104,304 AND ON  
CERTIORARI TO REVIEW A CERTIFIED  
INTERLOCUTORY ORDER OF THE  
DISTRICT COURT, OKLAHOMA COUNTY**

¶0 A receiver appointed in a proceeding in the District Court of Logan County joined with the Oklahoma Department of Securities and its Administrator and brought actions in the District Court for Oklahoma County against investors in a Ponzi scheme and sought judgments against them for any amounts they had received from the scheme in excess of their original investments. The Honorable Patricia G. Parish, District Judge, granted summary judgment against the investors by separate orders in Oklahoma County causes CJ-2005-3796 (consolidated with CJ-2005-3299). Several of the defendants appealed in four separate appeals and the Court of Civil Appeals affirmed the judgments of the District Court by separate opinions in Supreme Court Nos. 104,004, 104,161, and consolidated 104,262/104,304. The investors requested that certiorari issue in this Court to the Court of Civil Appeals. In Oklahoma County Cause No. CJ-2005-3799, the Honorable Vicki Robertson, District Judge, granted a partial summary adjudication to the Oklahoma Department of Securities against investors, stayed proceedings in the District Court, and certified three issues for an immediate appeal that was brought in No. 105,682. **We hold that the Oklahoma Uniform Securities Act provides authority for the Department of Securities to bring an action against innocent investors in a Ponzi scheme when they received a profit from the Ponzi scheme that is in excess of their original investment and when the profit is an unreasonable return on the investment. We hold that a District Court has subject matter jurisdiction to adjudicate competing claims of ownership to funds that were part of an investment scheme which violated the securities laws. We hold that a court-appointed receiver for the assets of a failed Ponzi-scheme operator may bring a proceeding for equitable relief against innocent investors for recovery of funds that qualify as an unjust enrichment obtained by the investors from the Ponzi scheme. We hold that an innocent investor in a Ponzi scheme may use equitable setoffs in defense against an unjust enrichment claim brought by the Department.**

**CERTIORARI PREVIOUSLY GRANTED IN  
NOS. 104,004; 104,161; 104,262/104,304;  
OPINIONS OF THE COURT CIVIL  
APPEALS VACATED IN NOS. 104,004;  
104,161; AND 104,262/104,304; JUDGMENTS  
OF THE DISTRICT COURT REVERSED;  
CAUSES REMANDED TO THE DISTRICT  
COURT FOR FURTHER PROCEEDINGS  
CONSISTENT WITH THIS  
COURT'S OPINION**

**CERTIORARI PREVIOUSLY GRANTED IN  
NO. 105,682; ORDER OF THE DISTRICT  
COURT REVERSED; CAUSE REMANDED  
TO THE DISTRICT COURT FOR FURTHER  
PROCEEDINGS CONSISTENT WITH THIS  
COURT'S OPINION**

G. David Bryant and Lisa Wilcox, Kline, Kline, Elliott & Bryant, P.C., Oklahoma City, Oklahoma, for Appellants in Nos. 104,004; 104,161; and 104,262 (Consolidated with No. 104,304).

Melanie Hall, Gerri Stuckey, and Amanda Cornmesser, Oklahoma City, Oklahoma for Appellee Oklahoma Department of Securities in Nos. 104,004; 104,161; and 104,262 (Consolidated with No. 104,304).

Bradley E. Davenport, Gungoll, Jackson, Collins, Box, & Devoll, P.C., Enid, Oklahoma for Appellee, Douglas L. Jackson, Receiver, in Nos. 104,004; 104,161; and 104,262 (Consolidated with No. 104,304).

Russell L. Mulinix, Amy G. Piedmont, Mulinix, Ogden, Hall, Andrews & Ludlam, P.L.L.C., Oklahoma City, Oklahoma, for Petitioners in No. 105,682.

Melanie Hall, Gerri Stuckey, and Amanda Cornmesser, Oklahoma City, Oklahoma for Respondent, Oklahoma Department of Securities in No. 105,682.

**EDMONDSON, C. J.**

¶1 The first-impression principal issue in these appellate proceedings is whether an action may be maintained under the Oklahoma Uniform Securities Act against innocent victims of a Ponzi scheme to force them to pay to the Department of Securities those amounts they received from the Ponzi scheme which are in excess of their investments in that scheme. We hold that the Department may proceed against the innocent investors to recover *unreasonable* profits received in excess of their investments in the Ponzi scheme. We hold that a court-appointed receiver of a Ponzi-scheme

operator may also proceed against innocent investors to recover *unreasonable* profits in excess of their investments in the scheme. We also hold that the Department's action is subject to equitable setoffs raised in defense by the innocent investors. We consolidate the proceedings for the sole purpose of a single pronouncement from this Court on the issues.<sup>1</sup>

### I. The Facts of the Controversy

¶2 Marsha Schubert, as a registered agent of registered investment broker-dealers, Schubert's business, Schubert and Associates, received over two hundred million dollars during the period of December 1999 to October 2004 to invest for other people.<sup>2</sup> She made verbal statements to investors that their money would be used to make trades in alleged options accounts and day trading accounts, and that their accounts with the broker-dealers held large balances.

¶3 Schubert deposited the funds into various personal bank accounts she controlled as well as her business bank account, in the name of Schubert & Associates. She also deposited some funds she received into brokerage accounts for the investors. For example, money received by Defendants, the Youngs, was split into deposits for the Youngs' brokerage account and the Schubert and Associates bank account. The investment monies deposited into the Schubert & Associate account and Schubert's various personal bank accounts were never directly used to make any investment trades through the broker-dealers on behalf of the investors, although Schubert continually made statements to the contrary to her investors. The money she received for option contracts or day trading, she appropriated as part of a Ponzi scheme. The majority of these funds were eventually deposited into personal accounts of Schubert where they were commingled with Schubert's personal funds.<sup>3</sup>

¶4 Schubert kept her Ponzi scheme from discovery by making payments to some of her investors. She paid them with checks drawn on her Schubert & Associates bank account, another bank account listing her name with a tax permit number, as well as payments by wire transfers from her bank accounts directly into the investors' broker-dealer accounts. Investors would receive statements from their broker-dealers showing funds in their accounts.

¶5 After discovery of the Ponzi scheme the Oklahoma Department of Securities (Depart-

ment) brought an action in the District Court for Logan County against Schubert and sought injunctive relief and appointment of a receiver for her and her business, Schubert and Associates. The trial court appointed a receiver and by a subsequent order directed that Receiver, Douglas L. Jackson, also serve as "receiver for the benefit of claimants and creditors of Marsha Schubert and Schubert and Associates." The order authorized the receiver to "institute actions . . . Against paid investors . . . that the Receiver deems necessary to recover assets and to protect the interests of and promote equity among the investors." The order defined "assets" as including the "proceeds of the investment program described in the Petition (i.e., the Schubert Investment Program) by which certain participants were unjustly enriched or received fraudulent transfers."

¶6 In May of 2005 the receiver and the Department brought a joint action in the District Court for Oklahoma County and named one-hundred and fifty-eight defendants. Approximately eighty-seven people allegedly lost in excess of nine million dollars, and over one-hundred and fifty people allegedly made approximately six million dollars from Schubert.<sup>4</sup> The record *appears* to indicate that the 158 investors were paid with Schubert and Associates funds received from other investors. The defendants were not charged with securities violations.

¶7 The Petition asserted claims against the defendants on grounds of unjust enrichment, fraudulent transfer and an equitable lien "against all real property and personal property purchased with unearned investor assets" received by the defendants. The Petitioners later withdrew their claim of fraudulent transfers. The Receiver and Department then proceeded to obtain summary judgments solely on the unjust enrichment theory and the trial court granted judgment against the defendants based upon this theory. Several of the defendants appealed. We issue one opinion for the multiple appeals.

### II. District Court Jurisdiction in Actions by the Oklahoma Department of Securities Against Innocent Investors

¶8 The first issue presented is whether the District Court has jurisdiction in an action seeking equity/restitution brought by the Administrator and/or the Department against innocent investors in a securities fraud scheme

when the investors received more money from their investment than they invested in the scheme. At one point in the trial court the Administrator/Department summarized its legal basis for actions against Defendants in a District Court.

It is true that the text of the Act [Oklahoma Uniform Securities Act of 2004] and the Predecessor Act [Oklahoma Securities Act, 2001 as amended thru 2003] do not specifically address the ability to recover from relief defendants [the 158 defendants whom allegedly made a Ponzi profit], nor have the Oklahoma courts addressed this issue. However, Section 1-602 (B) [1-603 (B)] of the Act and Section 406.1 of the Predecessor Act clearly confer equitable jurisdiction upon the district courts when securities law violations occur. The Act and Predecessor Act also explicitly reference the important objective of promoting “greater uniformity in securities matters” among the state and federal government. In acknowledgment of the goal of uniformity, the Oklahoma Supreme Court has stated that the interpretative history of the federal securities acts, upon which Oklahoma’s securities laws are modeled, is properly considered in the interpretation of similar state securities provisions. *Day*, at ¶ 30-31, [*State ex rel. Day v. Southwest Mineral Energy, Inc.*, 1980 OK 118, 617 P.2d 1334]. More specifically, the Oklahoma Supreme Court found that the Oklahoma Legislature intended equitable remedies be available to the Administrator for enforcement under the Oklahoma securities laws and that the Administrator has the power to seek such remedial relief. *Day* at ¶ 18-21.

Department’s response to a motion to dismiss in the trial court.<sup>5</sup>

The Departments’ arguments may be further summarized as (1) an action against Ponzi defendants is authorized by § 1-603(B);<sup>6</sup> (2) the Administrator has authority to seek this particular equitable relief based upon the Court’s opinion in *State ex rel. Day v. Southwest Mineral Energy, Inc.*, 1980 OK 118, 617 P.2d 1334; (3) an action against Ponzi defendants promotes uniformity among the states and the federal government in securities matters; and (4) the interpretive history of federal securities acts is consistent with an action against Ponzi defendants.

¶9 The Oklahoma Securities Commission and the Oklahoma Department of Securities are created by statute, with the Commission as the policy-making and governing authority of the Department. 71 O. S. Supp. 2003 § 1-601 (B).<sup>7</sup> The Oklahoma Department of Securities (or Department), as a public agency, possesses those powers expressly granted by law, by constitution or statute, *and such powers as are necessary for the due and efficient exercise of the powers expressly granted*, or such as may be fairly implied from the constitutional provision or statute granting the express powers. *Oklahoma Public Employees Ass’n v. Oklahoma Dept. of Central Services*, 2002 OK 71, ¶¶ 25 - 27, 55 P.3d 1072, 1083 - 1084 (emphasis added).

¶10 The Administrator relies upon a provision of the Oklahoma Uniform Securities Act of 2004,<sup>8</sup> 71 O.S.Supp.2003 § 1-603,<sup>9</sup> the first paragraph of which clearly gives the Administrator the authority to seek equitable relief to stop a person from violating the Act or materially aiding a violation of the Act:

If the Administrator believes that *a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of this act . . . or that a person has, is, or is about to engage in an act, practice, or course of business that materially aids a violation of this act . . . the Administrator may . . . maintain an action in the district court of Oklahoma County . . . to enjoin the act, practice, or course of business and to enforce compliance with this act . . . .*

71 O.S.Supp. 2003 § 1-603 (A) (material omitted and material emphasized).

Statutory language that confers powers upon a governmental entity is construed according to the general and ordinary meaning of the words used unless the statute authorizes a separate and specific definition for those words. *Boydston v. State*, 1954 OK 327, 277 P.2d 138, 142. Section 1-603(A) refers to actions brought against a person violating the Securities Act or materially aiding a violation of the Act. In the trial court the Department explained that it made no allegation that the defendants violated the securities statutes or materially aided in the violation of those statutes.<sup>10</sup>

¶11 Title 71 § 1-603, paragraph “B” has three numbered parts as follows:

B. In an action under this section and on a proper showing, the court may:

1. Issue a permanent or temporary injunction, restraining order, or declaratory judgment;

2. Order other appropriate or ancillary relief, which may include:

a. an asset freeze, accounting, writ of attachment, writ of general or specific execution, and appointment of a receiver or conservator, that may be the Administrator, for the defendant or the defendant's assets,

b. ordering the Administrator to take charge and control of a defendant's property, including investment accounts and accounts in a depository institution, rents, and profits; to collect debts; and to acquire and dispose of property,

c. imposing a civil penalty up to a maximum of Five Thousand Dollars (\$5,000.00) for a single violation or up to Two Hundred Fifty Thousand Dollars (\$250,000.00) for more than one violation; an order of rescission, restitution, or disgorgement directed to a person that has engaged in an act, practice, or course of business constituting a violation of this act or the predecessor act or a rule adopted or order issued under this act or the predecessor act, and

d. ordering the payment of prejudgment and postjudgment interest; or

3. Order such other relief as the court considers appropriate.

71 O. S. Supp. 2003 § 1-603 (B), (emphasis added).

The Department argues that “[o]rder other appropriate or ancillary relief” and “[o]rder such other relief as the court considers appropriate” include relief in the form of obtaining a money judgment against the innocent investors.

¶12 The Department relies upon *State ex rel. Day v. Southwest Mineral Energy, Inc.*, 1980 OK 118, 617 P.2d 1334, for the concept that seeking restitution from innocent investors is a power implied from the express statutory powers. In *State ex rel. Day* the defendants were charged with violating registration and anti-fraud provisions of the 1971 version of the Oklahoma Securities Act. *Id.* 617 P.2d at 1335. In *Day* the

relief sought against those defendants was disgorgement which the Court defined as “a mandatory order by the Court requiring those who obtain funds from investors or purchasers or lessees in violation of regulatory provisions, to ‘disgorge’ themselves of the illegally obtained profits.” *Id.* In *Day* this Court explained that the unlimited original jurisdiction of all justiciable matters constitutionally conferred on the District Courts of this State makes them courts of equity and law. *Id.* 617 P.2d at 1337-1338, citing, Okla. Const. Art. 7 § 7.<sup>11</sup>

¶13 The innocent investors argue that the language in 71 O.S.Supp. 2003 § 1-603 (A) limits the scope of who may be a defendant in an action by the Department seeking equitable or other relief pursuant to the authority of paragraph “B” of that statute. For reasons we now explain, although the Department incorrectly characterizes its action as disgorgement, we hold that a District Court has jurisdiction to determine equitable claims brought by the Department against parties allegedly possessing funds obtained from a fraudulent scheme operated by a Department-regulated person or entity.

¶14 Our opinion in *State ex rel. Day, supra*, is consistent with federal courts’ construction of the purpose of federal securities laws to divest a wrongdoer of ill-gotten gains by the equitable remedy of disgorgement.<sup>12</sup> While some courts have loosely defined “disgorgement” to include seeking funds to compensate victims of fraud, several federal courts have explained that “disgorgement” requires a person to disgorge funds obtained from his or her violation of securities laws, while “restitution” is a different remedy and refers to compensating victims of the securities fraud for their losses.<sup>13</sup> Federal courts have recognized that the lack of express federal statutory authorization to order disgorgement does not to frustrate a court of equity in giving effect to the legislative policy behind the regulatory enactments.<sup>14</sup> Giving effect to the legislative policy is defined as a court providing “complete relief in light of the statutory purposes;”<sup>15</sup> *i.e.*, individuals who had violated securities laws were required to disgorge their ill-gotten profits.<sup>16</sup> Disgorgement is not for the purpose of compensating victims, although compensation of victims often results from disgorgement. For example, “The purpose of disgorgement is not to compensate the victims of the fraud, but to deprive the wrongdoer of his ill-gotten gain.”<sup>17</sup> The legislative history of dis-

gorgement shows that it was not designed to compensate victims.<sup>18</sup>

¶15 Disgorgement is an exercise of a state's police or regulatory powers.<sup>19</sup> When the SEC seeks disgorgement it is acting in a sovereign governmental capacity. For example, statutes of limitation do not apply to bar equitable relief for disgorgement of ill-gotten gains from a wrong-doer.<sup>20</sup> This concept was explained at length in *SEC v. Lorin*, 869 F.Supp. 1117 (S.D.N.Y.1994), where that court discussed whether the Federal Securities and Exchange Commission (SEC) possessed a *public interest* to seek disgorgement or whether the SEC's action was merely a substitute for a private right of action.

. . . litigants and legal commentators have contended that SEC actions seeking disgorgement do not constitute the pursuit of a public interest or right because the SEC regularly turns over the disgorged proceeds to the victims of the violations; as a result, they assert, SEC enforcement actions serve as simple substitutes of the Rule 10b-5 actions that the victims might otherwise bring and consequently vindicate the rights of those private victims and not the public as a whole. . . .

Notwithstanding what appears to be the practical equivalence of SEC actions and those that private parties can bring, *the SEC's position finds great support in the fact that its statutory authorization to bring civil enforcement actions does not require it to turn disgorged proceeds over to the private investors who have been damaged by the violator's activity; rather, disgorged proceeds can very well end up in the United States Treasury*, for example, (1) where numerous victims suffered relatively small amounts thereby making distribution of the disgorged proceeds to them impractical, . . . (2) where the victims cannot be identified, . . . and (3) where there are no victims entitled to damages, . . .

In this way, the SEC's actions differ from actions brought by the EEOC, discussed in *Occidental Life*, [*Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 97 S.Ct. 2447, 53 L. Ed.2d 402 (1977).] where the back pay sought against an employer, must, by statutory definition, be turned over to the individual who of course could have brought a private action. This difference persists despite the fact that the SEC's authoriza-

tion does not go so far as to prohibit it from so distributing disgorged proceeds. As a result, unlike the situation described by the dissent in *Occidental Life*, the United States is not precluded from gaining something "tangible" as a result of the type of SEC suits at issue here.

I therefore find that the SEC action at issue here operates to vindicate a public interest and, accordingly, that it is improper to "borrow" a limitation period. *The element of SEC actions that I find dispositive in terming them public interest actions is their allowance for the United States to itself obtain a monetary benefit.* The fact that SEC actions often benefit private parties does not persuade me that they cannot simultaneously serve the public interest. *See also* Comment, Christopher R. Dollase, *The Appeal of Rind: Limitations of Actions in Securities and Exchange Commission Civil Enforcement Actions*, 49 Bus.Law. 1793, 1814 (1994) ("There does not need to be a complete demarcation between public interest and benefits to individuals."). Several cases have recognized, in other contexts, the dual benefit that SEC actions create. *SEC v. Tome*, 833 F.2d 1086, 1096 (2d Cir.1987) ("The *paramount purpose* of . . . disgorgement is to make sure that wrongdoers will not profit from their wrongdoing." (emphasis added)), *cert. denied*, 486 U.S. 1014, 108 S.Ct. 1751, 100 L.Ed.2d 213 (1988); *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 102 (2d Cir.1978) ("[T]he *primary purpose* of disgorgement is not to compensate investors. Unlike damages, it is a method of forcing a defendant to give up the amount by which he was unjustly enriched." (emphasis added)); *cf. SEC v. Penn Cent. Co.*, 425 F.Supp. 593, 599 (E.D.Pa.1976) ("The fact that one consequence of the action may be to benefit private parties does not detract from the public purpose of effectuating the goals of the securities laws." (emphasis added)).

*SEC v. Lorin*, 869 F.Supp. at 1128 -1129 (material omitted and emphasis added).

The potential payment to the U. S. Treasury was a *dispositive* element showing that the SEC was litigating a *public interest* when seeking disgorgement. While Congressional authority was given to the SEC to retain disgorged funds with their ultimate payment to the U. S. Treasury, no similar legislative authority is shown for the

Department to seize disgorged or restitution funds and pay them to the State Treasurer.

¶16 *SEC v. Lorin* also refers to the public purpose of effectuating the goals of securities laws. Section 1-603 expressly authorizes both disgorgement and restitution involving a person who has violated the securities laws.

B. In an action under this section and on a proper showing, the court may:

. . . 2. Order other appropriate or ancillary relief, which may include:

. . . c. imposing a civil penalty up to a maximum of Five Thousand Dollars (\$5,000.00) for a single violation or up to Two Hundred Fifty Thousand Dollars (\$250,000.00) for more than one violation; an order of rescission, restitution, or disgorgement directed to a person that has engaged in an act, practice, or course of business constituting a violation of this act or the predecessor act or a rule adopted or order issued under this act or the predecessor act, and . . .

71 O.S.Supp. 2003 § 1-603 (B)(2)(c) (emphasis added and material omitted).

Departmental action for disgorgement and restitution against one who has violated securities laws serves an obvious public purpose. Does the Department's action for restitution against an innocent investor serve a public purpose? The short answer is yes, if the nature of the transaction between the Ponzi operator and innocent investor is inequitable and the innocent investor's right to the funds becomes merely possessory.

¶17 Typical of the authority cited by the Department in the present case is *SEC v. Cross Financial Services, Inc.*, 908 F.Supp. 718 (C.D. Cal.1995), where the court stated the following:

According to *Cherif*, a district court has power to grant relief with respect to property to which non-violators have no valid claim. *Under these circumstances, the touchstone is whether the non-party's claim to the property is legitimate, not whether the party is innocent of fraud or wrongdoing.*

*Id.* at 732, emphasis added.

The Department construes this language to mean that the SEC has power to grant disgorgement against non-violators. *Cross Financial Services* relied upon *SEC v. Cherif*, 933 F.2d 403 (7th Cir. 1991), for the proposition that dis-

gorgement is an equitable remedy available against a non-violator if it is established that the non-violator possesses illegally obtained profits but has no legitimate claim to them. In *SEC v. Cherif*, 933 F.2d 403 (7th Cir. 1991), the SEC made an argument virtually identical to that of the Department in this case. One party therein, Sanchou, objected to being named in an action brought by the SEC because he had not been accused of any securities violations. The federal court explained that the SEC's reading of the applicable federal statute was incorrect.

*15 U.S.C. §§ 78u(d) and (e) also cannot aid the SEC since the statute is not so broadly written as the SEC contends. The statute has been construed to allow the granting of "any form of ancillary relief" \* \* \* where necessary and proper to effectuate the purposes of the statutory scheme." Materia*, 745 F.2d at 200. *Language about the importance of granting complete equitable relief, however, must be read in context. Usually the language advocates that all equitable powers residing in the district court be visited upon the defendant or violator before the court. See id.; Farrand, Ancillary Remedies in SEC Civil Enforcement Suits*, 89 Harv. L.Rev. 1779 (1976). *Nothing in the statute or case law suggests that 15 U.S.C. § 78u(d) or (e) authorizes a court to freeze the assets of a non-party, one against whom no wrongdoing is alleged.*

*SEC v. Cherif*, 933 F.2d 403, 414 (emphasis added).

The Seventh Circuit rejected the SEC's position that securities statutes authorized an asset freeze against a person it classified as a "non-party" since he had not violated the securities laws. *Id.* The Oklahoma Department of Securities recognizes this holding of *Cherif* because it relies not upon the holdings of the opinion, but upon a footnote therein stating that "A court can obtain equitable relief from a non-party against whom no wrongdoing is alleged if it is established that the non-party possesses illegally obtained profits but has no legitimate claim to them." *Id.* at 414, n. 11 (emphasis added).

¶18 A party added by the SEC as a *nominal defendant* has no legal claim to the proceeds of the property other than a possessory claim.

A nominal defendant is a person who "holds the subject matter of the litigation in a subordinate or possessory capacity as to which there is no dispute." . . . The para-

digmatic nominal defendant is “a trustee, agent, or depository ... [who is] joined purely as a means of facilitating collection.” *Id.* (internal quotations and citation omitted). As the nominal defendant has no legitimate claim to the disputed property, he is not a real party in interest. Accordingly, “there is no claim against him and it is unnecessary to obtain subject matter jurisdiction over him once jurisdiction of the defendant is established.”

*SEC v. Colello*, 139 F.3d at 676 (9th Cir.1998), quoting *SEC v. Cherif*, 933 F.2d at 414 (footnote and material omitted).

A usual nominal defendant is a bank or trustee, which has only a custodial claim to the property. *SEC v. Colello*, *supra* at 677. For example, one court has recognized that the SEC could freeze assets held by a non-culpable third party when the assets belong to, or are in route to, a securities-culpable entity, or when the culpable entity controlled the assets as a matter of law, or when the non-party is innocent with respect to the securities violation and is named as a “nominal party” to recover proceeds of fraud. *SEC v. Black*, 163 F.3d 188, 196-197 (3d Cir. 1998).<sup>21</sup> Thus, the “nominal party” distinction maintains the concept that the funds are being disgorged by the wrongdoer, although those funds were held by a non-culpable third party. In *Colello* the SEC characterized a nominal party’s claim to funds as an affirmative defense, but the court disagreed and stated that “the lack of a legitimate claim to the funds is the defining element of a nominal defendant.” *SEC v. Colello*, 139 F.3d at 677.

¶19 The Defendants cast this issue as a jurisdictional dispute. Subject matter jurisdiction exists when a court has power to proceed in a case of the character presented, or power to grant the relief sought in a proper cause. *State ex rel. Turpen v. A 1977 Chevrolet Pickup Truck*, 1988 OK 38, ¶ 10, 753 P.2d 1356, 1359 quoting, *Consolidated Mtr. Frt. Terminal v. Vineyard*, 1943 OK 358, 143 P.2d 610, 612. The power to proceed is acquired by an application of a party showing the general nature of the case and requesting relief of the kind the court has power to grant. *Id.* Subject matter jurisdiction is invoked by the pleadings filed with the court. *State ex rel. Oklahoma Tax Com’n v. Texaco Exploration*, 2005 OK 52, ¶ 14, 131 P.3d 705, 709.

¶20 In our case today the Defendants allege that the Department’s action is not against

nominal parties, but against parties who have more than possessory rights to the funds and that the Department lacks jurisdiction to proceed against them. The Department alleges that Defendants possess funds transferred to them as part of an investment scheme which violated securities laws that the Department has authority to enforce, that these funds rightfully belong to other investors, that the Department has authority to file a claim in a District Court to gain funds wrongfully transferred pursuant to violations of securities laws, that the Defendants are *nominal parties*, and that a District Court has jurisdiction to adjudicate competing claims concerning ownership of funds that were part of that scheme. The status of the defendants as nominal, as alleged by the Department, goes to the merits of the Defendants’ claim to ownership of the contested funds. We hold that an Oklahoma District Court has subject matter jurisdiction to adjudicate competing claims of ownership to funds that were part of an investment scheme which violated the securities laws.<sup>22</sup>

### III. Equitable Relief Against Innocent Investors

¶21 The Department argues that when an innocent investor receives a profit from investment in a Ponzi scheme the amount of the profit is inequitable as a matter of law, the investor’s right to the profit is merely possessory as a matter of law, and equity provides relief in the form of a legal proceeding for restitution of those funds to the innocent investors who did not make a profit. We agree with the Department that the nature of the transaction between the Ponzi operator and innocent investor *may* be inequitable and the innocent investor’s right to the funds becomes merely possessory, but we disagree that the profit is, as a matter of law, inequitable and thereby subject to a restitution proceeding. Whether a profit is unjust enrichment that a District Court should rectify presents a mixed question of fact and law.

¶22 Unjust enrichment is a condition which results from the failure of a party to make restitution in circumstances where not to do so is inequitable, *i.e.*, the party has money in its hands that, in equity and good conscience, it should not be allowed to retain. *Harvell v. Goodyear Tire & Rubber Co.*, ¶ 18, 164 P.3d 1028, 1035.<sup>23</sup> Some states define unjust enrichment with four parts: (1) the unjust (2) retention of (3) a benefit received (4) at the expense of another.<sup>24</sup> We explained in *Harvell v. Goodyear Tire & Rubber Co.*, *supra*, that elements of unjust

enrichment claims differ markedly from state to state. 2006 OK 24, ¶ 20, 164 P.3d at 1036. One element of the claim which does not receive uniform treatment by courts is whether the party against whom relief is sought has engaged in wrongful conduct.<sup>25</sup>

¶23 We have explained that a “careful reading” of opinions in Oklahoma shows that when a constructive trust is sought to remedy unjust enrichment, there must be some active wrongdoing on the part of the person against whom recovery is sought:

The primary reason for imposing a constructive trust is to avoid unjust enrichment. It is imposed against one who “by fraud, actual or constructive, by devices or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy.” . . . A careful reading of the cases in this jurisdiction, in which the imposition of a constructive trust was sought, reveals that an element of unfairness in allowing the legal title holder to retain the property is not sufficient to justify the imposition of a constructive trust. There must also be some active wrongdoing on the part of the person against whom recovery is sought . . . .

*Easterling v. Ferris*, 1982 OK 99, 651 P.2d 677, 680 (emphasis added, citations and material omitted).

In *French Energy, Inc. v. Alexander*, 1991 OK 106, 818 P.2d 1234, 1237-1238, we explained that unjust enrichment based upon “innocent misrepresentation or non-disclosure” may be used to justify restitution. To satisfy these principles, the Department must prove that an innocent investor’s conduct of possessing a Ponzi-scheme profit is, by itself, active wrongdoing or possession against equity and good conscience sufficient to justify a constructive trust imposed by a District Court.

¶24 The Department’s arguments that the Defendants were unjustly enriched may be summarized by the following quote from the Department’s briefs:

To allow defendants to keep money that does not belong to them in exchange for nothing would result in them being sub-

stantially unjustly enriched. [And] or The Department is authorized to seek the disgorgement of the funds received by Defendants that were in excess of the reasonable equivalent value exchanged.<sup>26</sup>

We agree that a Ponzi-scheme profit received by an innocent investor may represent unjust enrichment when a reasonably equivalent value has not been exchanged, as we now explain.

¶25 Bankruptcy-related actions against innocent investors in a Ponzi scheme who received a profit on their investments is common. One commentator in 1998 observed the following:

The largest assets of a Ponzi-scheme [bankruptcy] estate typically are the claims that the estate has against those investors who received “returns” on their investments. A trustee of a Ponzi-scheme estate may sue to recover such payments to investors pursuant to the fraudulent transfer and preference provisions of the Bankruptcy Code. In March 1998, the trustee of *Bennett Funding* filed over 10,000 lawsuits against former investors, seeking recovery of \$100 million in alleged fraudulent transfers. Amounts recovered from such investors can then be ratably distributed to all of the creditors, both investors who lost money in the scheme, and other, noninvestor creditors of the estate.

Mark A. McDermott, *Ponzi Schemes and the Law of Fraudulent and Preferential Transfers*, 72 Am. Bankr.L.J. 157, 158 -159(1998), (note omitted).

One court has explained that the examination by bankruptcy courts of alleged fraudulent transfers in Ponzi schemes has resulted in two distinct lines of cases.

As the district court noted in *Daly v. Dep-tula (Carrozzella & Richardson)*, 286 B.R. 480, 487 (D.Conn.2002) “[t]here is sharp split of authority on the issue of whether the payment of interest [or some other form of return to a Ponzi scheme investor] by a Ponzi scheme operator can ever constitute reasonably equivalent value.” 286 B.R. at 487. Describing the legal reasoning supporting the first line of authority, which holds that any transfer by a debtor to a Ponzi scheme investor over and above the amount of the transferee’s initial investment is not, as a matter of law, supported by reasonably equivalent value, . . . . (Discus-

sion of first of two competing principles/rationales and citations omitted.)

*Rieser v. Hayslip (In re Canyon Sys. Corp.)*, 343 B.R. 615, 639 (Bankr.S.D.Ohio 2006).

This first line of cases makes all Ponzi profits, as a matter of law, unsupported by the exchange of a reasonably equivalent value.<sup>27</sup>

¶26 The second line of cases makes the issue of reasonably equivalent value a question of fact, and was explained by the court as follows.

[The second line of authority] focuses on the discrete transaction between the debtor and the defendant, without regard to the nature of the debtor's overall enterprise. The[se] cases have cited the narrow language of the Uniform Fraudulent Transfer Act that refers to the transfer at issue [ *see, e.g.,* Ohio Rev.Code Ann. § 1336.05, which provides that a transfer is avoidable if the debtor made the transfer "without receiving reasonably equivalent value in exchange for the transfer"]. The[se] courts have measured what was given against what was received *in that transaction* ... [and have] described the "fatal legal flaw" in the reasoning adopted by the ... [first] line of cases ... as follows:

[I]t focuses not on a comparison of the values of the mutual consideration actually exchanged in the transaction between the [transferee] and the [d]ebtor, but on the value, or more accurately stated, the supposed significance or consequence of the [transferee-debtor] transaction in the context of the [d]ebtor's whole Ponzi scheme.... [T]he statutes and case law do not call for the court to assess the impact of an alleged fraudulent transfer in a debtor's overall business. The statutes require an evaluation of the specific consideration exchanged by the debtor and the transferee in the specific transaction which the trustee seeks to avoid, and if the transfer is equivalent in value, it is not subject to avoidance under the law. . . .

[In the decisions comprising the second line of authority] [t]he courts have ... looked to the plain language of the Bankruptcy Code and the state-law fraudulent transfer acts that define "value" as including "satisfaction ... of an antecedent debt." 11 U.S.C. § 548(d)(2)(A); [Ohio Rev.Code Ann. § 1336.03(A) ]. [They hold] that the payment

of interest to innocent investors pursuant to a contractual obligation clearly constitute[s] the satisfaction of an antecedent debt and, therefore, based upon the clear language of the statute, should be considered as the receipt of value by the debtor [,] ... reason[ing] that the debtor's use of the investor's funds for a period of time supported the payment of reasonable contractual interest and, [these courts further note that] if Congress did not intend such a result when the debtor was involved in a Ponzi scheme, it should so specify in the Bankruptcy Code rather than leaving it to the courts to ignore what is clearly value and fair consideration under the fraudulent conveyance statutes. To hold otherwise, the[se] [c]ourt[s] [reason], would ignore the universally accepted fundamental commercial principal that, when you loan an entity money for a period of time in good faith, you have given value and you are entitled to a reasonable return.

The[se] [c]ourt[s] also question[ ] why innocent investors should be treated any differently than a Ponzi-scheme operator's trade creditors, such as utility companies and landlords, since the payment of contractual debts owing to these trade creditors diminishes the debtor's estate in the same manner that payment of reasonable contractual interest to innocent investors diminishes the estate....

[Cases adhering to this view] note[ ] that the[ ] decisions [comprising the first line of authority] have failed to explain why [an] illegal and unenforceable contract allows the repayment of principal but not interest.... [These courts point out] that allowing an investor to retain reasonable contractual interest does not further a Ponzi scheme any more than allowing that investor to retain repaid principal.

*Rieser v. Hayslip (In re Canyon Sys. Corp.)*, 343 B.R. 615, 640-641 (explanatory marking in original) quoting *Daly v. Deptula (Carrozzella & Richardson)*, 286 B.R. 480, 488-490 (D.Conn.2002) (citations and quotation marks omitted).

This second line of cases examines whether the innocent investor received the funds for satisfaction of an antecedent debt and if the funds received by the investor were based upon a reasonable contractual interest. This second line of authority points out that for the

purpose of fraudulent transfers and *if the first line of cases is followed*, then a Ponzi investor should return *both the repaid initial investment and any profit received* if a court treats the Ponzi transactions as lacking an exchange of reasonably equivalent value. In other words, if the first line of cases is followed and a court holds that a profit is transferred for less than a reasonable contractual interest as a matter of law, such holding would also necessitate an investor returning the recovered original investment to a receiver for pro rata distribution to all investors.

¶27 We prefer to follow the second line of authority and apply it to a claim in equity for restitution. Equity is based upon the circumstances of the particular case before the court.<sup>28</sup> Some courts have granted equity relief against Ponzi-investors who received a profit while noting the inequity inherent when granting that relief.

We are aware that it may create a significant hardship when an innocent investor such as Kowell is informed that he must disgorge profits he earned innocently, often years after the money has been received and spent. Nevertheless, courts have long held that it is more equitable to attempt to distribute all recoverable assets among the defrauded investors who did not recover their initial investments rather than to allow the losses to rest where they fell. *See Scholes*, 56 F.3d at 757 (“[I]t may seem ‘only fair’ that [the early investor] should be entitled to the profits ... made with his money... [However, h]e should not be permitted to benefit from a fraud at [later investors’] expense merely because he was not himself to blame for the fraud.”).

*Donell v. Kowell*, 533 F.3d 762, 776 (9th Cir. 2008) (note omitted).

The inequity in forcing restitution of profits from innocent investors has kept some courts from ordering the restitution.

Some investors who received “fictitious profits” may have spent the money on education or other necessities many years ago. What else in equity and good conscience should plaintiffs who received money in good faith pursuant to an “investment contract” have done? In contrast, some investors who lost money may have been speculators who were prepared to lose their investments. There is simply no neat

answer to the various equities involved here where the investors never knew each other and were equally at fault for trusting Chilcott. “Unexpected gains or losses by equally innocent parties may present similar problems, not capable of resolution by unjust enrichment principles.” *Dobbs, Remedies*, § 4.1 (1973). There is no precedent in law or equity for applying unjust enrichment principles in these circumstances. In such circumstances the courts may simply leave the parties where they were found.

*Johnson v. Studholme*, 619 F.Supp. 1347, 1350 (D.Colo.1985), *aff’d*, 833 F.2d 908 (10th Cir.1987).

All of the circumstances present “various equities” with different investors and some courts have declined to find an equitable right to restitution from Ponzi profits held by another investor, and others have found that equitable right.<sup>29</sup>

¶28 An action by the Department, a state agency, against innocent investors to recover Ponzi-profits paid “many years ago” is a concern for courts since the State would appear to be pursuing a public, and not private, interest. The concern arises, in part, because (1) In an equitable proceeding defenses such as laches and estoppel are *generally* not available against the state and its agencies acting in a sovereign capacity,<sup>30</sup> unless application of equitable defenses would further a principle of public policy or interest;<sup>31</sup> and (2) The argument of the Department herein is that there exists no legal or equitable interests in the profits held by Defendants, and that no public policy exists herein that would support thwarting the Department seeking relief against the Defendants.

¶29 The SEC protects investors<sup>32</sup> while taking into consideration whether its actions “will promote efficiency, competition, and capital formation.”<sup>33</sup> The Administrator of the Department also protects the public and investors. There is no doubt that some federal courts have allowed actions by the SEC against Ponzi-investors for *any* profits and have based the relief awarded upon an unjust enrichment theory. A Ponzi scheme, according to one definition, is “[a] fraudulent investment scheme in which money contributed by later investors *generates artificially high dividends* for the original investors, whose example attracts even larger investment.” *Black’s Law Dictionary*, 1180 (7th Edition 1999) (emphasis added). The

Department argues for an equitable right to restitution regardless of the reasonableness of the return or dividend obtained by an innocent investor. We conclude that this approach is contrary to the equities involved in a Ponzi scheme where an innocent investor relies upon the advice of a licensed investment dealer and the investor does not receive an artificially inflated Ponzi-scheme profit.

¶30 We hold that the Department may seek relief against Ponzi investors who received profits that are artificially high dividends. However, we decline to recognize authority by the Department to seek restitution from innocent Ponzi-scheme investors who received their investment with a reasonable interest thereon. Our holding is based upon the principle that the Department possesses a public interest in seeking restitution *for investors* who did not receive the return of their initial investment, and that the Department's unjust enrichment claim is brought against investors who received unreasonable high dividends in a Ponzi-scheme.

#### IV. Action by Court Appointed Receiver Against Innocent Investors

¶31 A District Court appointed Douglas L. Jackson as a receiver for the investors and creditors of Schubert & Assoc. and for the assets of Marsha Schubert, individually, and doing business as Schubert & Associates, and for Schubert & Associates. An issue raised by these appeals is whether a court appointed receiver may proceed against the innocent investors.

¶32 Defendants argue<sup>34</sup> that the receiver holds title to property of the estate with the same right and title as those who hold claims against the estate, that the receiver may not hold an antagonistic position as creditor against the estate, that the receiver may not favor one investor over another, and that a receiver for a sole proprietorship could not recover an alleged fraudulent conveyance. *In re OK Investment Corp.*, 1977 OK 33, 560 P.2d 969, we quoted from *Hudson v. Hubbell*, 1935 OK 138, 41 P.2d 844, and stated the following:

Receivers are appointed to conserve the property pending litigation, for the benefit of those interested as parties to the action. Usually, as in this case, the property is taken charge of before judgment is rendered. Its supervision and disposition is under the direction of the court. A receiver

has only such powers as are granted by order of the court, and he acts under the direction of the court . . . .

*In re OK Investment Corp.*, 560 P.2d at 970.

The statutory power of a receiver is as follows:

The receiver has, under the control of the court, power to bring and defend actions in his own name, as receiver; to take and keep possession of the property, to receive rents, to collect debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the courts may authorize.

12 O.S.2001 § 1554.

A receiver not only takes possession of property, *In re OK Investment Corp.*, *supra*, but also has authority to bring an action in a District Court to obtain property possessed by a person or entity other than the entity the receiver is appointed for. While Defendants appear to recognize that a receiver may bring an action in District Court, they argue that a receiver may not bring this particular action seeking equitable relief.

¶33 In this case the District Court of Logan County defined the assets over which the receiver was appointed as including the proceeds obtained by certain participants in the Ponzi-scheme whereby they were "unjustly enriched or received fraudulent transfers." Defendants argue that a receiver may not be appointed for such a purpose. In *Farrimond v. State ex rel. Fisher*, 200 OK 52, 8 P.3d 872, we explained that a receiver holds property and funds coming into the receiver's hands by the same right and title as the person or entity from whom the receiver has been appointed. *Id.* at ¶ 14, 8 P.3d at 875 quoting, *Norman v. Trison Development Corp.*, 1992 OK 67 ¶ 7, 832 P.2d 6.

¶34 Defendants argue that Marsha Schubert and the investors in her financial schemes do not possess any right or title to the funds in question, and thus the receiver has no such right. They argue that Jackson is not really suing on behalf of Schubert and her associated entities, but on behalf of the investors (creditors) and that a receiver in cases such as this, as a matter of law, does not have standing to sue on behalf of the investors. Their argument rests upon the following: "The rule is that the maker of the fraudulent conveyance and all those in privity with him - which certainly includes the

corporations - are bound by it." *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir.), cert. denied, 516 U.S. 1028, 116 S.Ct. 673, 133 L.Ed.2d 522 (1995). In summary, the receiver is bound by the actions that were allegedly fraudulent and unjust. *Scholes* ultimately concluded that a receiver could bring an action to recover Ponzi-scheme profits, but its holding rests, in part, upon a receiver acting through a corporation. We reach the same conclusion as *Scholes* that a receiver may seek restitution from investors in a Ponzi scheme, but for a reason not expressed by the *Scholes* court.

¶35 This Court has explained on several occasions that when a corporation is being mismanaged and its property in danger of being lost to the stockholders through mismanagement, collusion, or fraud of its officers and directors, or through diversion of corporate property to individual officers, a court of equity has the inherent power to appoint a receiver for the property of such corporation to preserve the property of the corporation.<sup>35</sup> A similar principle is found in opinions discussing business trusts and associations, *Grohoma Growers Ass'n v. Tomlinson*, 1938 OK 32, 76 P.2d 404, as well as a joint venture where the parties possessed "rights and liabilities as between themselves were similar to or the same as those of partners." *Vilbig Const. Co. v. Whitham*, 1944 OK 259, 152 P.2d 916, 919. The commission of fraud by those exercising control in a commercial enterprise is a ground which supports the appointment of a receiver by a court. *Id.* 152 P.2d at 920.

¶36 A receiver controls property and claims for the ultimate benefit of the interested parties, including creditors, subject to claims and defenses possessed by all interested parties. For example, in *Harn v. Smith*, 1921 OK 328, 204 P. 642, we stated the following:

The receiver of an insolvent, nongoing corporation takes the property of the company for the creditors, subject to such equities, liens, or incumbrances, whether created by operation of law or by act of the corporation, which existed against the property at the time of his appointment.

*Id.* at 647.

Historically, a receiver's primary duty was to take charge of a debtor's assets and make pro rata payments of all debts. D. Dobbs, *Handbook on the Law of Remedies*, § 2.12, n. 43, (1973) citing R. Clark, *Receivers*, § 232 (2d ed. 1929).

¶37 While the power to appoint receivers is governed by statute, when deciding non-statutory receivership issues the court must look for guidance to the established usages and customs prevailing in the courts of equity. *Smoot v. Barker*, 1944 OK 319, 153 P.2d 227, 228. A receivership is ancillary or auxiliary to proper equitable relief; that is, such relief is a provisional remedy granted only in connection with an action for some other purpose. *Fidelity Trust & Deposit Co. v. Certified Oil Properties*, 1941 OK 250, 119 P.2d 83, 84; *Harris v. National Loan Co.*, 1934 OK 624, 43 P.2d 1038, 1040. In discussing the equitable rights of members in an association, this Court stated, "The flexible rules of equity apply in all such cases, and the courts of equity are always open to those wronged by the acts of mismanagement of the officers." *Grohoma Growers Ass'n v. Tomlinson*, 76 P.2d at 407.

¶38 In summary, a receivership is a procedural vehicle to protect the underlying equitable rights possessed by stockholders, partners, joint venturers, and members of an association to funds that have been grossly mismanaged and dissipated by fraud. The protection of those equitable rights includes applying flexible procedural rules to effectuate the protection of equitable substantive rights possessed by those who participated in a business relationship, whether by corporation, business venture, or association. The property taken by Receiver in this case includes those equities that are attached to the property created by law or acts of Schubert, and the property is subject to all setoffs, liens, and encumbrances. *Harn v. Smith, supra*. To deny a receiver the ability to litigate the equitable rights of the Ponzi investors in this case because of Schubert's choice of using, or not using, a particular business vehicle would elevate procedure over substance in an equitable proceeding where flexible rules of procedure are used to guarantee equity. We therefore hold that a court-appointed receiver for the failed business ventures of a Ponzi-scheme operator may seek equitable relief against Ponzi-scheme investors.<sup>36</sup>

## V. Tracing and Setoffs

¶39 Appeal No. 105,682 is from a certified interlocutory order issued in Oklahoma County District Court Cause No. CJ-2005-3799 granting a partial summary adjudication. The three issues certified by the trial court are:

1. Whether the Department is required to trace funds received by the investor as

belonging to other investors in order to prove unjust enrichment and require disgorgement of such monies?

2. Whether the Department may recover monies received by the investors under a Ponzi scheme based on the theory of unjust enrichment?

3. Whether the Pollards are entitled to setoff or offset against any monies ordered to be disgorged?

¶40 The United States Supreme Court has recognized that, in equity, certain tracing rules should be suspended. *Cunningham v. Brown*, 265 U.S. 1, 44 S.Ct. 424, 427, 68 L.Ed. 873 (1924). One federal court explained *Cunningham's* tracing analysis this way:

In *Cunningham*, creditors argued that they were rescinding their contracts with Ponzi because of fraud. They attempted to use a tracing presumption to remove their money from a fund before other defrauded creditors could reach it. Although their money had been removed from the bank account, the creditors argued that if a fund is composed partly of the wrongdoer's money and the defrauded person's money, the court should presume the wrongdoer has removed his money and left the victim's money in the account. 265 U.S. at 12, 44 S.Ct. at 427. However, the Supreme Court recognized that the other money in the account belonged to other victims, not Ponzi, and that the use of this presumption would harm other victims. 265 U.S. at 13, 44 S.Ct. at 427. Moreover, since these creditors occupied the same legal position as other creditors, equity would not permit them a preference; for "equality is equity." *Id.*

*Securities and Exchange Commission v. Elliott, et al.*, 953 F.2d 1560 (11th Cir.1992), *rev'd in part*, 998 F.2d 922 (11th Cir.1993).

Generally, we agree with *Cunningham* that when a Ponzi-scheme operator has commingled funds of several Ponzi-scheme investors with the operator's funds the Department need not show that the funds received by the innocent investor came from a defrauded Ponzi-scheme investor. However, the Pollards claim that this tracing is necessary because they gave amounts to Schubert for investment in addition to the Ponzi-scheme investments.

¶41 The Pollards allege that over an eleven year period more than \$616,626.00 was invested with Shubert. Barry Pollard alleges that he obtained a judgment against Schubert in the amount of \$827,000.00 in the District Court of Logan County. The Pollards were assigned a claim from L & S Pollard Farms, L.L.C. against Schubert in the amount of \$284,464.05. L & S Pollard Farms, L.L.C. is designated as a "short investor" and is purportedly one of the investors for which the Department seeks equity. The Department alleges that the Pollards invested \$59,100 "with Receivership Subjects and received, directly or indirectly, \$445,268.06 in return, for a net gain of \$386,158.06." Pollard alleges that the Department's lawsuit for equitable relief is "seeking disgorgement for monies that the Department alleges the Pollards received out of the same transactions for which the Pollards obtained their judgment against Schubert." There are contested facts concerning the source of the monetary obligation reduced to judgment in the amount of \$827,000.00 and whether it involves the same commingled accounts used in the Ponzi scheme, the amounts invested by Pollard in the scheme, the amounts invested by Pollard with Schubert in other investments, and the amounts received by Pollard attributed to the Ponzi scheme.

¶42 The Department's unjust enrichment action recognizes, according to the Department, that money received from Schubert's Ponzi scheme should be offset by money invested in the scheme. This is, of course, a form of tracing. The Department is tracing funds into and out of the scheme, and apparently omitting funds from its calculations that it contends are not involved in the scheme. The Department uses both the phrase "Receivership subjects" as well as specific bank accounts to determine the status of Ponzi funds. In the record on appeal the Department's filings do not link specific bank accounts with specific receivership subjects for the purpose of the Pollards' claims, and that fact issue is not before us in these proceedings. The record does appear to show that Schubert's clients, including the Pollards, could receive funds from securities accounts that were unrelated to the Ponzi scheme.

¶43 Schubert had access to several accounts and commingled many of them with investor and personal funds. We agree with the Department that a simple netting out of funds received and deposited into accounts used for the Ponzi

scheme with disbursements from those accounts to investors is a sufficient method to show whether an investor received his initial investment and a profit or loss thereon. However, we also agree with the Pollards that if Schubert's Ponzi-scheme funds were used to pay a legitimate non-Ponzi investment dividend, such payment does not represent a return on the Ponzi investment and should not be considered for the unjust enrichment claim. We agree with the Department that the facts of the nature of a legitimate investment and the alleged dividend payments are facts in the nature of an affirmative defense<sup>37</sup> to be pled by the Pollards and should not be considered as an element of the unjust enrichment claim brought by the Department.

¶44 In *Securities and Exchange Commission v. Elliott*, *supra*, the court stated that the right to setoff exists where there are mutual debts between parties,<sup>38</sup> and other federal courts have recognized a strong federal policy to allow setoffs.<sup>39</sup> A receiver's argument that a setoff creates, by itself, an inequitable preference has been repeatedly rejected.

The Receiver argues that if Hagstrom is allowed a setoff, he will receive a preference over other creditors. While other creditors will only receive a percentage of their investments, Hagstrom would receive, up to \$280,000, a dollar per dollar return on his investment. The Receiver's argument has been rejected repeatedly for almost a century. As early as 1892, the United States Supreme Court recognized that if a debtor has a valid right to a setoff, it is not a preference. *Scott v. Armstrong*, 146 U.S. 499, 13 S.Ct. 148, 151, 36 L.Ed. 1059 (1892). Despite having the effect of a preference, a setoff is a long-recognized right and is generally favored. *Cumberland Glass Mfg. Co. v. De Witt & Co.*, 237 U.S. 447, 455, 35 S.Ct. 636, 639, 59 L.Ed. 1042 (1915); *In re Applied Logic Corp.*, 576 F.2d 952, 957 (2d Cir.1978); *Bohack*, 599 F.2d at 1165. Equity's general principle of equality among creditors is not an appropriate consideration when considering whether to grant setoff, which is itself equitable in origin. *Applied Logic*, 576 F.2d at 961; *Johnson*, 552 F.2d at 1079. Thus, if the Receiver is to prevail, he must do more than argue that Hagstrom is being treated better than other creditors.

*SEC v. Elliott*, 953 F.2d at 1573.

The receiver then argued in *SEC v. Elliott* that in a mass fraud scheme, such as a Ponzi scheme, a court should not allow setoffs. The Court rejected this argument.

The Receiver argues that the special circumstances of mass fraud with hundreds of defrauded creditors require special rules, but this argument can only go so far. The cases of each creditor must be examined individually to determine the rights of that individual. The Receiver cannot, for the sake of expediency, group together claimants with different claims. The law recognizes a right to setoff, and courts are not "free to ignore [the setoff rule] when they think [its] application would be 'unjust.'" *Applied Logic*, 576 F.2d at 957. The Receiver fails to cite any cases which grant an exception to the setoff rule in a situation similar to this one.

*SEC v. Elliott*, 953 F.2d at 1573, citing (*In re Applied Logic Corp.*, 576 F.2d 952, 957 (2d Cir.1978)).

Although this federal jurisprudence is not controlling, it agrees with the equitable principles adopted by this Court in its precedential opinions.

¶45 In *Jones v. England*, 1989 OK 142, 782 P.2d 119, we said that: "Insolvency of one of the parties may create an equity, or at least strengthen it, sufficient to allow a setoff of the mutual obligations." *Id.* at 122, citing 3 J. Story, *Commentaries on Equity Jurisprudence*, § 1872 (14th ed 1918). We then explained the "grave injustice" of denying a setoff.

The grave injustice of denying a setoff . . . is no less an injustice when an insolvent plaintiff is bringing suit on a guaranty agreement and the defendant desires to setoff the guaranty obligation with payments allegedly made to the plaintiff. Thus, we hold that Howard's counterclaim raises a permissible defense to the action on the guaranty.

*Jones v. England*, 1989 OK 142, 782 P.2d at 122 (material omitted).

This Court has recognized that a court applying equity may use one judgment to setoff another judgment.<sup>40</sup> A judgment debtor may purchase a judgment to setoff another judgment "if this be done bona fide." *Johnson v. Noble*, 1936 OK 779, 65 P.2d 502, 504. But "the

power to offset judgments will not be exercised so as to work injustice to the interests of third persons acquired in good faith.” *Id.*

¶46 The record does not state whether the \$827,000.00 judgment against Schubert relates to Ponzi-scheme activities or non-Ponzi investments. The Department offsets dividends against Ponzi investments and thereby limits setoff calculations to Ponzi-related funds. We decline to hold that the right of an investor to an equitable setoff by a judgment against the operator of the Ponzi scheme is dependent upon whether the judgment relates to the Ponzi scheme. Separate judgments used in equity to setoff obligations are, or least should be, based upon different or separate causes of action or separate transactions and occurrences. This is so because a judgment is the final determination of the rights of the parties where the cause of action is merged into the judgment, and separate judgments on the same claim (or cause of action) do not usually coexist without issues frustrating their enforcement such as preclusion, estoppel, and splitting a cause of action.<sup>41</sup> Thus, separate judgments used for an equitable setoff will not both arise from the Ponzi scheme.

¶47 The Department is seeking equity, and doing equity depends upon the circumstances of individual parties. The fact that a massive fraud scheme was used does not change the nature of equity. As observed in *SEC v. Elliott, supra*,

A claimant is not treated better in the eyes of the law if the controlling facts surrounding his or her case lead to a different legal conclusion. To argue that all claimants should be treated similarly, without presenting facts, is an empty argument. One of the basic purposes of law and the courts is to determine which facts are legally relevant or irrelevant. If relevant facts differ, then the law will treat the claimants differently. Thus, it is incorrect to say the law prefers one claimant if that claimant’s situation differs in a legally cognizable way.

*Id.* 953 F.2d at 1573

Doing equity in this State, since at least the 1916 opinion of *Elms v. Arn*, 1916 OK 718, 158 P. 1150, has included recognizing that a court of equity may use a judgment to offset another judgment.

¶48 The Department challenges the right of the Pollards to use the judgment obtained against Schubert with the argument that privity of parties is necessary for a setoff, and that the judgment is not against the Department. In *Sarkeys v. Marlow*, 1951 OK 195, 235 P.2d 676, we said “There must be privity of parties in order to enable a defendant to plead and prove a set-off, and defendant cannot plead and prove a set-off in favor of himself and against one who is not a party to the suit.” *Sarkeys*, 235 P.2d at 679, citing *Van Arsdale v. Edwards*, 1909 OK 138, 101 P. 1123; and *Hurford v. Norvall*, 1913 OK 590, 135 P. 1060.

¶49 We have explained herein that setoffs are proper when a receiver presses claims for unjust enrichment based upon a Ponzi scheme. The Department’s argument is thus based upon the idea that although equity may require a setoff if the receiver is a party, the same rule of equity does not apply when the Department is the party pressing for payment. Equity elevates substance over form. *Cobb v. Whitney* 1926 OK 920, 255 P. 577. In this case the sole claim brought by the Department is an equitable claim against one class of investors for restitution to another class of investors. The Department’s claim for unjust enrichment is, like the receiver’s, based upon the conduct of Schubert and the Ponzi-scheme. When the Department seeks the “complete relief in equity” as it has argued herein, it cannot be heard to complain when the same rule of equity applied to a receiver is applied to the Department’s receiver-like claim. We hold that the Department’s quest for equity is subject to a legitimate equitable setoff in the form of a judgment against Schubert.

¶50 We have answered the first two certified questions by our opinion. The third, whether the Pollards are actually entitled to a setoff, cannot be answered today. Whether a setoff should be granted or denied, based upon the disposition of certain non-Ponzi investments and the calculation of Ponzi-scheme investments and Ponzi-scheme dividends, cannot be made due to the uncertainty of the facts in the record before us. Similarly, whether the assignment of the claim to the Pollards from L & S Pollard Farms, L.L.C. in the amount of \$284,464.05 was a bona fide assignment for value, in addition to other potential issues relating to this claim, are not determinable from the record before us and were not determined by the trial court in the first instance.

Finally, we note that this proceeding is on certiorari review from the District Court of Oklahoma County, the truncated District Court record on appeal does not appear to contain the judgment roll of the proceeding in the District Court of Logan County which resulted in a judgment or a certified copy of that judgment, and the District Court's ruling on a partial summary adjudication did not reach the factual issue of the existence of the judgment and the equity of its application. We decline to adjudicate these issues in the first instance and they must be left for the District Court on remand.

## VI. Application of the Court's Holdings to the Individual Appeals

¶51 The assignments of error in appeal Nos. 104,004, 104,161, and 104,262 consolidated with 104,304, challenge summary judgments granted in the same action in the District Court for Oklahoma County, Cause No. CJ-2005-3796 (consolidated with CJ-2005-3299). The petitions for certiorari in these appeals challenge the Department's action against innocent investors and the ability of the court-appointed receiver to seek equitable refunds from innocent investors who received more than their original investments.

¶52 Summary judgment was granted based upon the principle that a profit to a Ponzi-scheme investor is, as a matter of law, unjust enrichment, and subject to an action by the Department for restitution. We have rejected that concept today and explained that equitable recovery against an innocent investor must be based upon that investor's receipt of an unreasonably high dividend on his or her investment, a mixed question of law and fact that must be decided by the trier of fact on remand.

¶53 The substantive equitable rights sought to be vindicated by the court-appointed receiver's unjust enrichment claim against the innocent investors are no greater in scope than those by the Department against the innocent investors. Judgment for the receiver must be based upon the investor's receipt of an unreasonably high dividend on his or her investment, an issue that must be decided by the trier of fact on remand.<sup>42</sup>

¶54 A moving party is entitled to summary judgment as a matter of law only when the pleadings, affidavits, depositions, admissions or other evidentiary materials establish that no

genuine issue of material fact exists. *Miller v. David Grace, Inc.*, 2009 OK 49, ¶ 10, 212 P.3d 1223, 1227; *Davis v. Leitner*, 1989 OK 146, ¶ 9, 782 P.2d 924, 926. Our *de novo* review on summary judgment determines whether a trial court erred in its application of the law. *Young v. Macy*, 2001 OK 4, ¶ 9, 21 P.3d 44, 47. Due to the mixed question of fact and law whether the investors' individual returns were unreasonably excessive, the summary judgments must be reversed. The summary judgments granted against Defendants in Okla. County Cause No. CJ-2005-3796 (consolidated with CJ-2005-3299) and challenged herein in Okla. Sup. Ct. Nos. 104,004, 104,161, and 104,262 consolidated with 104,304, are hereby reversed and the causes remanded to the District Court for further proceedings consistent with this opinion.

¶55 Appeal No. 105,682 is an appeal of a certified interlocutory order issued in Oklahoma County District Court Cause No. CJ-2005-3799 which granted the Department a partial summary adjudication after the trial court declined to consider the Pollards' arguments and claims relating to setoffs. The opinion herein explains that an equity claim for unjust enrichment allows for equity defenses based upon setoffs. Whether the facts support setoffs for the Pollards is an issue for adjudication by the trial court upon remand. The partial summary adjudication was based upon the concept that unjust enrichment is based merely upon whether an innocent investor received more than his or her initial investment. The opinion herein shows that unjust enrichment must be based upon an unreasonable dividend obtained by a defendant. The record on appeal shows contrary allegations of fact concerning how much the Pollards invested with Schubert, the nature of those investments, and which should be attributed to the Ponzi scheme. A genuine issue of fact exists concerning the nature of the Pollards' investments and dividends. The summary adjudication for the Department must be reversed. *Young v. Macy, supra*; *Miller v. David Grace, Inc., supra*. The cause is remanded for further proceedings consistent with this opinion.

## VII. Conclusion

¶56 The Oklahoma Legislature could expressly state that the Department is authorized to seek equitable relief against innocent investors in a Ponzi scheme for the benefit of other innocent investors and define the rights and liabilities of such investors in such proceedings. There is nothing in the record submitted by the

Department showing that the Oklahoma Legislature has *expressly* considered and weighed the competing equities of the two classes of innocent investors. We have declined to adopt the Department's view that every innocent investor who received a return on his or her investment in excess of the initial investment has, as a matter of law, been unjustly enriched and is subject to an action seeking equitable restitution brought by either the Department or an appropriate court-appointed receiver. We have instead opted for defining the presence of unjust enrichment upon the true nature of a Ponzi-scheme and its perpetuation — the payment of an unreasonably high dividend. Innocent investors ignorant of the Ponzi scheme may not hide behind their ignorance when unreasonably high dividends are paid to them and then claim that their high dividends are insulated from equity.

¶157 We recognize that our opinion precludes recovery from innocent investors who receive a reasonable rate of return, or even less than a reasonable rate of return and after several years recover their investment. The Department's arguments herein do not address what course of conduct an innocent investor should pursue if that investor wants to make a reasonable rate of return without fear of a potential District Court action for restitution of dividends at some unspecified time in the future. Should an investor segregate and hold financial profits until a statute of limitations or laches expires? In the alternative, should an innocent investor be held to a higher standard of accountability and inquiry concerning his or her investments placed with a licensed securities dealer? These and similar questions are for the Legislature should it consider if public policy requires unjust enrichment to be defined as the Department contends, or whether unjust enrichment should be defined, as we have here, based upon a reasonably-equivalent-value-exchanged model used in fraudulent transfers as interpreted by some courts.

¶158 EDMONDSON, C.J., TAYLOR, V.C.J., OPALA, COLBERT, and REIF, JJ., CONCUR.

¶159 HARGRAVE, KAUGER, WINCHESTER, JJ., DISSENT.

¶160 WATT, J., NOT PARTICIPATING.

1. The assignments of error in appeal Nos. 104,004, 104,161, and 104,262 consolidated with 104,304, challenge summary judgments granted in the same action in the District Court for Oklahoma County, Cause No. CJ-2005-3796 (consolidated with CJ-2005-3299). Appeal No. 105,682 is an appeal of a certified interlocutory order issued in Okla-

homa County District Court Cause No. CJ-2005-3799. Contemporaneous appeals of orders or judgments in the same district court proceeding may be consolidated into one appeal with one record on appeal. 12 O.S. 2001 Ch. 15, App. 1, Okla. Sup. Ct. R. 1.27(c) & (d). We decline to consolidate these appeals for any purpose other than adjudication by a single opinion because the separate records have already been filed in these appeals, No. 105,682 involves a trial court action not consolidated in the trial court with the other trial court action.

Appellant, Wade Toepfer, moved to voluntarily dismiss his appeal in No. 104,004 while the matter was pending before this Court. The motion is granted and Toepfer's name has been removed from the list of appellants in the style. Appellant, Sheryl Mercer, moved to dismiss her appeal in No. 104,161 while the matter was pending before this Court. No motion contesting the dismissal has been filed. The motion is granted and Mercer's name has been removed from the list of appellants in the style.

2. No. 105, 682, O.R. at 124, 125, Tab "D", Plaintiff's Motion for Summary Judgment, March 29, 2007, Affidavit of D. C., Supervisory Investigator for Department of Securities.

3. No. 105, 682, O.R. at 124, 125, Tab "D", Plaintiff's Motion for Summary Judgment, March 29, 2007, Affidavit of D. C., Supervisory Investigator for Department of Securities.

4. No. 105, 682, O.R. at 124, 125, Tab "D", Plaintiff's Motion for Summary Judgment, March 29, 2007, Affidavit of D. C., Supervisory Investigator for Department of Securities.

5. No. 104,161, O.R. Vol. 1, Tab 7, pg. 4, "Plaintiff Oklahoma Department of Securities' Response to Defendants' Supplemental Brief to Motion to Dismiss," No. CJ-2005-3299, consolidated with CJ-2005-3796, filed Aug. 8, 2005, (explanatory phrases and citation added to original).

6. The quote from the Department's filing cites 71 O. S. Supp. 2003 § 1-602(B) and former 71 O.S.2001 § 406.1. Former § 406.1 is codified in an amended form at 71 O. S. Supp. 2003 § 1-603. Section 1-602(B) involves production of records and other procedures not relevant to the controversy before us. The Department's other filings clearly indicate that it relies upon § 1-603(B) and not § 1-602(B).

7. 71 O. S. Supp. 2003 § 1-601 (B), states that "There are hereby created the Oklahoma Securities Commission and the Department of Securities. The Commission shall be the policy making and governing authority of the Department, shall appoint the Administrator and shall be responsible for the enforcement of this act."

8. In 2003 the Legislature created the Oklahoma Uniform Securities Act of 2004 that became effective July 1, 2004. 71 O. S. Supp. 2003 § 1-101. The appellate records show that the trial court actions were filed after July 1, 2004, and we apply the new Act to the controversy as briefed by the parties. None of the parties address retroactivity of the Uniform Act, and we decline to address the issue *sua sponte*.

9. 71 O. S. Supp. 2003 § 1-603. Civil enforcement

A. If the Administrator believes that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of this act or a rule adopted or order issued under this act or constituting a dishonest or unethical practice or that a person has, is, or is about to engage in an act, practice, or course of business that materially aids a violation of this act or a rule adopted or order issued under this act or a dishonest or unethical practice, the Administrator may, prior to, concurrently with, or subsequent to an administrative proceeding, maintain an action in the district court of Oklahoma County or the district court of any other county where service can be obtained to enjoin the act, practice, or course of business and to enforce compliance with this act or a rule adopted or order issued under this act.

B. In an action under this section and on a proper showing, the court may:

1. Issue a permanent or temporary injunction, restraining order, or declaratory judgment;

2. Order other appropriate or ancillary relief, which may include:

a. an asset freeze, accounting, writ of attachment, writ of general or specific execution, and appointment of a receiver or conservator, that may be the Administrator, for the defendant or the defendant's assets,

b. ordering the Administrator to take charge and control of a defendant's property, including investment accounts and accounts in a depository institution, rents, and profits; to collect debts; and to acquire and dispose of property,

c. imposing a civil penalty up to a maximum of Five Thousand Dollars (\$5,000.00) for a single violation or up to Two Hundred Fifty Thousand Dollars (\$250,000.00) for more than one violation; an order of rescission, restitution, or disgorgement directed to a person that has engaged in an act, practice, or course of business constituting a violation of this act or the predecessor act or a rule adopted or order issued under this act or the predecessor act, and

d. ordering the payment of prejudgment and postjudgment interest; or

3. Order such other relief as the court considers appropriate.

C. The Administrator may not be required to post a bond in an action or proceeding under this act.

10. The Department stated that "Plaintiff Department has not alleged that the Relief Defendants [the 158 defendants who allegedly made a Ponzi profit] violated the act. No. 104,161, O.R. Vol. 1, Tab 13, pg. 4, "Plaintiff Oklahoma Department of Securities' Brief in Response to Defendants' Motion for Summary Judgment," No. CJ-2005-3299, consolidated with CJ-2005-3796, filed July 14, 2006, (explanatory phrase added to original).

11. Okla. Const. Art. 7 § 7(a) states in part that "... The District Court shall have unlimited original jurisdiction of all justiciable matters, except as otherwise provided in this Article. . . ."

12. The SEC has had statutory power to seek disgorgement in administrative proceedings since at least 1990 in addition to its older equitable disgorgement power. *Verity Winship, Fair Funds and the SEC's Compensation of Injured Investors*, 60 Fla. L. Rev. 1103, 1112 (2008) (author cites the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, § 102(e), 104 Stat. 931 (1990), codified as amended at 15 U.S.C. § 80a-9(e) (2006)). See *SEC v. DiBella*, 409 F.Supp.2d 122, 130-133 (D.Conn. 2006) (discussed history of disgorgement and the lack of specific statutory authority).

13. See, e.g., *SEC v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993) ("Disgorgement does not aim to compensate the victims of the wrongful acts, as restitution does."); *SEC v. Tome*, 833 F.2d 1086, 1096 (2d Cir. 1987), cert. denied, 486 U.S. 1014, 108 S.Ct. 1751, 100 L.Ed.2d 213 (1988), (distinguishing between disgorgement and restitution and stating that whether or not any investors may be entitled to money damages is immaterial for the purpose of disgorgement); *SEC v. Drexel Burnham Lambert, Inc.*, 956 F.Supp. 503, 507 (S.D.N.Y. 1997) (same). See also *SEC v. Lorin*, 869 F.Supp. 1117, 1122, 1123 (S.D.N.Y.1994) ("...disgorgement merely returns the wrongdoer to the status quo before any wrongdoing had occurred. . . . SEC actions seeking disgorgement differ slightly from 10b-5 actions in that they do not attempt to redress a private injury, but rather aim to separate the securities law violator from his or her unlawfully obtained profits."); *Verity Winship, Fair Funds and the SEC's Compensation of Injured Investors*, 60 Fla. L. Rev. 1103, 1113 (2008) ("Courts have adopted the view that disgorgement is primarily aimed at deterring violators by depriving them of profit. On this ground, they have held that the appropriateness of disgorgement does not depend on the identification of harmed private parties or the distribution of this amount to those harmed.").

14. *Mitchell v. Robert DeMario Jewelry*, 361 U.S. 288, 291-292, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960), (principle giving complete relief in light of the statutory purposes is shown in the context of construing the Fair Labor Standards Act of 1938); *United States v. Moore*, 340 U.S. 616, 71 S.Ct. 524, 95 L.Ed. 582 (1951), (when construing Housing and Rent Act of 1947 the Court stated that an equitable decree of restitution would be within the section if it was reasonably appropriate and necessary to enforce compliance with the Act and effectuate its purposes); *Porter v. Warner Holding Co.*, 328 U.S. 395, 400, 66 S.Ct. 1086, 90 L.Ed.2d 1332 (1946), (in the context of construing the Emergency Price Control Act of 1942 the Court indicated that its ruling was to give effect to a congressional purpose to authorize whatever equitable order may be considered appropriate and necessary to enforce compliance with the Act).

15. *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-92, 80 S.Ct. 332, 335, 4 L.Ed.2d 323 (1960) ("When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes.").

16. Disgorgement by those who violated federal securities laws has long been held to be within a court's equitable powers. *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301 (2nd Cir.), cert. denied, 404 U.S. 1005, 92 S.Ct. 562, 30 L.Ed.2d 558 (1971), (the defendants, appealing an order of restitution of illegal profits derived from a § 10(b) violation, unsuccessfully argued that the SEC had no authority under the Act to seek any relief other than the injunctive relief provided in § 21(e) [currently § 21(d)]; *SEC v. Ridenour*, 913 F.2d 515, 517 (8th Cir.1990) ("An individual found liable for fraudulently trading federal securities may properly be ordered to disgorge any ill-gotten profits."); *SEC v. Tome*, 833 F.2d 1086, 1096 (2d Cir.1987) cert. denied, 486 U.S. 1015, 108 S.Ct. 1751, 100 L.Ed.2d 213 (1989) (upholding order of disgorgement of illegal proceeds from those guilty of insider trading in violation of §§ 10(b) and 14(e)); *SEC v. Materia*, 745 F.2d 197, 200-201 (2d Cir.1984) cert. denied, 471 U.S. 1053, 105 S.Ct. 2112, 85 L.Ed.2d 477 (1985), (holding that section 21(d) does not restrict the available remedies to injunctive relief when disgorgement is sought against a person who violated § 10(b)).

17. *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978), citing *SEC v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 102 (2d Cir. 1978).

18. *Verity Winship, Fair Funds and the SEC's Compensation of Injured Investors*, 60 Fla. L. Rev. 1103, 1117 (2008) citing H.R. Rep. 101-616, at 31 (1990), reprinted in 1990 U.S.C.C.A.N. 1379, 1389.

19. *In re Nelson*, 240 B.R. 802, 806 (Bkrcty. D. Me. 1999) (bankruptcy stay did not stay state's action based upon violations of unfair trade practices and consumer solicitation sales and seeking injunctive relief, restitution, and civil penalties as relief was pursuant to police or regulatory powers); *SEC v. Towers Fin. Corp.*, 205 B.R. 27 (S.D.N.Y.1997), (SEC action against debtor seeking disgorgement of investor funds, as well as injunctive relief, was excepted from the bankruptcy stay as an exercise of police and regulatory powers, rejecting debtor's argument that SEC was seeking a pecuniary benefit); *Bilzerian v. SEC*, 146 B.R. 871, 873 (Bankr.M.D.Fla.1992), ("in this instance, disgorgement is a remedy sought by the SEC in furtherance of its police powers under the Securities Laws.").

20. *SEC v. Tambone*, 550 F.3d 106, 148 (1st Cir. 2008); *SEC v. Diversified Corporate Consulting Group*, 378 F.3d 1219, 1224 (11th Cir.2004); *SEC v. Rind*, 991 F.2d 1486, 1490-91 (9th Cir.), cert. denied, 510 U.S. 963, 114 S.Ct. 439, 126 L.Ed.2d 372 (1993); *SEC v. Lorin*, 869 F.Supp. 1117, 1120-1130 (S.D.N.Y.1994).

21. We need not discuss or attempt to harmonize federal court opinions discussing freezing funds held by nominal third parties. *SEC v. Black*, supra, and *SEC v. Cherif*, supra, are not dispositive whether an asset freeze authorized by 71 O.S. § 1-603 (B)(2) includes an asset freeze of funds held by an innocent third party to a Ponzi scheme. We need not adjudicate that issue to address the arguments raised by the parties herein, and we expressly decline to reach that issue.

22. The third element of jurisdiction, jurisdictional power to render the particular judgment, is raised by the arguments in this case. This jurisdictional element focuses on the actual judgment sought or obtained and whether it violates mandatory law. See, e.g., *Gulfstream Petroleum Corp. v. Laden*, 1981 OK 56, 632 P.2d 376 (compulsory statutory requirement antecedent to judgment or final order must be fulfilled to satisfy third element of jurisdiction); *Abraham v. Homer*, 1924 OK 393, 226 P. 45, 48 (facts showing compliance with a procedural statute mandatorily required for a judgment are material to the existence of the power of the court to render that judgment). No violation of mandatory law is shown by the Defendants herein.

23. It is not necessary to discuss the debate over the distinction, if any, between restitution and unjust enrichment in order to decide the present controversy. See, e.g., Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. Rev. 1577 (2002); Andrew Kull, *Rationalizing Restitution*, 83 Cal. L. Rev. 1191, 1193 (1995) ("The modern consensus puts unjust enrichment at the heart of liability in restitution, so the question, simply put, is whether restitution properly includes anything else.").

24. Variations of this description include courts focusing on the benefit being something conferred on the defendant by the plaintiff. See, e.g., *Berry and Gold, P. A. v. Berry*, 360 Md. 142, 757 A.2d 108, 151 (unjust enrichment is "(1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value."); *Ragland v. Sheehan*, 256 Mont. 322, 846 P.2d 1000, 1004 (unjust enrichment is an equitable doctrine wherein the plaintiff must show some element of misconduct or fault on the part of defendant or that defendant somehow took advantage of plaintiff); *Jo-Ann Stores, Inc. v. Property Operating Co., LLC*, 91 Conn.App. 179, 194, 880 A.2d 945, 955 (2005) (a plaintiff seeking recovery for unjust enrichment must prove (1) that the defendant was benefitted, (2) that the defendant unjustly did not pay the plaintiff for the benefit, and (3) that the failure of payment was to the plaintiff's detriment); *Danforth v. Ruotolo*, 650 A.2d 1334, 1335 n.2 (Me. 1994) ("The elements of unjust enrichment are (1) a benefit conferred on defendant by plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) the acceptance or retention of the benefit in circumstances that make it inequitable for the defendant to retain the benefit without payment for the value of the benefit conferred."); *Heimann v. Kinder-Morgan CO2 Co., L.P.*, 140 N.M. 522, 144 P.3d 111, 118 (2006) cert. denied, 552 U.S. 1062, 128 S.Ct. 707, 169 L. Ed. 2d 553 (2007) (unjust enrichment is a theory under which an aggrieved party may recover from another party who has profited at the expense of the aggrieved party).

25. In *Harvell*, 2006 OK 24, n. 36, 164 P.3d at 1036, we provided three examples: *DCB Construction Co., Inc. v. Central City Development Co.*, 965 P.2d 115, 119 (Colo.1998) (holding that unjust enrichment requires a showing of improper, deceitful, or misleading conduct); *Schock v. Nash*, 732 A.2d 217, 232 (Del.1999) (allowing for restitution, even when defendant is not a wrongdoer); *Anderson v. DeLisle*, 352 N.W.2d 794, 796

(Minn.App.1984) (unjust enrichment claim allowable in situations where enrichment was morally wrong).

26. The quotations are found in the record at the following: O.R. No. 105,682, Vol. 1, Department's motion for summary judgment, 63, 69-69; O.R. 105,682, Vol. 2, Department's response to Defendants' motion for summary judgment, at 796-797.

27. Oklahoma's Uniform Fraudulent Transfer Act, not at issue in this case, also uses the concept of "reasonably equivalent value." 24 O.S.2001 § 116 (B)(8), § 117(A).

28. *Harrell v. Samson Resources Co.*, 1998 OK 69, ¶ 24, 980 P.2d 99, 106; *Heiman v. Atlantic Richfield Co.*, 1995 OK 19, 891 P.2d 1252, 1257.

29. Leaving the parties where they are found appears to be based not only on the substantial differences concerning individual innocent investors, but also upon equitable principles that assets are not marshaled to destroy equal equities, and when the equities are equal the loss or harm must be borne by the party upon whom it has fallen. *In re Martin*, 1994 OK 48, 875 P.2d 417, 421; *Roberts v. Sterr*, 1957 OK 133, 312 P.2d 449, 451. We are not presented in this case with an innocent investor acting in bad faith, or with an investor who is related to Schubert. *See, e.g., Renberg v. Zarrow*, 1983 OK 22, 667 P.2d 465, 471 ("A court of equity will not enforce stock transfer restrictions for close corporation adopted under circumstances which indicate bad faith and inequitable treatment of stock purchasers.").

30. *State ex rel. Cartwright v. Tidmore*, 1983 OK 116, 674 P.2d 14, 17 ("laches and estoppel do not apply against the state acting in its sovereign capacity because of mistakes or errors of its employees"); *State ex rel. Oklahoma Tax Comm'n v. Emery*, 1982 OK CIV APP 13, 645 P.2d 1048, 1051 (same), (Approved for Publication by Supreme Court).

31. *Indiana Nat'l Bank v. State Dept. of Human Services*, 1993 OK 101, 857 P.2d 53, 64 ("The general rule is the application of estoppel is not allowed against the state, political subdivisions or agencies, unless it would further a principle of public policy or interest."); *Burdick v. Independent School Dist.*, 1985 OK 49, 702 P.2d 48, 53 (same). This controversy does not require us to either explain *State ex rel. Cartwright v. Tidmore*, *supra*, and *Indiana Nat'l Bank*, *supra*, or re-examine our opinions that state when a state agency goes into court on its own volition it will be treated as any other litigant and must concede to the defendant the right to plead and establish, by competent evidence, any legal or equitable defense the defendant might establish as against a private litigant. *See, e.g., Independent School District No. 16 of Payne County v. Reed*, 1972 OK 150, 503 P.2d 1265, 1268 and quoting stated principle from *State ex rel. Commissioners of Land Office v. Sparks*, 1953 OK 39, 253 P.2d 1070.

32. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 127 S.Ct. 2499, 2507, 168 L.Ed.2d 179 (2007). *See, e.g., Schiller v. Tower Semiconductor, Ltd.*, 449 F.3d 266, n.5, 292 (2d Cir. 2006) (court notes the SEC's power pursuant to the National Securities Markets Improvement Act of 1996 to exempt a person, security, transaction, etc., from specified statutes, rules, or regulations, "to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.").

33. *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264, 127 S.Ct. 2383, 2396, 168 L.Ed.2d 145 (2007).

34. *See, e.g.*, No. 104,004, Defendants/Appellants' petition for certiorari at 5-6.

35. *Boynton Gas & Elec. Co. v. Mosier*, 1937 OK 119, 65 P.2d 448, 450 quoting *AngloAmerican Royalties Corporation v. Brentnall*, 1934 OK 53, 29 P.2d 120. *See also White v. Tullahassee Realty Co.*, 1921 OK 189, 198 P. 584, 585-586.

36. Due to our holding we need not address whether the assignment of claims to the receiver by a few investors to the Ponzi scheme may serve as an independent basis for the receiver seeking equitable relief against the investors who received more than their initial investments.

37. The nature of Pollard's allegations sets up proof of new and additional facts concerning how Schubert used the receivership entities to pay legitimate investment dividends, and as such have the nature of an affirmative defense. *See, e.g., Schulte v. Starritt*, 1940 OK 749, 110 P.2d 611, 612 ("If the defense, whether specifically pleaded, or asserted under a general denial, does not merely negative the title and right of possession of plaintiff, but seeks to avoid it by proof of a new and distinct proposition or state of facts, such defense is affirmative in its nature.").

38. *Securities and Exchange Commission v. Elliott*, 953 F.2d at 1572, citing, *Louden v. Northwestern Nat'l Bank & Trust Co.*, 298 U.S. 160, 56 S.Ct. 696, 698, 80 L.Ed. 1114 (1936).

39. *Securities and Exchange Commission v. Elliott*, 953 F.2d at 1572, citing, *Bohack Corp. v. Borden, Inc.*, 599 F.2d 1160, 1165 (2d Cir.1979); *In re Johnson*, 552 F.2d 1072, 1078 (4th Cir.1977); *In re Williams*, 422 F.Supp. 342, 345 n. 4 (N.D.Ga.1976).

40. *Widick v. Phillips Petroleum Company*, 1937 OK 463, 70 P.2d 474, 476; *Johnson v. Noble*, 1936 OK 779, 65 P.2d 502, 504; *State ex rel. Barnett v. Wood*, 1935 OK 372, 43 P.2d 136, 137; *Elms v. Arn*, 1916 OK 718, 158 P. 1150, 1151 quoting *Schuler v. Collins et al.*, 63 Kan. 372, 65 Pac. 662 (1901).

41. A judgment is the final determination of the rights of the parties in an action. 12 O.S.2001 § 681. Upon entry of a judgment the cause of action is merged into the judgment and the cause of action ceases to exist. *Johnson v. State ex rel. Department of Public Safety*, 2000 OK 7, ¶ 9, 2 P.3d 334. There can only be one "judgment" or one final judicial determination upon a single cause of action. *Federal Deposit Ins. Corp. v. Tidwell*, 1991 OK 119, ¶ 5, 820 P.2d 1338.

42. Due to our holdings today which reverse the judgments of the District Court we need not discuss the procedural/substantive rights of the court-appointed receiver versus those of the Department when both seek recovery of the identical Ponzi-scheme unreasonable dividend.

WINCHESTER, J., dissenting, with whom HARGRAVE and KAUGER, JJ. join:

¶1 I respect the fact that the majority opinion labors to determine how to achieve equitable treatment for equally innocent investors in a Ponzi scheme. After carefully considering this Court's struggle and its rationale behind the holdings, I am persuaded that no answer to the issues raised in the opinion is quite satisfactory. But of the difficult choices, I am convinced that the Court's choice is not the best option.

¶2 The majority opinion begins with a question, which is whether the Department of Securities has the authority under the Oklahoma Uniform Securities Act to force innocent victims of a Ponzi scheme to return money they received that exceeded their original investment. The opinion ends with questions. "Should an investor segregate and hold all financial profits until a statute of limitations or laches expires? . . . [S]hould an innocent investor be held to a higher standard of accountability and inquiry concerning his or her investments placed with a licensed securities dealer?" From the wording, one would expect the answers to these questions to be "No." Instead, the majority holds that the full power of the law may be employed to force those innocent investors to "disgorge" unreasonable profits. The opinion leaves the district court with unsatisfactory subjective standards to determine what profits are unreasonable. Such a conclusion seems to invite a subsequent appeal.

¶3 The dissent to the Court of Civil Appeals was correct in concluding that there is simply no authority to grant power to the receiver in this case for bringing unjust enrichment claims against those innocent investors who profited from the Ponzi scheme. This Court's majority opinion recognizes that the inequity in forcing restitution of profits from innocent investors has kept some courts from ordering such "restitution."<sup>1</sup>

¶4 The *Johnson v. Studholme* case quoted by the majority illustrates the dilemma: “Some investors who received ‘fictitious profits’ may have spent the money on education or other necessities many years ago.”<sup>2</sup> Then the federal district court’s opinion observes that spending their investment money for necessities violates neither equity nor good conscience.

¶5 The contrast is that some later investors who lost money may have been speculators who were willing to take great risks and were prepared to lose their investments. So, as *Johnson* correctly observes, there is no “neat answer.” Are any of the innocent investors at fault for placing their money with a licensed security dealer? They have violated no law, nor is there any law requiring them to liquidate assets innocently purchased with what they believed to be lawfully obtained profits. As the *Johnson* court observes, “In such circumstances the courts may simply leave the parties where they were found.”<sup>3</sup>

¶6 The Oklahoma Department of Securities appears to search for a deep pocket to reimburse innocent parties for their losses. Although that agency’s motives may be just, the pockets they wish to empty belong to equally innocent parties. Since the Ponzi scheme began in December 1999, those profits could have been received almost ten years ago. The warning for investors now who are willing to take big risks with their funds is this, not only do you risk your money when you first invest it, you also risk a subsequent government intervention to take back the funds. The remedy supplied by this Court potentially does greater damage to innocent investors than the damage done if this Court were to leave all innocent investors where they now stand. Ultimately the individual must be responsible for investigating before investing. Accordingly, I respectfully dissent.

1. *Johnson v. Studholme*, 619 F.Supp. 1347, 1350 (D.Colo. 1985), *aff’d*, 833 F.2d 908 (10th Cir. 1987) and quoted in ¶ 27 of the majority opinion of this Court.

2. *Johnson*, 619 F.Supp at 1350.

3. *Johnson*, 619 F.Supp at 1350.

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Mark D. Antinoro, Chairman  
Oklahoma Judicial Nominating Commission



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need to raise \$5,000  
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For 31 years, OETA has  
provided television time  
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A Lawyer" program. By  
assisting OETA, we  
show our appreciation.



## OETA Festival Volunteers Needed

OBA members are asked again this year  
to help take pledge calls during the OETA  
Festival to raise funds for continued  
quality public television.

- Tuesday, March 16
- 5:45 - 10 p.m.
- OETA studio at Wilshire &  
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dinner & training session
- recruit other OBA members  
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- Contact Jeff Kelton to sign up.  
Phone: (405) 416-7018  
E-mail: [jeffk@okbar.org](mailto:jeffk@okbar.org)  
Fax: (405) 416-7089

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**Mail to OBA, P.O. Box 53036  
Oklahoma City, OK 73152**

# FIFTH ANNUAL OKLAHOMA FORENSIC ACADEMY

SPONSORED BY THE CRIMINAL LAW AND FAMILY LAW SECTIONS

SUBMITTED FOR 8.0 CLE INCLUDING 1 HOUR OF ETHICS

When: April 2<sup>nd</sup> 2010, 8:00-5:00

Where: Moore/Norman Technology Center, 13301 S. Pennsylvania Ave, Oklahoma City

Topics: An array of forensic issues addressing domestic violence. Topics include:

Family Law & Criminal Statutes touching on Domestic Abuse  
Ethical Dilemmas faced in Domestic Abuse Litigation  
SANE Nurses – Evidence Preservation & Destruction  
Inter-Family Sexual Abuse & Forensic Relationships  
Sex Offender Registrations  
The Circle of Violence  
Parental Alienation  
Elder Abuse  
VPO's

Registration *includes lunch*, and the opportunity to learn with Judges, defense attorneys, and prosecutors from all over the state. Because domestic violence addresses many disciplines, the Family Law Section is the cosponsor to this year's forensic academy. For questions, contact Mike Wilds at (918) 449-6532 or wilds@nsuok.edu.

=====

## FORENSICS ACADEMY REGISTRATION

Make Checks payable to the Criminal Law Section of the OBA

**Mail/Fax Registrations (if you fax your registration payment will be accepted at the seminar) to:**

**David Brockman**, Cleveland Co. D.A., 201 S. Jones, Suite 300, Norman, OK 73069, Fax (405) 360-7840

**Trent Baggett**, DAC, 421 NW 13<sup>th</sup>, Suite 290, OKC, OK 73102, Fax: (405) 264-5099

**Ben Brown**, Okla. Co. PD's Office, 5909 N. Classen Court, Suite 204, OKC, OK 73118, Fax: (405) 713-6777

**Lori Pirraglia**, Family Law Solutions, 6440 Avondale Dr. Suite 208, OKC, OK 73116 (405) 843-5581

Last Name (print) \_\_\_\_\_ First Name \_\_\_\_\_

Address \_\_\_\_\_

Bar Number \_\_\_\_\_ Tele # (\_\_\_\_) \_\_\_\_\_ E-mail \_\_\_\_\_

I am a member of the: [ ] Criminal Law Section [ ] Family Law Section [ ] Oklahoma Judiciary

**REGISTRATIONS MUST BE RECEIVED BY 5:00 P.M. ON FRIDAY, MARCH 26, 2010**

CRIMINAL LAW OR FAMILY LAW SECTION MEMBERS \$80 \_\_\_\_\_ Nonmember \$95 \_\_\_\_\_  
Gov. Rate \$70 \_\_\_\_\_ Payment invoiced to my Agency: OIDS \_\_\_\_\_, DAC \_\_\_\_\_, PD's Office \_\_\_\_\_, Other \_\_\_\_\_  
Judges (FREE, MUST PRE-REGISTER) \_\_\_\_\_ Late Registration \$100 \_\_\_\_\_

# Court of Criminal Appeals Opinions

Case No. M-2009-598. February 11, 2010

## ORDER FOR MANDATE TO ISSUE

Now, on the 11th day of February, 2010, the Clerk of this Court is hereby ordered to issue the mandate in the following styled and numbered causes:

<u>Case No.</u>	<u>Case Description</u>
M-2009-598	Burns v. State of Oklahoma

WITNESS MY HAND AND THE SEAL OF THIS COURT, THIS 11th DAY of February, 2010.

/s/ Charles A. Johnson  
Presiding Judge

ATTEST:

/s/ Michael S. Richie  
Clerk

2010 OK CR 3

**DESTRIE DANE DIXON, Petitioner -vs.-  
STATE OF OKLAHOMA, Respondent.**

**No. PC-2009-854. February 22, 2010**

## ORDER DENYING REQUEST FOR OUT-OF-TIME APPEAL AND VACATING PORTION OF DISTRICT COURT ORDER RECOMMENDING THAT AN OUT-OF- TIME APPEAL BE GRANTED

¶1 On September 25, 2009, Petitioner, through counsel, Richard L. Yohn, filed with the Clerk of this Court an "Application for an Appeal Out-of Time." In support of this Application, Petitioner attaches a copy of an "Order Denying Petition to Withdraw Plea" pronounced on September 17, 2009, by the Honorable Bill Culver, Special Judge, in Ottawa County District Court Case Nos. CF-2004-439, CF-2005-145, and CF-2009-75. Within that order, Judge Culver recommends that Petitioner "be allowed to file an appeal out-of-time upon an application for post-conviction relief request to appeal out-of-time." (O.R. 10.)

¶2 According to those records presented by Petitioner, on June 24, 2009, Petitioner's three cases came before Judge Culver for disposition. Cases CF-2004-439 and CF-2005-145 were before the trial court on motions to revoke suspended sentences wherein Petitioner had previously stipulated to the allegations in the motions to revoke. (Tr. 2.) In CF-2009-75, Petitioner was before the trial court for sentencing following a previously entered plea of guilty to a felony offense of Actual Physical Control of a Motor Vehicle while under the Influence. At the conclusion of the June 24th hearing, Judge Culver revoked in full the suspended portions of Petitioner's sentences in CF-2004-439 and CF-2005-145 and imposed a consecutive sentence of five (5) years imprisonment in CF-2009-75. (Tr. 16.)

¶3 Within ten (10) days after the foregoing hearing, Petitioner filed a "Petition to Withdraw Blind Plea of Guilty" wherein he asked leave to "withdraw his Blind Plea in CF-2009-75 and stipulations to the Motions to Revoke in CF-2004-439 and CF-2005-245." (O.R. 2.) When the Petition to Withdraw came on for hearing, Judge Culver entered his September 17, 2009, order denying it as to all three cases and then made his recommendation for an out-of-time appeal.<sup>1</sup>

¶4 "In *Smith v. State*, 1980 OK CR 43, ¶ 2, 611 P.2d 276, 277, this Court established a vehicle by which an Appellant could seek an out-of-time appeal. Under that procedure, the defendant files an application for post-conviction relief seeking an appeal out of time." *Blades v. State*, 2005 OK CR 1, ¶ 4 n.2, 107 P.3d 607, 608 n.2. The Post-Conviction Procedure Act provides that a post-conviction "proceeding is commenced by filing a verified 'application for post-conviction relief' with the clerk of the court imposing judgment." 22 O.S.2001, § 1081.

¶5 Under these procedures and prior to filing any petition with this Court seeking leave to commence an out-of-time appeal, a defendant must first file a verified post-conviction application in the trial court for such an appeal. Once the application is filed, the defendant then uses the application as a vehicle to obtain findings of fact and conclusions of law from the trial court. In cases where the defendant was aware of his right to appeal, he must establish before the trial court that he always desired to exercise that right of appeal but that he was denied the opportunity to do so through no fault of his own. Upon proving as much, the defendant would then be entitled to the trial court's recommendation that he be granted an out-of-time appeal.<sup>2</sup>

¶6 In Petitioner's matter, there is no record of Petitioner having filed a verified application for post-conviction relief seeking an out-of-time appeal.<sup>3</sup> Additionally, there have been no findings of fact or conclusions of law properly made demonstrating that Petitioner is entitled to an appeal out of time of the final orders of revocation in CF-2004-439 and CF-2005-145, or an appeal out of time of the final order denying him leave to withdraw the guilty plea in CF-2009-75.<sup>4</sup> To the extent that Judge Culver's order recommends an out-of-time appeal from one or more of those three final orders, that recommendation must be vacated, as it has been made (1) without a verified post-conviction application having been filed; (2) without specific findings and conclusions as to whether Petitioner timely expressed a desire to appeal and how he was denied, through no fault of his own, the exercise of any right of appeal that he possessed; and (3) without any identification of the specific final orders or judgments from which a right of appeal had been lost and for which an out-of-time appeal is recommended.<sup>5</sup>

¶7 Because Petitioner has not complied with the established procedure for obtaining an out-of-time appeal by having a verified post-conviction application filed in the trial court and by having obtained a proper order adjudicating that application with specific and adequate findings of fact and conclusions of law, his "Application for Appeal Out-of Time" now before this Court must be denied.

¶8 **IT IS THEREFORE THE ORDER OF THIS COURT** that Petitioner's "Application for Appeal Out-of Time," filed herein on September 25, 2009, and requesting leave to commence an appeal out of time from one or more of the final orders entered in the District Court of Ottawa County, Case Nos. CF-2004-439, CF-2005-145, and CF-2009-75, is **DENIED**.

¶9 **IT IS THE FURTHER ORDER OF THIS COURT** that the recommendation for an appeal out of time made in the September 17, 2009, "Order Denying Petition to Withdraw Plea" and entered by the District Court in CF-2004-439, CF-2005-145, and CF-2009-75, is hereby **VACATED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2010), **MANDATE IS ORDERED ISSUED** upon the filing of this decision.

¶10 **IT IS SO ORDERED.**

¶11 **WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this 22nd day of February, 2010.

/s/CHARLES A. JOHNSON,  
Presiding Judge

/s/ ARLENE JOHNSON,  
Vice Presiding Judge

/s/ GARY L. LUMPKIN,  
Judge

/s/ CHARLES S. CHAPEL,  
Judge

/s/ DAVID B. LEWIS,  
Judge

ATTEST:

/s/ Michael Richie  
Clerk

1. In his order, Judge Culver stated that he was denying the Petition to Withdraw on the grounds "that the Petition was not timely set for hearing and by law must be denied." (O.R. 10.) In reaching this holding, Judge Culver apparently relies on Rule 4.2(B) of the *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2010), which directs that the evidentiary hearing on an application to withdraw plea is to be held within thirty (30) days of its filing. The hearing on Petitioner's application to withdraw plea did not occur until some two-and-a-half months after the application's filing. Nevertheless, as Petitioner timely filed an application to withdraw his guilty plea in CF-2009-75, he could have filed his Petition for Writ of Certiorari in this Court appealing Judge Culver's order denying his Petition to Withdraw, for there was no necessity in CF-2009-75 for any out-of-time appeal. Petitioner, however, did not choose that course but instead filed the current "Application for an Appeal Out-of Time." Because Petitioner has not brought a certiorari appeal from the District Court's order denying his application to withdraw the plea in CF-2009-75, the question of whether Judge Culver committed reversible error in that case when finding the "Petition [to Withdraw] was not timely set for hearing and by law must be denied" is an issue not properly before this Court in the context of the out-of-time appeal application now before us; therefore, it will not be addressed.

2. See Rule 2.1(E), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2010) (rule setting forth the procedures for obtaining the various types of out-of-time appeals).

3. A "verified" application is one that is either notarized or given before a person authorized to administer oaths or is one that is signed under penalty of perjury as specified under 12 O.S.Supp.2002, § 426. Rule 1.13(L). Additionally, parties should recognize under 22 O.S.2001, § 1088.1, that "[b]y presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, written motion or other papers regarding an application for post-conviction relief an attorney or unrepresented party is certifying" the truth and viability of his claims to the extent described in Section 1088.1.

4. It appears from the record presented that Petitioner proceeded in the trial court under the notion that he could employ certiorari appeal procedures to appeal a final order of revocation. This Court clearly rejected that notion in *Burnham v. State*, 2002 OK CR 6, ¶¶ 6-8, 43 P.3d 387, 389-90 (holding that an appeal from a final order of revocation is by Petition in Error and therefore dismissing the defendant's attempted revocation appeal that he sought to perfect through the filing of a Petition for Writ of Certiorari).

5. We would also note that the "Application for Appeal Out-of Time" that Petitioner has filed in this Court fails to adequately identify the specific final orders, judgments, or sentences from which a right of appeal was allegedly lost and for which an out-of-time appeal is being requested. Any petition to this Court for an out-of-time appeal must provide sufficient information for this Court to determine whether the petitioning party is entitled to the out-of-time appeal being requested. By itself, proof that the trial court has recommended the granting of an out-of-time appeal is not enough to demonstrate entitlement to an out-of-time appeal.

**In re Retirement of the Honorable  
Charles S. Chapel**

**No. CCAD-2010-1**

Court of Criminal Appeals of Oklahoma

February 17, 2010

**ORDER COMMEMORATING SERVICE**

¶1 **NOW**, on this 17th day of February, 2010, the Oklahoma Court of Criminal Appeals, sitting *en banc* to honor the stewardship of Judge Charles S. Chapel for his many years of service to the citizens of the State of Oklahoma, directs the following comments of his colleagues and citation of appreciation to be spread of record to commemorate his steadfast devotion to the Oklahoma Judicial System.

**COMMENTS OF THE COURT**

¶2 **Presiding Judge Charles A. Johnson:** Charlie, I found out early on how important you were. I was already here and thought my name was Charlie until you got on the Court and took it away. That was my first pleasure of serving with you for lo these many years. I remember doing some background checking and found out you were first in your class in law school at the University of Tulsa. Things were tough when you graduated. Three of you got together and started a law firm that has flourished to this day and is one of the mega law firms in the State of Oklahoma. Now, with your retirement, you are going back to the firm to make sure they get it right again. What an asset you have been to this Court for the past seventeen years that you have served. When you came to the Court you brought an already distinguished career, but you made it even better during these years. As you know, there have been those on the U. S. Supreme Court who have been called the great dissenters and so often those dissents became the law later. That is what is going to happen with you. You were a great dissenter; you made all the Judges on the Court think, and to be in conference with you and discuss a case was truly a pleasure. The future will show that many of those dissents will become the law in Oklahoma. Your great work ethic in your office, and the way you handled your staff, were all simply outstanding. It has been a true pleasure to serve with you. I know, in the future, you will get that hole in one. Conferences will never be the same; you are a scholar and a gentleman.

¶3 **Vice-Presiding Judge Arlene Johnson:** Charlie, you have given this Court some very good years. We will all feel the loss of your intellect, your clear writing, and your passion for getting it right. I will very much miss the spark you bring to conference and to deliberations.

¶4 The OCCA is a better Court because of your work here. Your writings, opinions and dissents, will continue to shape the jurisprudence of this Court in years to come. That is a legacy to be proud of.

¶5 **Judge Gary L. Lumpkin:** Charlie, it does not seem possible that the last seventeen years have passed so fast. And, things have really changed since you took office on January 12, 1993. At that time the State of Oklahoma, and this Court, were being challenged in Federal Court for case delays occasioned by under funding of the Oklahoma Indigent Defense System. That challenge created the impetus for the judges of this Court to create novel methods to alleviate the delay in the processing of cases on appeal. Working together, we created the Court's Accelerated Docket Procedures to ensure priority cases were addressed in a timely fashion. We also presented to the Oklahoma Legislature a proposal to create an Emergency Appellate Division of this Court, at no cost to the State, to be staffed by volunteer judges from the District Court. The Legislature adopted our proposal and there is now a permanent process in place should the Court ever be faced with a backlog again. Due to these innovative procedures, and the teamwork of the judges on the Court, we were able to become current in the disposition of the cases filed with the Court. Due to the contribution of your outstanding work ethic, the Court has been able to remain current in the disposition of our cases to this day.

¶6 I had a pastor who once said the building of faith is like the strengthening of steel. Without the tempering process of heating, cooling, heating, cooling, the steel would not have its strength. The same is true for faith to become strong and I believe the principle also applies to the development of the law. Over the last seventeen years you have contributed greatly to the tempering process of the development of the law for the citizens of Oklahoma. For all your efforts, we say a job well done, and may God bless you with many wonderful years of health and enjoyment in your "working" retirement.

¶7 *Judge David Lewis*: Charlie, congratulations upon your well earned retirement. You have been a true asset to the Court. I personally appreciate the support and encouragement that you gave to me when I joined the Court. The Court will miss you and I will miss you.

#### CITATION OF APPRECIATION

¶8 **WHEREAS** you have served the citizens of the United States of America as a U. S. Marine from 1959 to 1963; and

¶9 **WHEREAS**, upon retirement from the Marine Corps you entered the University of Tulsa, School of Law and were named the Oklahoma Bar Association Outstanding Law Student of 1968 for the School of Law; and

¶10 **WHEREAS**, upon graduation you founded a law firm that grew to one of the largest law firms in Tulsa — Chapel, Riggs, Abney, Neal & Turpen; and

¶11 **WHEREAS**, you have served as an adjunct law professor for the University of Tulsa in addition to the prior service as the Associate Editor of the Tulsa Law Journal; and

¶12 **WHEREAS**, you were appointed to the Oklahoma Court of Criminal Appeals on January 12, 1993, by Governor David Walters, and were retained in office by a vote of the people in 1994, 1998, and 2004; and

¶13 **WHEREAS**, you sought to increase your knowledge and perspective of the law by obtaining an L.L.M. degree from the University of Virginia while you served as a judge on the Court of Criminal Appeals; and

¶14 **WHEREAS**, the judges of the Oklahoma Court of Criminal Appeals elected you to serve as the Court's Presiding Judge in 1996-97 and again in 2005-06; and

¶15 **WHEREAS**, your seventeen (17) years of judicial service reflects great credit on this Court, the Oklahoma Judicial system, and the State of Oklahoma; and

¶16 **WHEREAS**, the Court of Criminal Appeals is the Court of last resort and possesses exclusive jurisdiction over the appeal of criminal cases in the State of Oklahoma.

¶17 **NOW, THEREFORE**, the members of the Oklahoma Court of Criminal Appeals, sitting *en banc*, do herewith extend our appreciation for your many years of devotion, service, and contribution to this Court and the citizens of the State of Oklahoma, and commend your

tireless efforts on behalf of the Court, which have contributed to its efficiency, stature and prestige.

¶18 **IT IS SO ORDERED.**

¶19 **WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this 17th day of February, 2010.

/s/ CHARLES A. JOHNSON,  
Presiding Judge

/s/ ARLENE JOHNSON,  
Vice Presiding Judge

/s/ GARY L. LUMPKIN,  
Judge

/s/ DAVID LEWIS,  
Judge

2010 OK CR 2

MICHAEL DAVID RANDOLPH, Appellant,  
v. The STATE OF OKLAHOMA, Appellee.

Case No. F-2008-208. February 4, 2010

#### OPINION

LEWIS, JUDGE:

¶1 Michael David Randolph, Appellant, was tried by jury and found guilty in the District Court of Tulsa County, Case No. CF-2007-1661, of Count 1, trafficking in illegal drugs, after former conviction of two (2) or more felonies, in violation of 63 O.S.Supp.2004, § 2-415; Count 2, possession of marijuana, second offense, after former conviction of one (1) or more felonies, in violation of 63 O.S.Supp.2004, § 2-402; and Count 3, failure to obtain a drug tax stamp, after former conviction of two (2) or more felonies, in violation of 68 O.S.2001, § 450.3. The jury sentenced Appellant to life without parole and a \$25,000 fine on Count 1, two (2) years imprisonment and a \$1,000 fine on Count 2, and four (4) years imprisonment and a \$1,000 fine on Count 3. The Honorable Jesse S. Harris, District Judge, pronounced judgment and sentence in accordance with the jury's verdict and ordered that the sentences on Counts 1 and 2 be served concurrently, but consecutively to Count 3. Mr. Randolph appeals.

#### FACTS

¶2 In March, 2007, Tulsa police officers Ludwig and Beaty received information that someone was dealing drugs to a pregnant black female at a particular apartment in Tulsa. In response to that information, the officers initiated an investigation of an apartment on East

Fifth Place. They arrived at the residence around 6:00 p.m. on March 22, 2007. The officers knocked on the apartment door. A man later identified as Robert Benson answered. The officers, who were dressed in police uniforms, told Benson the reason for their visit and asked if they could enter the apartment. Benson stepped to the side and told them to "Come on in."

¶3 Upon entering the living room, both officers saw Appellant standing in a doorway to a bedroom down the hallway of the apartment. When Appellant saw the officers, he turned and walked quickly out of sight. The officers became suspicious and followed him. As Officer Ludwig entered the room, he saw Appellant standing partially turned to his left and facing away from the door, cupping a clear plastic baggie containing a leafy green substance in his left hand. Officer Ludwig also saw a pregnant black female in the room, dressed in a towel and just out of the shower. Officer Ludwig seized the baggie, handed it to Officer Beaty, and arrested Appellant for possession of marijuana. As he was being handcuffed, Appellant complained to the officers that he "just wanted to roll a blunt."

¶4 The officers removed Appellant from the bedroom and searched his clothing, finding \$77 in his pocket. Officer Ludwig testified that he requested consent to search the apartment from Robert Benson. Officer Beaty filled out the search warrant waiver and consent form, which Officer Ludwig explained and presented to Benson. Benson executed the form. As a witness for the Appellant at trial, Robert Benson gave a conflicting account of these events. He testified that the officers asked him some questions when he opened the door, but did not ask if they could come inside. Benson stated that while the officers were still outside, he asked if they had a search warrant. The officers then pushed open the door, handcuffed him and the female in the apartment, and then went into the back bedroom where Appellant was. Benson also said that he only signed the search waiver because the officers threatened he would go to jail if he didn't.

¶5 After arresting the Appellant, Officers Ludwig and Beaty transported him to Tulsa's Uniform Division North station. At the station, Appellant expressed interest in becoming a confidential informant. During this discussion, Appellant also asked to go to the restroom. As both officers escorted Appellant down the hall, they noticed him walking with a pronounced

limp. Appellant had walked with a limp from the patrol car into the police station, but had not done so earlier at the apartment.

¶6 Appellant's handcuffs were removed in the restroom. As Appellant walked to the urinal, the officers saw a small plastic baggie fall from the bottom of his left shorts leg. Appellant quickly picked it up and began to shove it into his pocket. Officer Ludwig immediately re-handcuffed him and retrieved a clear baggie containing what proved to be cocaine base. There was no tax stamp on the item. A Tulsa Police Department forensic scientist testified that the cocaine base weighed approximately 8.52 grams, a trafficking quantity of crack cocaine.

### ANALYSIS

¶7 In his first proposition of error, Appellant claims the trial of this case was barred by former jeopardy, violating his rights under Article II, section 21 of the Oklahoma Constitution and the Fifth Amendment to the United States Constitution. Appellant did not plead in the court below that he was formerly convicted or acquitted of these crimes by the verdict of a jury. 22 O.S.2001, §§ 14, 513. He rests this claim on the fact that the district court declared a mistrial over his objection and discharged a previous jury sworn to try the case. When Appellant was brought before the district court for retrial, he moved to dismiss the charges on grounds of former jeopardy. The district court denied the motion. Appellant preserved the issue for review. *Harris v. State*, 1989 OK CR 34, 777 P.2d 1359; *Sussman v. The District Court of Oklahoma County*, 1969 OK CR 185, 455 P.2d 724 (granting pre-trial writ of prohibition); *Barnhart v. State*, 1977 OK CR 18, 559 P.2d 451 (reviewing former jeopardy claim following subsequent trial).

¶8 In *Loyd v. State*, 1911 OK CR 255, 6 Okla. Crim. 76, 116 P. 959, Judge Furman set out the essential facts which determine whether a discharge of the trial jury operates as an acquittal:

First. The defendant must be put upon trial before a court of competent jurisdiction. Second. The information or indictment against the defendant must be sufficient to sustain a conviction. Third. The jury must have been impaneled and sworn to try the case. Fourth. After having been so impaneled and sworn to try the case the jury must have been unnecessarily discharged. Fifth. That such discharge of the jury must

have been without the consent of the defendant. When those things all occur, then the discharge of a jury operates as an acquittal of the defendant.

*Loyd*, 6 Okla. Crim. at 84, 116 P. at 962. This Court has applied these principles in such cases since statehood. *Pickens v. State*, 1964 OK CR 10, 393 P.2d 889; *Painter v. Martin*, 1974 OK CR 231, 531 P.2d 341.

¶9 Four of the requirements for acquittal by discharge of the jury are undisputed here. Only the question of manifest necessity remains. In *United States v. Perez*, (9 Wheat.) 22 U.S. 579, 580, 6 L.Ed. 165 (1824), Justice Story wrote:

[T]he law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, *in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.* They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere ... (emphasis added).

This Court has likewise stated that the district courts

necessarily must have a discretion in the matter of determining the necessity for the discharge of the jury, but such court cannot act arbitrarily or capriciously, and unless the facts upon which the court based its judgment are entered of record, this court is unable to determine whether the action of the court was arbitrary or capricious, or in accordance with justice.

*Yarbrough v. State*, 1949 OK CR 100, 90 Okla. Crim. 74, 82, 210 P.2d 375, 379. Whether a district court grants a mistrial and discharges the jury upon a party's motion or *sua sponte*, we review the decision for abuse of discretion, *Knighton v. State*, 1996 OK CR 2, ¶ 64, 912 P.2d 878, 894, which is shown only when the ruling "is clearly made outside the law or facts of the case." *Id.*

¶10 During the previous trial of these offenses, the prosecution's first police officer witness identified the substance Appellant was cupping in his hand as marijuana. When defense counsel objected to the lack of foundation, the court sustained the objection and admonished the jury. The State then laid an adequate foundation and the officer identified the substance

without objection. The same officer then identified the substance that fell from Appellant's clothing as crack cocaine. Defense counsel again objected. The court sustained the objection and admonished the jury to disregard the evidence. The court then offered defense counsel a mistrial, which he declined. Defense counsel requested instead that the whole of the officer's testimony be excluded, which the district court refused. The court cautioned the veteran officer that he was not to inject prejudicial information into the trial, and if it happened again, the court would order a mistrial.

¶11 During the State's direct examination of the second police officer, while being questioned briefly by the court, the witness testified before the jury that Appellant's offer to do some work for police meant he was offering "to set up another drug dealer." Defense counsel again approached the bench and objected. The court agreed the comment was improper, and asked counsel whether he was requesting a mistrial. After consulting with Appellant, defense counsel again declined a mistrial. Defense counsel instead requested that the court instruct the jury that the witness had injected evidentiary harpoons. The district court refused to instruct the jury as requested. The following then transpired:

The Court: What the man said was another drug dealer. That suggests this man is a drug dealer. I believe that's why you're objecting, Mr. Allen?

Defense Counsel: It is, your Honor.

Prosecutor: Your Honor, only—the only thing that I would go back to the first element of a drug tax stamp.

The Court: That may be, but the jury has to decide whether or not this man is a drug dealer.

Prosecutor: I understand.

The Court: To just tell them that he is, is improper. Objection—to which I sustained the objection. And my problem is, quite frankly, this is a third evidentiary harpoon. They got this man [the officer] calling the man a drug dealer; we have another guy take the witness stand [sic] say something is cocaine without a laboratory analysis; and also he offers his opinion that its marijuana. We have what I consider here to be a collection of errors. I'm going to declare a mistrial on my own motion. This case —

would be reversed on appeal. There is no — makes no sense to continue to go through this exercise in futility when I know the man hasn't received a fair trial. And if the man's found guilty and sent to the penitentiary and the case is sent back, it makes no sense to continue going on with this. We have a veteran police officer of 12 years who knows better than to inject an evidentiary harpoon in the case, not once, but twice. Now we have a less experienced officer — his testimony alone was not grounds for mistrial, but combined with the other two errors, I can't, in good conscience, send this case forward when I believe it's going to be reversed. It makes no sense to continue. What do you say, Mr. Allen? I'm guessing the reason you objected was because you felt like these things were wrong.

Defense Counsel: Yes, sir.

The Court: I've overruled [sic] your objections. And with the accumulation of errors, it's my belief that this will be reversed if your guy's found guilty. We're not doing this just for practice. And even though you may want to waive these errors, I'm certain that if he's found guilty on appeal, some appeal attorney is not going to waive these errors.

Defense Counsel: I expect they would not, Judge.

The Court: We wind up just doing this for practice. That is not a good use of your time, Counselors, or mine, or this jury's. And it's certainly not good use of the defendant's time to go down and sit in the penitentiary, if he's found guilty, with my knowing, or at least feeling reasonably sure that this case will be reversed and tried again given the collection of errors. All right. I'll declare a mistrial.

¶12 When Appellant later moved to dismiss the charges based on former jeopardy, the district court again explained its rationale and purpose in discharging the jury:

The Court: The defendant now makes a Motion to Dismiss again based on double jeopardy because the Court determined that there were evidentiary harpoons that were made by not one but two witnesses, as I recall . . . . And it was the Court's decision to complete the trial would guarantee a mistrial. So rather than wasting the

Court's time and court resources, the Court determined over the defendant's objection, to declare a mistrial, since the case was obviously tried erroneously, at least in my opinion . . . . I'm going to deny your Motion to Dismiss for double jeopardy. Counselor, what I was trying to do was give your client a fair trial. And it was my determination that based upon the testimony that was elicited by the State, that your client's rights were prejudiced. In order to protect him from getting a huge sentence and being sent to the penitentiary for a very long time and having to appeal it and sit in the penitentiary for a number of years before his appeal was successful, which I anticipated it would be, I was trying to save him some time. That is not double jeopardy. Deny your request.

¶13 In an unusual reversal of rhetoric, appellate counsel now argues, with singular dexterity, that the errors to which Appellant objected at his first trial (and which objections provoked the district court to declare the mistrial) were not *errors* at all, or were "clearly harmless" errors. From this, he reasons inexorably that discharging the jury was an unnecessary act amounting to acquittal. The Attorney General, uncharacteristically, counters that the errors committed in the first trial were prejudicial to Appellant's rights and the mistrial was justified by manifest necessity.

¶14 While the parties largely frame the issue as whether the case would have been reversed on appeal, this is not the scope of our review. The question facing the district court was whether "taking all the circumstances into consideration," there was "a manifest necessity for the [mistrial], or the ends of public justice would otherwise be defeated." *Perez*, 22 U.S. at 580, 6 L.Ed. at 165. A common thread uniting our prior cases where jeopardy attached upon the unnecessary discharge of the jury was a district court's *mistaken* conclusion that a mistrial was *required* under prevailing law. *Loyd*, 6 Okla. Crim. at 84, 116 P. at 962 (mistrial unnecessary based on erroneous conclusion that information charging murder in one county was invalid where deceased died in another county); *Yarbrough*, 90 Okla. Crim. at 80-82, 210 P.2d at 378-79 (mistrial unnecessary where juror declared personal knowledge of case during trial; statute required juror first be examined by counsel in open court); *Pickens*, ¶¶ 3-10, 393 P.2d at 890-92 (mistrial was unauthorized where State's principal witness failed to appear after

jury was sworn); *Sussman*, ¶¶ 51-56, 455 P.2d at 733 (discharge of jury where State failed to prove element of arson amounted to acquittal); *Painter*, ¶ 3, 531 P.2d 341-42 (mistrial to prevent Bruton confrontation problem was unnecessary, as court could have excluded statement of co-defendant as hearsay); *McClendon v. State*, 1988 OK CR 186, ¶¶ 4-6, 761 P.2d 895, 896-97 (record did not support district court's conclusion that mistrial was required where juror recognized he knew appellant's sister); *Harris*, ¶ 21, 777 P.2d at 1365 (mistrial of burglary charge was unnecessary despite failure to certify defendant as adult; failure to certify only rendered conviction voidable and did not deprive court of jurisdiction).

¶15 By contrast, the determination of when evidentiary errors have denied a fair trial and doomed a case to reversal is rarely a clear cut matter. *Ozbun v. State*, 1983 OK CR 29, ¶ 3, 659 P.2d 954, 956, n. 1 (trial court did not abuse its discretion in declaring mistrial; witness' non-responsive comment about "two ex-cons running around with shotguns" provided a "very cogent and compelling reason"). A trial court has both the power and the duty to declare a mistrial when misconduct or other evidentiary errors have compromised the right to a fair trial. *Edwards v. State*, 1947 OK CR 123, 85 Okla. Crim. 125, 130-32, 186 P.2d 333, 335-36 (improper comment on defendant's failure to testify resulted in duty to declare mistrial); *Mendenhall v. State*, 1946 OK CR 39, 82 Okla. Crim. 220, 224, 168 P.2d 138, 140 (trial court has duty to ensure defendant receives a fair trial). The exercise of this power necessarily involves considerable legal judgment, requiring the application of sometimes complex legal rules and a broad array of factors unique to the trial court setting, including the demeanor of witnesses, the reactions of the jury, the perceived efficacy of admonitions, the cumulative impact of prejudicial errors, and other intangibles.

¶16 At the time of these errors, the previous trial was not finished, and the district court had already concluded the State's witnesses committed evidentiary errors which infected the trial with unfairness.<sup>1</sup> The district court clearly considered not only these errors, but also the fact that counsel had timely objected when they occurred. Defense counsel strangely declined the offer of a certain curative remedy, instead requesting exclusion of the witness' testimony and an instruction to jurors about evidentiary harpoons. Counsel thus created a record with preserved errors, and possible ineffective assistance of counsel, in a manda-

tory life without parole case. On appeal, appellate counsel would have flourished the district court's repeated offers of a mistrial as evidence of how inflammatory the harpoons *really were*; and argued zealously that trial counsel's rejection of the mistrial was deficient representation which led directly to Appellant's erroneous conviction. Given the mandatory sentence of life without parole required by Appellant's prior convictions, his arguments might well have garnered support for reversal.

¶17 The district court's discharge of the previous jury after these evidentiary errors reflected a scrupulous adherence to the evidentiary rules by which trials involving grave mandatory penalties must be conducted. We could certainly attempt to decide whether these errors were rendered harmless — not only by the district court's admonitions, but by the evidence of Appellant's guilt — but such an analysis of an incomplete trial seems unwise. We are encouraged in this view by the recognition that "[c]ourts of last resort must establish precedents under which innocent men are to be tried." *Stough v. State*, 1942 OK CR 115, 75 Okla. Crim. 62, 128 P.2d 1028, 1031-32, quoting *Humphrey v. State*, 1910 OK CR 54, 3 Okla. Crim. 504, 507, 106 P. 978, 979. Abuse of discretion is therefore the only appropriate scrutiny to be applied to a ruling of this character. When an experienced trial court concluded that Appellant's rights to a fair and impartial trial and effective assistance of counsel were irreparably compromised, it was faced with a "cogent and compelling reason" to order a mistrial and discharge the jury. *Ozbun*, ¶ 3, 659 P.2d at 956. We find no abuse of discretion in this ruling, and no former acquittal which barred Appellant's retrial and conviction. Proposition One is denied. In Proposition Three, Appellant argues ineffective assistance of counsel as a precaution against a finding that his claims in Propositions One and Two were waived. Since we addressed this claim on the merits, Proposition Three is moot as it pertains to Proposition One.

¶18 Appellant's Proposition Two claims that police violated his freedom from unreasonable search and seizure by entering the apartment and approaching him in the bedroom after he turned and walked quickly out of their sight. Appellant filed a pre-trial motion to suppress the evidence, which the district court denied. He argued generally in the district court that consent to enter the apartment was either non-existent or involuntary. On appeal he maintains this claim, but now asserts a different

claim that the entry exceeded the scope of a qualified consent. This much of the claim is waived, but we review the issue for plain error.

¶19 Under the Fourth Amendment and Article II, section 30 of the Oklahoma Constitution, warrantless searches are *per se* unreasonable, absent a recognized exception. A warrantless police intrusion into a protected area is reasonable, and thus constitutionally permissible, if preceded by free and voluntary consent. *Burkham v. State*, 1975 OK CR 150, 538 P.2d 1121, 1123. Any person with common authority over jointly occupied premises may consent to a warrantless search. *Smith v. State*, 1979 OK CR 142, 604 P.2d 139, 140. Whether a voluntary consent was given is a question of fact to be determined from all the circumstances. This Court will defer to the trial court's finding of voluntary consent where competent evidence reasonably tends to support it. *Sullivan v. State*, 1986 OK CR 39, ¶ 12, 716 P.2d 684, 687. Concerning the scope of a voluntary consent, the authorities show that

[w]hen the police are relying upon consent as the basis for their warrantless search, they have no more authority than they have apparently been given by the consent . . . But, the question is *not* to be determined on the basis of the subjective intentions of the consenting party or the subjective interpretation of the searching officer. As the Supreme Court concluded in *Florida v. Jimeno*, the standard is "that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the [consenting party]?"

Consents to search are not given in the abstract; the police are interested in searching a particular place, and thus it is the practice for them to specify a certain place, such as a residence or vehicle. If, as is likely, the consent given in response is general and unqualified, then the police may proceed to conduct a general search of that place.

W. LAFAVE, 3 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 8.1(c), 610 (3d ed., West 1996) (emphasis in original; internal references omitted), quoting *Florida v. Jimeno*, 500 U.S. 248, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991).

¶20 Decisions interpreting the Fourth Amendment have also recognized that "[u]nder appropriate circumstances police officers, in the

course of their duty, may approach and question suspicious individuals in order to determine their identity or to maintain the status quo momentarily while obtaining more information, even though there are insufficient grounds for arrest." *Prock v. State*, 1975 OK CR 213, ¶ 18, 542 P.2d 522, 526, citing *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). In *Prock*, this Court found that when an officer "was in a place he had a right to be" while investigating a report of suspicious behavior, the officer's seizure of a gun that was in plain view in the defendant's waistband during the encounter was reasonable; and the evidence was admissible in a prosecution for unlawful possession of a firearm. *Id.*, ¶¶ 18-19, 542 P.2d at 526-27. Under this "plain view" exception to the warrant requirement, an officer may always confiscate "what clearly is incriminating evidence or contraband when it is discovered in a place where the officer has a right to be." *Lyons v. State*, 1989 OK CR 86, ¶ 7, 787 P.2d 460, 463.

¶21 Appellant primarily argues the officers' act of approaching him in the bedroom — at which point they observed him in the commission of an offense — exceeded the scope of Benson's consent. The record contradicts this. Despite evidence that Benson initially gave verbal consent to the officers' entry and later executed a written consent to search the apartment, Benson testified the officers obtained no consent and forced their way past him into the apartment. The officers testified that before they asked to enter, they introduced themselves and explained to Benson that the purpose of their visit was to investigate a complaint of drug dealing inside the apartment. They also testified that Benson later executed a free and voluntary consent to search the premises.

¶22 Although the facts of the exchange between the officers and Benson were disputed, the evidence showed a voluntary consent to enter the premises. Officers did not exceed the reasonable scope of that consent when they approached Appellant in the bedroom. Viewed objectively, when the officers informed Benson of the purpose of their visit, Benson's act of stepping aside and telling officers to "Come on in" reasonably implied a right of access sufficient to identify persons inside the apartment and make a reasonable inquiry into whether drug dealing had recently been in progress. From their lawful vantage point inside, the officers saw Appellant. When Appellant saw them, he turned and walked quickly out of

their view. We need not decide whether this alone provided sufficient justification for an immediate investigative detention and pat-down search of Appellant, because no such detention or “stop and frisk” happened. The officers, lawfully within the apartment, simply approached someone they deemed suspicious “to determine their identity or to maintain the status quo momentarily while obtaining more information.” *Loman v. State*, 1991 OK CR 24, ¶ 17, 806 P.2d 663, 666-67. Before any investigative detention occurred, the officers plainly viewed Appellant in possession of marijuana, at which point his arrest was based on probable cause.

¶23 Appellant has presented nothing to suggest he held any greater right to control the area of the apartment where he was found than Benson did; he had no reasonable expectation that entering the bedroom would shield him from an encounter with the officers who were present pursuant to Benson’s consent. *Sullivan*, ¶ 8, 716 P.2d at 686 (law of consent recognizes that co-inhabitants assume the risk that one of their number may consent to search of common area). Because the officers’ entry and Appellant’s warrantless arrest for possession of marijuana were lawful, the evidence obtained when it dropped from Appellant’s clothing at the police station was admissible at trial. Proposition Two is denied. Proposition Three, in which Appellant claims ineffective assistance of counsel based on trial counsel’s failure to argue this scope of consent issue in the court below, necessarily fails because Appellant cannot show either deficient performance or prejudice. *Malone v. State*, 2007 OK CR 34, ¶ 90, 168 P.3d 185, 219 (failure to object to admissible evidence is not ineffective assistance of counsel).

¶24 In Proposition Four, Appellant argues the admission at preliminary examination of a report of laboratory analysis over his objection violated his right to confront his accusers. The report itself does not appear in the original record or transcript of evidence on appeal, but Appellant states in his brief that “information in the report established both that the evidence seized was cocaine base and that it weighed over eight grams.” Relying largely on developments in the law of confrontation in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L. Ed.2d 177 (2004), and subsequent Supreme Court case law, Appellant argues the admission of this report without the testimony of its maker violated his right to confront his accusers.

¶25 Appellant’s argument is fraught with conceptual problems, but relief is unnecessary for the more basic reason that he waived the right to confront at preliminary examination the witness who prepared the report. Under 22 O.S.Supp.2004, § 751, a “laboratory report from a forensic laboratory operated by this state or any political subdivision thereof,” which has been “made available to the accused by the office of the district attorney at least five (5) days prior to the hearing,” shall be received “as evidence of the facts and findings stated, if relevant and otherwise admissible in evidence.” § 751(A)(3), (A)(5). When such a report is deemed relevant “by the state or the accused, the court shall admit the report without the testimony of the person making the report, unless the court, pursuant to subsection C of this section, orders the person making the report to appear.” § 751(A)(5). Section 751(C) further provides that the court, “upon motion of the state or the accused, shall order the attendance of any person preparing a report submitted as evidence in any hearing prior to trial or forfeiture hearing, when it appears there is a substantial likelihood that material evidence not contained in such report may be produced by the testimony of the person having prepared the report” (emphasis added).

¶26 When the State tendered the laboratory report identifying the type and amount of controlled dangerous substances as evidence just before the conclusion of the preliminary hearing, Appellant objected. Defense counsel argued:

[A]lthough Oklahoma Statutes permit a hearsay exception for the lab results and Medical Examiner’s reports, a state hearsay exception cannot trump a constitutional guarantee. It’s also clear from case law that [the] right of confrontation applies in preliminary hearings, and I ask the Court to honor that right in this case.

The district court overruled the objection and admitted the document in evidence, relying largely on *State v. Tinkler*, 1991 OK CR 73, 815 P.2d 190, *overruled on other grounds*, *State v. Johnson*, 1992 OK CR 72, 877 P.2d 1136.<sup>2</sup>

¶27 The preliminary examination provided by Article II, section 17 of the Oklahoma Constitution is “a personal privilege for benefit of accused, which may be waived by him.” *Ex parte Pruitt*, 1949 OK CR 66, 89 Okla. Crim. 312, 207 P.2d 337, 339. While the law confers a limited right to confront adverse witnesses at pre-

liminary examination, that right is also subject to waiver. *Beaird v. Ramey*, 1969 OK CR 195, ¶ 7, 456 P.2d 587, 589; *LaFortune v. District Court*, 1998 OK CR 65, ¶ 11, 972 P.2d 868, 872 (“At the preliminary hearing, a defendant must not be denied his Constitutional right to be confronted with his accusers”); *Miles v. State*, 1954 OK CR 33, ¶ 15, 268 P.2d 290, 298 (defendant in a criminal action may be held to waiver of the right to confrontation by conduct inconsistent with a purpose to exercise it), *citing* 23 C.J.S. CRIMINAL LAW § 1009, p. 377, n. 97.

¶28 We find that the current version of the statute includes an opportunity for confrontation — effectively forcing the proponent of the certified report to produce the witness for cross-examination — upon a timely motion and a proper showing. Counsel clearly waived the right to confront the witness when he made no motion to have the witness appear as authorized under section 751(C), and offered no showing, either at preliminary examination or on appeal, of any “substantial likelihood that material evidence not contained in such report” would have been produced “by the testimony of the person having prepared the report.” If counsel truly intended to exercise Appellant’s rights to confront and cross-examine the witness, rather than merely intoning a spurious objection to the laboratory report, the statute provided a clear procedure for asserting those rights. Appellant ignored the statutory procedure and waived the right to confrontation.

¶29 Judge Chapel in dissent argues that admission of the drug analysis report under section 751 unconstitutionally denied Appellant’s right to confront his accusers at preliminary examination, relying on *Melendez-Diaz v. Massachusetts*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). The robust exposition of that case in the dissent simply has no application here. In *Melendez-Diaz*, the Supreme Court held the state trial court’s admission of a hearsay drug analysis report *at a criminal trial*, without an opportunity to cross-examine the maker of the report, violated the Sixth Amendment’s Confrontation Clause as interpreted by the Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). See *Melendez-Diaz*, 129 S.Ct. at 2532, *quoting Crawford*, 541 U.S. at 54, 124 S.Ct. at 1365 (“[a]bsent a showing that the [drug] analysts were unavailable *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to be ‘confronted with’ the analysts at trial”) (emphasis in original).

¶30 The Oklahoma Constitution, Article II, section 17, establishes the right to preliminary examination in felony prosecutions. “Quite simply, a preliminary examination is not a trial.” *Tinkler*, ¶ 10, 815 P.2d at 192. The scope of the right to confrontation of accusers at preliminary examination, like the scope of a preliminary examination itself, is subject to reasonable legislation. *LaFortune*, ¶ 10, 972 P.2d at 871 (noting that 1994 legislative amendments to Title 22 substantially limited scope and purpose of preliminary examination). The Supreme Court, in a unanimous opinion by Justice Marshall, long ago acknowledged the important distinction between the two proceedings in a case from Oklahoma, *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968):

The right to confrontation is basically a *trial right*. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A *preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists* to hold the accused for trial.

*Barber*, 390 U.S. at 725, 88 S.Ct. at 1322 (emphasis added).

¶31 In section 751 of Title 22, the Legislature provided for the admissibility of certain reports at preliminary examinations and other hearings, and established reasonable conditions for a party to request an opportunity to confront the witnesses making those reports. Section 751 is a reasonable enactment, and Appellant has completely failed to show how admission of the drug analysis report at preliminary examination over his objection violated his constitutional rights. The dissent broadly endorses Appellant’s constitutional attack on section 751, even though Appellant never invoked the confrontation procedure provided in section 751(C); never bothered to explore the parameters or potential limitations of that procedure through litigation in the court below; and never offered the slightest suggestion that he suffered prejudice from the admission of the drug analysis report in his case.

¶32 The dissent gleans from *Melendez-Diaz* that admission of these forensic reports at preliminary examinations over the objection of the accused, pursuant to section 751, “violates the Sixth Amendment right to confrontation.” We simply reiterate the words of this Court when

it upheld section 751 against a confrontation challenge many years ago:

In the present case, we are not concerned with the protection of the accused's right to confrontation *at trial*, but rather at a proceeding that is merely *precursory to a trial*, a proceeding which in fact determines whether the trial should even occur. *It follows then, that the rights and privileges afforded participants may not be the same for both trial and preliminary examination.*

*Tinkler*, ¶ 6, 815 P.2d at 192 (emphasis added). *Melendez-Diaz* applies the Confrontation Clause of the Sixth Amendment *strictly within the confines of a criminal trial*. Unlike the petitioner in *Melendez-Diaz*, Appellant in this case was afforded a complete opportunity to confront the maker of the drug analysis report when the analyst testified for the State and was cross-examined by defense counsel (very briefly, it turns out) at trial. We are confident Appellant's conviction is free from the error condemned by the Supreme Court in *Melendez-Diaz*. Because Appellant abandoned the opportunity for confrontation at preliminary examination provided by section 751(C), no further review is required. Proposition Four is denied.

¶33 In Proposition Five, Appellant argues that the Trafficking in Illegal Drugs Act, 63 O.S.Supp.2004, § 2-415, violates due process and equal protection by creating an unconstitutional presumption of intent to distribute drugs based solely on the quantity of drugs possessed. We addressed a virtually identical claim in *Anderson v. State*, 1995 OK CR 63, ¶ 5, 905 P.2d 231, 233, and concluded:

[T]he term "trafficking" as used in this statute does not create a presumption a defendant sold the drugs or intended to sell drugs. Rather, the Legislature, in one part of the statute, has defined "trafficking" as possessing specific amounts of a controlled dangerous substance. The statute merely sets forth guidelines for punishment, and represents a determination by the Legislature that "those who possess [a drug in excess of a specified amount] deserve a stiff punishment."

*Id.*, quoting *United States v. Maske*, 840 F.Supp. 151, 158 (D.D.C. 1993). Appellant's attempt here to recast the argument rejected in *Anderson* as an equal protection challenge is without merit. *Love v. State*, 2009 OK CR 20, ¶¶ 5-7, 217 P.3d 116, 118-19 (rejecting equal protection

challenge). The drug trafficking statute is constitutional. Proposition Five is denied.

¶34 Appellant's Proposition Six argues that his mandatory sentence of life without parole for trafficking in illegal drugs violates Article II, section 9 of the Oklahoma Constitution and the Cruel and Unusual Punishments Clause of the Eighth Amendment to the United States Constitution. He concedes that this Court rejected the same claim in *Dodd v. State*, 1994 OK CR 51, 879 P.2d 822, but notes that "[t]wo of the three members of the Oklahoma Court of Criminal Appeals who decided the majority opinion in *Dodd* are no longer sitting on this Court." While the change of personnel on a court may provide the occasion to revisit established precedents, it cannot alone provide the justification. Appellant's sentence is indeed harsh, but it is neither cruel nor unusual in the sense prohibited by our constitutions. Proposition Six requires no relief.

¶35 The Judgment and Sentence of the District Court of Tulsa County is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2010), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT  
COURT OF TULSA COUNTY  
THE HONORABLE JESSE S. HARRIS,  
DISTRICT JUDGE**

#### **APPEARANCES AT TRIAL**

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OPINION BY: LEWIS, J.

C. JOHNSON, P.J.: Concur

A. JOHNSON, V.P.J.: Concur

LUMPKIN, J.: Specially Concur

CHAPEL, J.: Dissent

1. Despite trial counsel's objections and his request for an instruction to jurors that the state's witnesses had injected "evidentiary harpoons," appellate counsel now argues that none of the comments to which counsel objected were classic evidentiary harpoons. *Lambert v. State*, 1999 OK CR 17, ¶ 47, 984 P.2d 221, 235 (evidentiary harpoons are voluntary statements of experienced police officers, willfully jabbed to inject evidence of other crimes, and calculated to prejudice a defendant). This much of Appellant's argument is an exercise in semantics. The "evidentiary harpoon" of our case law is simply a particular species of inadmissible testimony, its probative value being substantially outweighed by the danger of unfair prejudice. 12 O.S.Supp.2004, § 2403. The district court's correct use of a legal catch-phrase is unimportant. In substance, the district court sustained defense counsel's objections, and ultimately granted a mistrial, because it concluded the witnesses had testified unfairly and prejudiced Appellant's right to a fair and impartial trial.

2. In *State v. Tinkler*, this Court reversed a district court's ruling that 22 O.S.Supp.1988, § 751, allowing the admission of a hearsay report at preliminary hearing, violated a defendant's right to confrontation. *Tinkler* was decided under an early version of section 751. The Court found that by enacting section 751, the Legislature "created a narrow, limited exception to the hearsay rule, applicable only in the case of a preliminary examination ... [and] that the ability to confront the actual witness is *eliminated* by the establishment of the rule." *Tinkler*, ¶ 11, 815 P.2d at 192 (emphasis added). As detailed in the opinion above, language in the current version of section 751(C) provides a procedure for exercising a right of confrontation not contained in the text considered by the Court in *Tinkler*.

### LUMPKIN, JUDGE: SPECIALLY CONCUR

¶1 I concur in the Court's analysis and the affirming of the judgment and sentence. The supplemental briefing in this case points to a distinction that needs to be made between constitutional rights and statutory procedures. In this day and age, some would make every issue a constitutional issue, however, that is not always the case. In the recent case of *Melendez-Diaz v. Massachusetts*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 2527 (2009), the United States Supreme Court discussed a defendant's right, under the Sixth Amendment to the United States Constitution, to confront the witnesses against him/her at trial. Both the U.S. Supreme Court and this Court have held that this right of confrontation is a trial right. *Howell v. State*, 1994 OK CR 62, ¶ 18, 882 P.2d 1086, 1091, citing *Barber v. Page*, 390 U.S. 719, 725, 88 S.Ct. 1318, 1322, 20 L.Ed.2d 255 (1968). Judge Lewis appropriately points out this fact and this Court's analysis of the issue in *State v. Tinkler*, 1991 OK CR 73, ¶ 10, 815 P.2d 190, 192. In this case, Appellant was afforded that right at his trial, when Paul Schroeder, forensic chemist with the Tulsa Police Department, was called and testified. Defense counsel thoroughly cross-examined the chemist at trial.

¶2 It is interesting that in *Melendez-Diaz*, Justice Scalia, writing for the Court, sought to downplay the impact of requiring live confrontation at trial by noting:

Many States have already adopted the constitutional rule we announce today, while many others permit the defendant to assert

(or forfeit by silence) his Confrontation Clause right after receiving notice of the prosecution's intent to use a forensic analyst's report. Despite these widespread practices, there is no evidence that the criminal justice system has ground to a halt in the States that, one way or another, empower a defendant to insist upon the analyst's appearance at trial.

129 S.Ct. at 2540-2541 (internal citations and footnotes omitted).

¶3 Thus, at least implicitly, the U.S. Supreme Court confirmed that the type of notice/demand procedure set out in 22 O.S.Supp.2004, § 751(A)(3) meets constitutional muster, even in a trial setting. In discussing the burden shifting argument made by the dissent, the Supreme Court made its holding explicit:

First, the dissent believes that those state statutes "requiring the defendant to give early notice of his intent to confront the analyst," are "burden-shifting statutes [that] may be invalidated by the Court's reasoning." That is not so. In their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial. Contrary to the dissent's perception, these statutes shift no burden whatever.

129 S.Ct. at 2541 (internal citations omitted).

¶4 The proposition of error in this case does not allege a violation at trial, but at preliminary hearing, a stage of the criminal proceeding at which the federal right of confrontation under the Sixth Amendment is more limited. See *Barber v. Page*, *supra*; *State v. Tinkler*, *supra*. Therefore, this Court must only determine if there was statutory compliance in this case. It appears from the record that notice was given prior to preliminary hearing and the defense merely objected, without an attempt to call the chemist to testify. Because the defense did not call the chemist or attempt to examine the witness, much of the argument raised by the dissent in this case is not ripe for decision by this Court. We cannot rule based merely on the speculation of how the statute might have been interpreted if it had been invoked. As a result of my review of *Melendez-Diaz*, I find no error and

join with the Court in affirming the judgment and sentence in this case.

#### CHAPEL, JUDGE, DISSENTING:

¶1 I dissent based on the majority's resolution of Propositions I and IV. In Proposition I, the majority opinion correctly acknowledges that in cases dating back to Statehood, this Court has consistently held that when a criminal jury trial has been properly commenced, a mid-trial mistrial cannot be granted without the defendant's consent, except in cases of "manifest necessity."<sup>1</sup> The United States Supreme Court and this Court have repeatedly recognized that the Constitutional protection against "Double Jeopardy" includes the right not be "twice put in jeopardy" for the same offense, whether or not the original trial results in an actual verdict.<sup>2</sup> The opinion also correctly concludes that the resolution of Randolph's Proposition I double jeopardy claim depends entirely on whether the district court's declaration of a mistrial in the original trial, and over Randolph's objection, was authorized by "manifest necessity."

¶2 The majority notes that the "common thread" uniting this Court's cases finding that a particular defendant could *not* be re-tried is the fact that the mistrial declaration resulted from the district court's "*mistaken* conclusion that a mistrial was *required* under prevailing law" (emphasis in original). Nevertheless, the majority somehow then rejects Randolph's Proposition I claim without finding either that the mistrial declaration in this case was justified by manifest necessity or that the district court *correctly* concluded that a mistrial was required — which it certainly was *not*.<sup>3</sup> The district court was quite candid that it was declaring a mistrial, on its own motion and over defense objection, in order to avoid "wasting the Court's time and court resources," as well as those of the parties, by completing a trial that the court (inexplicably) felt was basically "doomed" to reversal on appeal. Neither the district court nor today's majority opinion explicitly acknowledges the right of a defendant to a decision by the jury originally empanelled to hear his or her case.<sup>4</sup> Even if the district court had all the best intentions and was sincerely attempting to preserve the defendant's right to a fair trial, this does *not* mean that the defendant can be retried when that court abuses its discretion by unnecessarily declaring a mistrial, over the objection of the defendant.<sup>5</sup>

¶3 In *Sussman v. District Court of Oklahoma County*,<sup>6</sup> this Court found that "manifest necessity" in this context "*must be forceful and compelling* and must be in the nature of a cause or emergency over which neither court nor attorney has control, or which could not have been averted by diligence and care."<sup>7</sup> And just as "scrupulous adherence to [j]evidentiary rules" is called for in "trials involving grave mandatory penalties," so is scrupulous protection of fundamental constitutional rights, such as the protection against Double Jeopardy.<sup>8</sup> There is nothing new or subtle about the double jeopardy principles that should have prevented the district court from so eagerly granting a mistrial in this case, and that should compel this Court to reverse defendant's convictions and find that he cannot be re-tried.<sup>9</sup> This Court should conclude, as we did in *Sussman*: "[T]here is a right way and a wrong way to do things. In this case, the wrong procedure was followed, and it is the opinion of this Court that jeopardy has applied."<sup>10</sup> Hence Randolph should prevail on his Proposition I claim.

¶4 In addition, I cannot agree with the majority's resolution of Proposition IV. In Proposition IV, Randolph argues that the preliminary hearing magistrate erred in admitting a laboratory analysis report, over his objection, without requiring testimony from the analyst who prepared the report. Randolph claims this violated his Sixth Amendment right to confrontation. The majority states that this argument is "fraught with conceptual problems." On the contrary, I find Randolph's argument clear, easy to understand, and supported by recent United States Supreme Court case law.

¶5 A defendant has the right to confront witnesses who bear testimony against him at every critical stage of trial.<sup>11</sup> This Court has held that preliminary hearing is a critical stage of trial.<sup>12</sup> If there were any doubt about a defendant's right to confrontation at preliminary hearing, it is put to rest by the Oklahoma statute governing preliminary hearings and Oklahoma case law, both of which grant defendants a right of confrontation at preliminary hearing.<sup>13</sup>

¶6 Recently, in *Melendez-Diaz v. Massachusetts*, the United States Supreme Court held that the right to confrontation applies to documents, as well as witnesses, at all critical stages of trial.<sup>14</sup> The core class of testimonial evidence includes "*ex parte* in-court testimony or its functional equivalent" such as affidavits and other written material.<sup>15</sup> The key is whether the

written material consists of sworn declarations or affirmations made for the purpose of proving a fact.<sup>16</sup> *Melendez-Diaz* concerned convictions for cocaine trafficking and distribution. Proof that the substance possessed by defendants was cocaine was provided by sworn “certificates of analysis” containing the laboratory reports of a state forensic laboratory, in accordance with Massachusetts law. The Supreme Court found that these certificates were not only made under circumstances which would lead an objective observer to conclude they might be used later at a trial, but that under Massachusetts law the affidavits’ sole purpose was to provide prima facie evidence of the substance’s composition, quality and weight.<sup>17</sup> The Court concluded that the analysts who prepared these reports were witnesses against Melendez-Diaz, through the reports’ contents. The Court noted that the Confrontation Clause guarantees a defendant the right to confront witnesses against him, and the Compulsory Process Clause guarantees a defendant the right to call witnesses in his favor. The Court commented, “[T]here is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.”<sup>18</sup>

¶7 The important point here is that a defendant must be allowed to cross-examine the preparer of a report about the information which is included in the report — that is, the information which the State seeks to introduce as evidence against him. This is what, following Oklahoma’s current statute, 22 O.S. § 751, Randolph was not allowed to do. Randolph raises nothing less than the question of whether our current statute remains constitutional in light of *Melendez-Diaz*. I conclude that it does not.

¶8 In order to avoid the clear requirements of *Melendez-Diaz*, the majority concludes that there is no right to confrontation at preliminary hearing. The majority first argues that the right to confrontation at preliminary hearing may be limited by statute. Certainly, the legislature may limit presentation of witnesses at a preliminary hearing to those necessary to sustain the State’s low burden during those proceedings by allowing the trial court to cut off witnesses after the State’s burden is met.<sup>19</sup> However, the statute allowing this procedure explicitly grants a right to confrontation against the State’s witnesses.<sup>20</sup> Although there is a difference between the right to present witnesses and the right to confront them, the majority does not recognize that difference. By the

majority’s reasoning, a preliminary hearing magistrate could hear the State’s evidence, refuse to allow any defense cross-examination of witnesses, and bind the defendant over on the charged offense.

¶9 The majority relies heavily on *State v. Tinkler*,<sup>21</sup> in which we first upheld § 751, and the cases cited therein. *Tinkler* notes that a preliminary hearing differs from a trial, and the scope of rights available to a defendant may differ as well.<sup>22</sup> However, *Tinkler* does not hold that there is no right to confrontation at preliminary hearing. *Tinkler* upheld the statute as a legislatively created exception to the hearsay rule, based on economic concerns.<sup>23</sup> In my opinion, the Supreme Court’s decision in *Melendez-Diaz* supersedes our opinion in *Tinkler*. Put simply, *Tinkler* and § 751 were good law before *Melendez-Diaz*. Now they are not.

¶10 The majority and *Tinkler* quote from a Supreme Court case, *Barber v. Page*, discussing the difference between preliminary hearing and trial and noting that the right of confrontation is “basically a trial right”.<sup>24</sup> Even a cursory reading of *Barber* shows its underlying assumption that a right to confrontation at preliminary hearing exists. In *Barber* the State wanted to use a preliminary hearing transcript in lieu of calling a witness at trial, without showing the witness was unavailable; defense counsel had not cross-examined the witness at the preliminary hearing. The *Barber* Court found that whether or not the defendant had cross-examined at preliminary hearing, on the facts of this case such a cross-examination would not have been sufficient to preserve the defendant’s right to confrontation at trial. The *Barber* Court stated, “While there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demand of the confrontation clause where the witness is shown to be actually unavailable. . . .”<sup>25</sup> If there is no right to confrontation at preliminary hearing, this makes no sense.

¶11 I understand that the majority wishes to uphold the statute at issue, which deprives both the State and the defendant of the right to question an expert who prepared a laboratory report. However, that is not what the opinion says. By concluding the defendant has no right to confrontation at preliminary hearing, the majority suggests a defendant may be prevented from questioning witnesses who actually testify for the State. That is, after all, what

the right of confrontation consists of — the ability to question witnesses who testify against you. I cannot conceive of any circumstances under which such a conclusion would be either constitutional or fair.

¶12 The majority thus first determines that *Melendez-Diaz* does not control in this case because there is no right to confrontation at preliminary hearing in this case. However, inexplicably, the majority goes on to claim that an Oklahoma statute governing (among other things) state forensic and OSBI laboratory reports preserves the right to confrontation at preliminary hearing, and that Randolph waived his right under that statute. The majority's analysis of that statute is doubly flawed. It misrepresents the statutory provisions regarding waiver of witnesses, and assumes that the statute preserves the right to confrontation at issue here.

¶13 Preservation of the right to confrontation, of course, is the crucial constitutional issue. The statute, 22 O.S. § 751, allows introduction of certified laboratory or forensic reports at any pretrial hearing without a sponsoring witness. Section 751(A) provides that such certified reports from the OSBI, Oklahoma Bureau of Narcotics and Dangerous Drugs, Department of Safety, Medical Examiner, or state forensic laboratories, shall be admitted if the State has given five days notice to the defendant; if that condition is not met the trial court may grant a continuance sufficient to provide the defense five days to prepare after the report is furnished.<sup>26</sup> On its face, this statute allows a laboratory report to be introduced at preliminary hearing without calling the person who prepared the report to the witness stand. The notice requirement does not give a defendant the right to call and confront the preparing witness, but gives the defendant the equivalent of five days to prepare for the report's introduction without a sponsoring witness. One consequence of this is that the defendant cannot cross-examine the person who prepared the report about the material contained in the report. That is, the defendant cannot cross-examine a witness about the evidence being introduced against him. This is precisely what *Melendez-Diaz* prohibits.

¶14 After *Melendez-Diaz*, Section 751 can only be found constitutional if it makes provision for protection of the right to confrontation. Currently it does not. The majority relies on Section 751(C). This subsection does not, as the

majority would have it, preserve the right to confrontation at issue here. In fact, this subsection explicitly provides that the defendant shall not have the right to confront a preparing witness about the contents of the report. Instead, this subsection provides that a defendant may follow specific procedures to ask that a preparing witness be called "*when it appears there is a substantial likelihood that material evidence not contained in such report may be produced by the testimony of the person having prepared the report.*"<sup>27</sup> That is, a defendant may ask the trial court, in writing, to call a witness if he believes the witness may be able to testify to something not contained in the witness's written report. This does not preserve the defendant's right to confront the witness about the contents of the report which are admitted against him.

¶15 In fact, Section 751(C)(1) has nothing to do with the right of confrontation. At the most it tracks the Compulsory Process Clause and allows the defendant an opportunity to request the appearance of a witness who might have some evidence relevant to something other than the report which that witness prepared to be used as evidence against the defendant. In *Melendez-Diaz* the Supreme Court held that a defendant's right under the Compulsory Process Clause to call analysts was not a substitute for the State's duty to make them available under the Confrontation Clause. The defendant's right to subpoena a witness does not fulfill the right to confrontation, because a subpoenaed witness may fail to appear. "Converting the prosecution's duty under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court."<sup>28</sup>

¶16 Finally, the majority opinion relies on Section 751(C) to find that, because Randolph failed to follow the written procedures outlined therein, he waived any right to confront the sponsoring laboratory witness at preliminary hearing. Given the actual language of the statute this simply makes no sense. At the most, Randolph waived the right to ask the preparing witness about matters which may have had relevance to the proceedings but were not contained within the report. Section 751(C) provides no right to confront the pre-

paring witness about the material actually introduced in the report to prove an element of the crime, and failure to follow its procedures cannot result in waiver of that right.

¶17 A defendant, of course, may waive a preliminary hearing entirely. He may choose not to cross-examine witnesses at the preliminary hearing, effectively waiving the right to confrontation. However, a defendant may not be prevented from exercising the right to confrontation. That is what Section 751 does. The majority suggests that, because the defendant did not timely ask in writing that a witness be called to testify to material other than that in the report admitted against him, he waived his constitutional right to confront the witness who prepared that report about the information it contained. There is no basis in the statutory language or the law for this conclusion.

¶18 The trial court allowed the State to admit a laboratory report against Randolph without affording him an opportunity to cross-examine its preparer. Insofar as Section 751 allows introduction of a laboratory report without an opportunity for cross-examination, it violates the Sixth Amendment right to confrontation. That report was introduced to show the quantity of drugs necessary to bind Randolph over on the trafficking charge. Randolph should have had the chance to confront the witnesses who prepared that evidence. I understand the Legislature's desire to simplify pretrial process by allowing admission of laboratory results without any sponsoring witness. However, I agree with the United States Supreme Court that, "We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available."<sup>29</sup> I dissent.

1. The majority cites *United States v. Perez*, 22 U.S. (9 Wheat) 579, 580, 6 L.Ed.2d 165 (1824), for its description of the "manifest necessity" standard, which notes that district courts will have to exercise "sound discretion" in making this determination. It should likewise be noted that the holding of *Perez* was simply that a hung jury could qualify as a manifest necessity, such that a defendant could be re-tried after his original jury was unable to reach a verdict. *Id.* at 579-80.

2. See U.S. Const. amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"); Okla. Const. art. 2, § 20 ("Nor shall any person be twice put in jeopardy of life or limb for the same offense."); *Perez*, 22 U.S. 579; *Loyd v. State*, 1911 OK CR 255, 6 Okl. Cr. 76, 80-81, 116 P. 959, 961 (finding that "put in jeopardy" language of Oklahoma Constitution mandates conclusion that defendant is protected against second prosecution (absent consent or necessity in discharge of first jury), regardless of whether first trial resulted in verdict).

3. No one familiar with this Court's jurisprudence can seriously conclude that the testimony upon which the district court based its mistrial declaration would have had any substantial likelihood of resulting in a reversal by this Court, particularly since the defendant twice declined the trial court's offer of a mistrial. The district court's legal conclusion in this regard is entirely unreasonable, even granting that predicting results on appeal is often not "a clear cut matter."

4. If a district court is truly convinced that a case is doomed to reversal on appeal, the proper procedure is to allow the jury to reach a verdict; and if that verdict results in any convictions, then grant a defense motion for a new trial. This approach both preserves the defendant's right to the verdict of the jury empanelled to hear his case and can avoid the "waste" of time and resources that would have been spent on the avoided appeal.

5. The sarcasm and cynicism of the majority opinion regarding this claim seem entirely misplaced. In the original trial defense counsel made basic objections to specific police testimony. Counsel never asked for and twice rejected the court's offer of a mistrial. There is nothing surprising or unusual about these circumstances; hence there is nothing surprising or ironic about the defendant's resultant Proposition I claim on appeal.

6. 1969 OK CR 185, 455 P.2d 724 (per curiam).

7. *Id.* at ¶ 40, 455 P.2d at 730 (emphasis in original).

8. It should be noted that this Court has faithfully applied the Double Jeopardy principles discussed herein even in cases involving the most serious of crimes, *i.e.*, even when the result was that a murder defendant could not be re-prosecuted. See, *e.g.*, *McClendon v. State*, 1988 OK CR 186, 761 P.2d 895, 895-96 (finding double jeopardy prevented any retrial of murder defendant, after trial court dismissed original jury, over defense objection, based merely on juror's statement that he recognized a spectator in courtroom, who he thought might be the defendant's sister).

9. In *Goodman v. State*, 1929 OK CR 23, 41 Okl. Cr. 405, 413, 273 P. 900, 902, the defendant claimed "that the action of the court in discharging the jury over his objection was such an abuse of judicial discretion as to amount to an acquittal." Even at that time this Court commented that "the question argued and urged by the defendant is not a new question in this state" and noted that the Supreme Court of Oklahoma Territory (in 1903) recited and applied the following rule:

"The general rule is that the prisoner has been put in jeopardy when he has been put upon trial before a court of competent jurisdiction, upon an indictment or information sufficient to sustain a conviction, and the jury has been empanelled and sworn to try the case, and the jury is discharged without sufficient cause, and without the defendant's consent; and such discharge of the jury, although improper, results in an acquittal of the defendant."

*Id.* at 415, 273 P. at 903 (quoting *Schrieber v. Clapp*, 1903 OK 96, ¶ 6, 74 P. 316, 317).

10. 1969 OK CR 185, ¶¶ 56-57; 455 P.2d at 735.

11. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 1374, 158 L.Ed.2d 177 (2004).

12. *Norton v. State*, 2002 OK CR 10, 43 P.3d 404, 408.

13. 22 O.S.Supp.2003, § 258; See, *e.g.*, *Thompson v. State*, 2007 OK CR 38, 169 P.3d 1198, 1206-07. I note also the distinction between a preliminary hearing and a grand jury. By statute, defendants have the right to confront witnesses at a preliminary hearing. There is no right to confrontation in grand jury proceedings. However, every Oklahoma defendant who is indicted by a grand jury has a right to a subsequent preliminary hearing, where he is granted the right to confront witnesses. 22 O.S.2001, § 524; *Stone v. Hope*, 1971 OK CR 302, 488 P.2d 616, 618. Shortly after statehood, this Court held that the state statutes and Constitution abolished the previous grand jury system and established indictment or information as concurrent methods of prosecution. *In re Mcnought*, 1 Okla.Crim. 528, 99 P. 241, 252 (1909). The Court emphasized the protections afforded citizens at preliminary hearing, including the right of confrontation.

14. *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2531-32, 174 L.Ed.2d 314 (2009).

15. *Melendez-Diaz*, 129 S.Ct. at 2531-32.

16. *Melendez-Diaz*, 129 S.Ct. at 2532.

17. *Id.*

18. *Melendez-Diaz*, 129 S.Ct. at 2534.

19. *LaFortune v. District Court*, 1998 OK CR 65, 972 P.2d 868, 871; 22 O.S.Supp.2003, § 258.

20. 22 O.S.Supp.2003, § 258.

21. 1991 OK CR 73, 815 P.2d 190.

22. *Tinkler*, 815 P.2d at 192.

23. *Tinkler*, 815 P.2d at 192-93.

24. 390 U.S. 719, 725, 88 S.Ct. 1318, 1322, 20 L.Ed.2d 255 (1968).

25. *Barber*, 390 U.S. at 725-26, 88 S.Ct. at 1322.

26. 22 O.S.Supp.2004, § 751(A). Section 751 was amended by the Legislature, effective November 1, 2009. The amendment does not substantively change the subsections discussed here.

27. 22 O.S.2009, § 751(C)(1) (emphasis added).

28. *Melendez-Diaz*, 129 S.Ct. at 2540.

29. *Melendez-Diaz*, 129 S.Ct. at 2536.



ANNUAL REPORT  
OF THE  
PROFESSIONAL RESPONSIBILITY COMMISSION  
AND  
PROFESSIONAL RESPONSIBILITY TRIBUNAL  
January 1, 2009 through December 31, 2009

SCBD # 5603

(Filed with Oklahoma Supreme Court, February 5, 2010)

Pursuant to the provisions of Rule 14.1, Rules Governing Disciplinary Proceedings, 5 O.S. 2001 Ch. 1, App. 1-A, this is the Annual Report of grievances and complaints received and processed for 2009 by the Professional Responsibility Commission and the Professional Responsibility Tribunal.

The Oklahoma Rules of Professional Conduct, 5 O.S. Ch. 1, App. 3-A, are the standards of conduct adopted and enforced by the Supreme Court of the State of Oklahoma, and provide guidelines by which all attorneys are to practice law in Oklahoma. The Rules Governing Disciplinary Proceedings, 5 O.S. Ch. 1, App. 1-A, provide the rules and procedures governing disciplinary proceedings.

**THE PROFESSIONAL RESPONSIBILITY COMMISSION:**

The Commission is composed of seven persons - five lawyer and two non-lawyer members. The attorneys are selected on rotating three-year terms by the President of the Association, subject to the approval of the Board of Governors. The non-lawyers are appointed, one each, by the Speaker of the Oklahoma House of Representatives and the President Pro Tempore of the Oklahoma Senate. No member can serve more than two consecutive terms. Terms expire on December 31st at the conclusion of the three-year term.

Lawyer members serving on the Professional Responsibility Commission through April 2009 were Melissa Griner DeLacerda, Stillwater; Michael E. Smith, Oklahoma City; J. Daniel Morgan, Tulsa; Mark W. Dixon, Tulsa; and Stephen D. Beam, Weatherford. Lawyer members

serving on the Professional Responsibility Commission from April, 2009 through the remainder of the year were Melissa Griner DeLacerda, Stillwater; Michael E. Smith, Oklahoma City; William R. Grimm, Tulsa; Stephen D. Beam, Weatherford; and David K. Petty, Guymon. Non-Lawyer members through April 2009 were Kevin A. Grover, Broken Arrow and Debra Thompson, Carney. Non-Lawyer members from April 2009 through the remainder of the year were Tony R. Blasier and Debra Thompson, Carney. J. Daniel Morgan served as Chairperson (through April, 2009) and was replaced by Michael E. Smith as Chairperson through the remainder of 2009. Debra Thompson served as Vice-Chairperson. Commission members serve without compensation but are reimbursed for actual travel expenses.

**Responsibilities:**

The Professional Responsibility Commission considers and investigates any alleged ground for discipline, or alleged incapacity, of any lawyer called to its attention, or upon its own motion, and takes such action as deemed appropriate, including holding hearings, receiving testimony, and issuing and serving subpoenas.

Under the supervision of the Professional Responsibility Commission, the Office of the General Counsel investigates all matters involving alleged misconduct or incapacity of any lawyer called to the attention of the General Counsel by grievance or otherwise, and reports to the Professional Responsibility Commission the results of investigations made by or at the direction of the General Counsel. The Professional Responsibility Commission then deter-

mines the disposition of grievances or directs the instituting of a formal complaint for alleged misconduct or personal incapacity of an attorney with the Oklahoma Supreme Court. The attorneys in the Office of the General Counsel prosecute all proceedings under the Rules Governing Disciplinary Proceedings, supervise the investigative process, and appear at all reinstatement proceedings.

#### **PROFESSIONAL RESPONSIBILITY TRIBUNAL:**

The Tribunal is composed of twenty-one persons — fourteen lawyers and seven non-lawyers. The attorneys are selected on rotating three-year terms by the President of the Association, subject to the approval of the Board of Governors. The non-lawyers are appointed by the Governor of the State of Oklahoma. Terms expire on June 30th at the conclusion of the three-year term.

The Supreme Court has established a panel of Masters designated to preside over and conduct hearings on formal disciplinary and incapacity hearings, as well as applications for reinstatement to the practice of law. Following the filing of a formal disciplinary complaint with the Supreme Court, a three-member panel of the Professional Responsibility Tribunal is appointed by the Chief Master, and is composed of two attorneys and one non-lawyer member. The Trial Panel presides at the hearing and prepares a report including findings of fact, conclusions of law, and a recommendation to the Supreme Court as to discipline, if such is indicated.

The lawyer members of the Professional Responsibility Tribunal who served during 2009 were: Andrew E. Karim, Oklahoma City; F. Douglas Shirley, Watonga; Steven Dobbs, Oklahoma City; Roger R. Scott, Tulsa; Lorenzo T. Collins, Ardmore; Stephen R. McNamara, Tulsa; Patrick T. Cornell, Clinton; Cody B. Hodgden, Woodward; Martha Rupp Carter, Tulsa; Kieran D. Maye Jr., Oklahoma City; Diane S. Goldschmidt, Oklahoma City and Robert Gilliland, Oklahoma City.

Dietmar K. Caudle and Luke Gaither replaced John Gardner and David Cummins, when their second terms expired on June 30, 2009. Roger Scott passed away, July, 2009 and has not been replaced.

The non-lawyer members were: Kenneth D. Mitchell, Guthrie; Dr. Douglas O. Brady, Law-

ton; Bill Pyeatt, Norman; John Thompson, Nichols Hills; and Jason Redd, Elk City.

At its annual meeting on June 25, 2009, the Professional Responsibility Tribunal voted to appoint Steven Dobbs to serve a one-year term as Chief Master and F. Douglas Shirley was appointed to serve a one-year term as Vice-Chief Master.

#### **VOLUME OF GRIEVANCES:**

During 2009, the Office of the General Counsel received 354 formal grievances involving 224 attorneys and 1146 informal grievances involving 852 attorneys. In total, 1,500 grievances were received against 1076 attorneys. The total number of attorneys differs because some attorneys received both formal and informal grievances. In addition, the Office handled 344 items of general correspondence, which is mail not considered to be a grievance against an attorney.

The Tulsa County Bar Association assists the Office of the General Counsel in the investigation of grievances against attorneys practicing in that county. Those grievances thought to be in violation of the Oklahoma Rules of Professional Conduct are forwarded to the Office of the General Counsel for further investigation. The Oklahoma, Tulsa, and LeFlore County Bar Associations also assist in arbitration of fee disputes.

On January 1, 2009, 211 formal grievances were carried over from the previous year and one grievance was remanded back to the Professional Responsibility Commission for further review. During 2009, 354 new formal grievances were opened for investigation. The carryover accounted for a total caseload of 566 formal investigations pending throughout 2009. Of those grievances, 205 investigations were completed by the Office of the General Counsel and presented for review to the Professional Responsibility Commission. Therefore, 361 investigations were pending on December 31, 2009. Of these 361 grievances, 43 have been investigated and are scheduled for dismissal or final disposition.

The time required for investigating and concluding each grievance varies depending on the seriousness and complexity of the allegations and the availability of witnesses and documents. The Professional Responsibility Commission requires the Office of the General Counsel to report monthly on all infor-

mal and formal grievances received and all investigations completed and ready for disposition by the Commission. In addition, the Commission receives a monthly statistical report on the pending caseload. The Board of Governors is advised statistically each month of the actions taken by the Professional Responsibility Commission.

**DISCIPLINE BY THE PROFESSIONAL RESPONSIBILITY COMMISSION:**

During 2009, the Commission voted the filing of formal disciplinary charges against seven lawyers involving 24 grievances.

Pursuant to Rule 5.3(c) of the Rules Governing Disciplinary Proceedings, the Professional Responsibility Commission has the authority to impose private reprimands, with the consent of the attorney, in matters of less serious misconduct or if mitigating factors reduce the sanction to be imposed. During 2009, the Commission issued private reprimands to 15 attorneys involving 17 grievances.

In addition, 22 grievances were dismissed with a letter of admonition cautioning that the conduct of the attorney was dangerously close to a violation of a disciplinary rule which the Commission believed warranted a warning rather than discipline. The Commission dismissed 140 grievances due to lack of merit or loss of jurisdiction of the respondent. Loss of jurisdiction includes the death of the attorney, resignation pending disciplinary proceedings, lengthy suspension or disbarment, or due to the attorney being stricken from membership for non-compliance with MCLE requirements or non-payment of dues. The Commission may also refer matters to the Diversionary Program where remedial measures are taken to ensure that any deficiency in the representation of a client does not occur in the future. During 2009, the Commission approved 10 attorneys to be admitted into the Diversion Program for conduct involving 20 grievances.

**DISCIPLINE IMPOSED BY THE OKLAHOMA SUPREME COURT:**

In 2009, 18 disciplinary cases were acted upon by the Supreme Court. The public sanctions are as follows:

**Disbarment:**

<u>Respondent</u>	<u>Effective Date</u>
Golden Jr., James E.; Oklahoma City	4/22/08 (retroactive f/ 12/3/07) (Petition for Rehearing denied 1/22/09)
Shomber, Melissa Anne; Edmond	12/15/09

**Resignations Pending Disciplinary (Tantamount to Disbarment) Proceedings Approved by Court:**

<u>Respondent</u>	<u>Effective Date</u>
Phelps, Ronald Wayne	01/26/09
Morgan, Kenneth Lloyd	04/14/09
Cook Jr., John Duane	05/11/09
Williams, Jacob Thayne	11/30/09
Willis Jr., William P.	12/15/09

**Disciplinary Suspensions:**

<u>Respondent</u>	<u>Length Effective Date</u>
Kinsey, Leah McCaslin	12 mos. 06/01/09
Clausing, W. Kirk	1 year 10/19/09
Confidential Rule 10	Indefinite 04/27/09

**Public Censure:**

<u>Respondent</u>	<u>Effective Date</u>
Wilcox, Tom J.	11/03/09

**Dismissals:**

<u>Respondent</u>	<u>Effective Date</u>
Roberts, Darryl F.	06/18/09
Malloy, Terry Paul	09/14/09
Wright Jr., Harvey Russell	09/14/09
Morris, Amber Nicole	11/03/09

In addition to the public discipline imposed in 2009, the Court also issued two private reprimands and three Rule 6/10 Interim Suspensions. The Court also issued an Immediate Interim Suspension on February 2, 2009 against Eddie Michael Pope in a Rule 7 Criminal Conviction/Reciprocal Discipline proceeding pending final imposition of discipline.

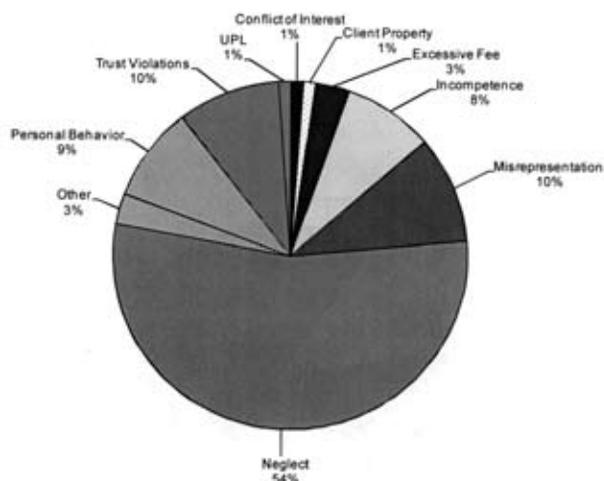
There were 26 cases pending before the Supreme Court on January 1, 2009. During 2009, seven new formal complaints and two Resignations Pending Disciplinary Proceedings were filed for a total of 35 cases. On December 31, 2009, 17 cases remained pending before the Court. There were nine reinstatements pending on January 1, 2009, and 14 petitions for reinstatement were filed in 2009. The Supreme Court approved eight reinstatements, denied two, dismissed one, and two were withdrawn. On December 31, 2009, there were ten petitions for reinstatement pending with the Supreme Court.

### SURVEY OF GRIEVANCES:

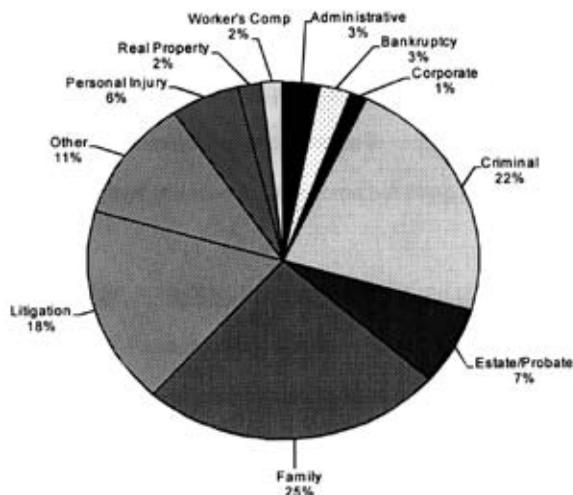
In order to better inform the Supreme Court, the bar and the public of the nature of the grievances received, the numbers of attorneys complained against, and the areas of attorney misconduct involved, the following information is presented.

Total membership of the Oklahoma Bar Association as of December 31, 2009 was 16,438 attorneys. Considering the total membership, the receipt of 1500 formal and informal grievances during 2009, involving 1076 attorneys, constituted approximately nine percent of the attorneys licensed to practice law by the Oklahoma Supreme Court.

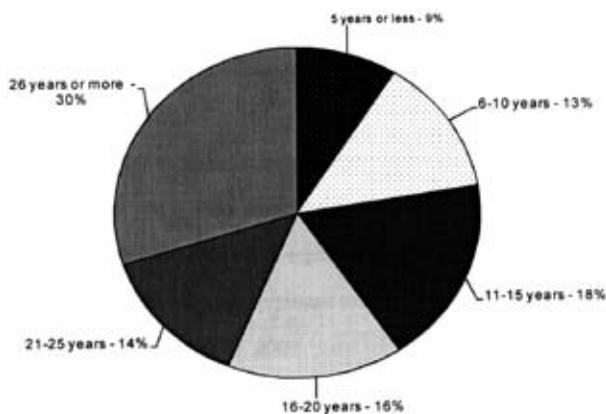
A breakdown of the type of attorney misconduct alleged in the 354 formal grievances received by the Office of the General Counsel in 2009 is as follows:



Of the 354 grievances registered, the area of practice is as follows:



The number of years in practice of the 224 attorneys receiving formal grievances is as follows:



The largest number of grievances received were against attorneys who have been in practice for 26 years or more. Considering the total number of practicing attorneys, the largest number have been in practice 26 years or more.

Of the 354 formal grievances filed against 224 attorneys in 2009, 187 are attorneys in urban areas and 159 attorneys live and practice in rural areas. Eight of the grievances were filed against attorneys licensed in Oklahoma but living out of state.

## **ACTION TAKEN BY THE PROFESSIONAL RESPONSIBILITY TRIBUNAL:**

The Professional Responsibility Tribunal hears disciplinary cases filed by the General Counsel. The Tribunal also hears petitions for reinstatement filed by attorneys seeking reinstatement to the Bar Association. Both of these proceedings are filed with the Clerk of the Supreme Court.

As of January 1, 2009, 13 disciplinary cases were pending before the Tribunal. In 2009, seven cases were presented to the Tribunal by the Supreme Court for a total of 20 cases pending throughout the year. Of those, the Tribunal heard and filed reports on six cases and in nine cases the respondent was suspended, resigned pending disciplinary proceedings or the matter was dismissed. On December 31, 2009, five cases were pending before the Tribunal.

On January 1, 2009, three petitions for reinstatement were pending with the Tribunal and 14 new petitions were filed throughout the year. Of these 17 petitions for reinstatement, 10 cases were heard and reports were filed by the Tribunal, one Petition was withdrawn and one Petition was dismissed leaving five reinstatement cases pending before the Tribunal on December 31, 2009.

## **ETHICS AND EDUCATION:**

During 2009, the General Counsel, Assistant General Counsels, and the Professional Responsibility Tribunal and Commission members continued to speak to county bar association meetings, Continuing Legal Education classes, law school classes and various civic organizations. In these sessions, disciplinary and investigative procedures, case law, and ethical standards within the profession were discussed. This effort directs lawyers to a better understanding of their ethical requirements and the disciplinary process, and informs the public of the efforts of the Oklahoma Bar Association to regulate the conduct of its members. In addition, the General Counsel and assistants were regular contributors to The Oklahoma Bar Journal.

Respectfully submitted this 5th day of February, 2010, on behalf of the Professional Responsibility Tribunal, the Professional Responsibility Commission, and the Office of the General Counsel of the Oklahoma Bar Association.

/s/ Gina Hendryx

Gina Hendryx, General Counsel  
Oklahoma Bar Association

### **NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT OF CHARLA REITER MONTGOMERY, SCBD #5600 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 Charla Reiter Montgomery 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, April 1, 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**

# Court of Civil Appeals Opinions

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2010 OK CIV APP 12

IN RE: FARMERS MED-PAY LITIGATION.  
LADONNA HOUCK, ROBERTA OLIVER,  
and TASHA SHERMAN-HARRIS,  
Individually and as Representatives of All  
Other Similarly Situated Insureds, Plaintiffs/  
Appellees, v. FARMERS INSURANCE  
COMPANY, INC.; FARMERS GROUP, INC.;  
FARMERS INSURANCE EXCHANGE; MID-  
CENTURY INSURANCE COMPANY;  
TRUCK INSURANCE EXCHANGE; and  
FIRE INSURANCE EXCHANGE,  
Defendants/Appellants, and ZURICH  
SERVICES CORPORATION, Defendant.

Case No. 105,295. October 20, 2009

APPEAL FROM THE DISTRICT COURT OF  
CANADIAN COUNTY, OKLAHOMA  
HONORABLE EDWARD C. CUNNINGHAM,  
TRIAL JUDGE

## AFFIRMED

Robert W. Nelson, Derrick L. Morton, NELSON, ROSELIUS, TERRY, O'HARA & MORTON, Oklahoma City, Oklahoma, Rick W. Bisher, RYAN BISHOP RYAN, Oklahoma City, Oklahoma, Bryce Johnson, JOHNSON & CARSON, Oklahoma City, Oklahoma, Paul M. Kolker, PIGNATO & COOPER, P.C., Oklahoma City, Oklahoma, Gregg R. Renegar, KORNFIELD, FRANKLIN, RENEGAR & RANDALL, Edmond, Oklahoma, Jeff F. Laird, FOSHEE & YAFFE, Oklahoma City, Oklahoma, for Plaintiffs/Appellees

Richard C. Ford, Brooke S. Murphy, Rustin J. Strubhar, CROWE & DUNLEVY, Oklahoma City, Oklahoma, for Defendants/Appellants

DOUG GABBARD II, PRESIDING JUDGE:

¶1 Defendants, Farmers Insurance Company and related entities (collectively, Farmers), appeal the trial court's certification of this case as a class action. We affirm.

## FACTS

¶2 Plaintiffs, Ladonna Houck, Roberta Oliver, and Tasha Sherman-Harris, are insurance policyholders of Farmers. Their policies all

contain identical clauses providing what is known as no-fault "med-pay" coverage. These clauses provide that where an insured suffers bodily injury in an accident, Farmers will pay reasonable expenses for necessary medical services furnished within two years of the accident. The policies define "reasonable expenses" as "expenses which are usual and customary for necessary medical services in the county in which those services are provided." Each of the Plaintiffs sustained injuries arising from accidents covered by the policies, each submitted bills for necessary medical services furnished within two years of her accident, and each had bills denied by Farmers, in whole or in part, as "unreasonable."

¶3 At issue is the manner in which Farmers processed, reviewed, and denied Plaintiffs' med-pay claims. Beginning in late 2000, Farmers entered into a Managed Care Services Agreement to have all such claims reviewed by Zurich Services Corporation (ZSC), a claims management company owned by Farmers. ZSC maintains a large computerized database of charges billed by medical providers within federally established medical service areas called PSROs (Professional Standards Review Organization). ZSC compares each incoming Farmers' policyholder's medical bill against the database, and "flags" a charge as potentially unreasonable whenever it exceeds the 80th percentile of all charges in the database for the relevant PSRO service. According to Farmers, ZSC then individually reviews the flagged charge and, in some cases, finds it unreasonable, assigns it an "RC40 code, and notifies the medical provider or policyholder that it is reducing or denying payment. Farmers asserts this process identifies inappropriate or excessive medical charges, and benefits policyholders because the provider usually accepts the reduction as full payment, leaving the policyholder with more room before reaching his or her "cap" on coverage.

¶4 However, Plaintiffs filed suit alleging that Farmers systematically uses the ZSC 80th percentile audit/review process to wrongfully deny payment/reimbursement of policyholders' medical expenses in a predetermined man-

ner, regardless of whether an expense is or is not unreasonable, primarily to reduce Farmers' costs. Although Plaintiffs have alleged causes of action for bad faith, unjust enrichment, fraud or deceit, and conspiracy to commit a tortious act,<sup>1</sup> they only seek class certification for their breach of contract claims.

¶5 After a hearing, the trial court entered a 30-page order which extensively analyzed the case pursuant to the prerequisites of 12 O.S.2001 § 2023, found that each prerequisite was met, and granted class certification with a class composed of:

All persons who made a covered claim pursuant to the Medical Payments Coverage of a private passenger automobile insurance policy written by [Farmers] where:

- A. Zurich Services Corporation ("ZSC") was utilized to review medical expenses;
- B. Farmers applied ZSC's RC 40 reduction to the medical expenses; and
- C. The insurance policy was written in one of the following states:

- 1. Alabama;
- 2. California;
- 3. Idaho;
- 4. Illinois;
- 5. Indiana;
- 6. Iowa;
- 7. Montana;
- 8. Nebraska;
- 9. Nevada;
- 10. New Mexico;
- 11. Ohio;
- 12. Oklahoma;
- 13. South Dakota; and/or
- 14. Wyoming.<sup>2</sup>

¶6 Farmers now seeks interlocutory review of this order.<sup>3</sup>

### STANDARD OF REVIEW

¶7 A trial court's class certification order is reviewed for abuse of discretion. *Shores v. First City Bank Corp.*, 1984 OK 67, ¶ 4, 689 P.2d 299, 301. An abuse of discretion occurs if the record fails to support the conclusion that each of the prerequisites set forth in 12 O.S.2001 § 2023 have been met.<sup>4</sup> *Ysbrand v. DaimlerChrysler Corp.*, 2003 OK 17, ¶ 5, 81 P.3d 618, 623 (*cert. den.*, 542 U.S. 937, 124 S. Ct. 2907 (2004)); *Har-*

*vell v. Goodyear Tire and Rubber Co.*, 2006 OK 24, 164 P.3d 1028.

¶8 Section 2023(A) sets forth four requirements for maintaining a class action: numerosity of the class; commonality of the questions of law or fact; typicality of the class representatives' claims; and ability of the class representatives to fairly and adequately protect the interests of the class. Section 2023(B) provides that class members seeking certification must meet one of three additional requirements. In this case, Plaintiffs assert that there is a predominance of common questions of law or fact over individual questions, pursuant to § 2023(B)(3).

¶9 "To resolve whether the prerequisites for class-certification are met, we need not reach the merits of the claim." *Harvell* at ¶ 11, 164 P.3d at 1032. However, in order to determine whether the trial court applied the correct legal standards in assessing the § 2023 requirements, we must identify and review the core liability issues asserted by the class. *Id.*, 164 P.3d at 1032-33.

### ANALYSIS

#### 1. Numerosity

¶10 Numerosity occurs when "[t]he class is so numerous that joinder of all members is impracticable." 12 O.S.2001 § 2023(A)(1). This requirement is satisfied by numbers alone where the size of the class is in the hundreds. *Black Hawk Oil Co. v. Exxon Corp.*, 1998 OK 70, 969 P.2d 337.

¶11 Here, the trial court found a sufficient number of potential class members to meet this requirement, noting that, in Oklahoma alone, thousands of claims were adjusted annually using the 80th percentile method. Farmers does not dispute this finding.

#### 2. Commonality

¶12 Commonality requires that there be questions of law or fact common to the class members. 12 O.S.2001 § 2023(A)(2). As a general rule, where a lawsuit challenges a practice or policy affecting all putative class members, individual factual differences among the individual litigants will not preclude a finding of commonality. *Ysbrand*, 2003 OK 17 at ¶ 21, 81 P.3d at 627.

¶13 Plaintiffs allege that all class members had similar Farmers' policies with identical

med-pay provisions, that Farmers denied payment of necessary medical charges for covered injuries using a predetermined computerized audit/review process primarily to reduce Farmers' costs, and that Farmers' actions were in violation of its policy terms. Clearly, commonality was present.

### 3. Typicality

¶14 Typicality is satisfied "[w]hen it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented . . . irrespective of varying fact patterns which underlie individual claims." *Ammons v. Am. Family Mut. Ins. Co.*, 897 P.2d 860, 863 (Colo. Ct. App. 1995)(quoting 1 H. Newberg, *Newberg on Class Actions* § 3-13 at 3-77 (3d ed. 1992)).

¶15 In this case, the court found that the class representatives' claims were typical of the class since each class member was insured by Farmers under a policy with identical med-pay language, each sustained injury in an automobile accident covered by the policy, each submitted medical bills for necessary treatment, each had bills for such services reduced or denied by Farmers after a ZSC audit/review, and each claimed that this denial was arbitrary and a breach of their insurance contract. Clearly, "the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented," as required for a finding of typicality.

¶16 Nevertheless, Farmers asserts that none of the Plaintiffs' claims are typical, because Farmers denied payment of individual medical bills as not "reasonable" for a wide variety of reasons, thereby necessitating an individual inquiry into each claim. In *Burgess v. Farmers Insurance Co., Inc.*, 2006 OK 66, ¶¶ 14, 17, 151 P.3d 92, 99-100, 101, the Oklahoma Supreme Court rejected a similar argument by Farmers, stating:

Insurer would have us reject class certification on the basis of a determination regarding the veracity of its defense on the merits — that Insurer in fact did not operate pursuant to an across-the-board pattern of underpayment of claims, but rather, made individual assessments as to the propriety of O & P payments on every claim. We express no opinion on the merits and our determination on class certification should not be taken as any indication of how a jury

might properly decide these fact questions. . . .

Here, the acts or omissions of Insurer which constitute the alleged breaches of contract, bad faith and/or fraud . . . are the same or similar acts or omissions for each class member.

### 4. Adequacy of representation

¶17 Adequacy of representation is satisfied when "[t]he representative parties will fairly and adequately protect the interests of the class." 12 O.S.2001 § 2023(A)(4). Farmers asserts that Plaintiffs cannot adequately represent the class due to "internal conflicts" among class members, because some providers accepted the reduced amounts paid by Farmers as full payment, thus lowering some insureds' medical bills and creating more "cap" room for their other medical expenses. We disagree.

¶18 The fact that a class representative has not personally incurred all the damages suffered by other class members does not necessarily preclude the representative's ability to adequately represent the class. Even a potential conflict between the representatives and some class members does not preclude the use of a class action if the parties appear to be united in interest against the defendant. 7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure Civil, 3rd ed.*, § 1768 (2009).<sup>5</sup> Plaintiffs are so united.

### 5. Predominance

¶19 Predominance involves two components. The court must find that: 1) "questions of law or fact common to the members of the class predominate over any questions affecting only individual members"; and 2) "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." 12 O.S.2001 § 2023(B)(3). The determination of predominance is a "qualitative rather than quantitative" matter, because the weight of resolving certain issues may outweigh their number. *Mattoon v. City of Norman*, 1981 OK 92, ¶ 18, 633 P.2d 735, 739. Generally, "in determining whether the predominance standard is met, a court focuses on the issue of liability, and if the liability issue is common to the class, common questions are held to predominate over individual ones." 59 Am. Jur. 2d *Parties* § 87 (2002).

### A. Common Issues of Fact and Law Predominate

¶20 The trial court found evidence that Farmers had essentially abandoned an individualized approach to assessment of med-pay claims,<sup>6</sup> that common issues predominated, and that while there were variances among the states regarding different legal issues, there was no variance regarding the core liability issues, i.e., the interpretation of the med-pay provision and whether Farmers' actions constitute a breach thereof. On this issue, Farmers asserts the trial court erred for three reasons.

¶21 First, as noted above, Farmers asserts that common factual issues do not predominate because it denied every medical charge as unreasonable for a different reason, and, therefore, each Plaintiff's claim will involve an inquiry into each of those reasons. We disagree. As we noted earlier in our discussion of the typicality requirement, all Plaintiffs and putative class members assert the same claim and will use similar proof. Farmers would have us reject class certification on the basis of a determination regarding the veracity of its defense on the merits. This is an argument that the Supreme Court rejected in *Burgess*, 2006 OK 66 at ¶ 1, 151 P.3d at 94. In *Black Hawk*, 1998 OK 70, 969 P.2d 337, the Oklahoma Supreme Court adopted the rule of *Eisen v. Carlisle and Jacqueline*, 417 U.S. 156, 94 S. Ct. 2140 (1974), holding that it is usually inappropriate to inquire into the merits of a class action dispute in deciding whether a class should be certified. Moreover, "[f]actual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory." *Ysbrand*, 2003 OK 17 at ¶ 21, 81 P.3d at 627.

¶22 Second, Farmers asserts that common legal issues do not predominate because the laws of 14 different states must be applied. For this argument, it relies upon *Harvell v. Goodyear Tire and Rubber Co.*, 2006 OK 24, 164 P.3d 1028.

¶23 In *Harvell*, the plaintiff filed a class action lawsuit against Goodyear Tire and Rubber Co., seeking certification of a national class action of consumers from 37 states who had paid Goodyear a "shop supply fee" since 1998. The plaintiff alleged that Goodyear set the fee at 7 percent of the labor charge with a maximum of \$20, regardless of whether shop supplies

were used. Although Goodyear initiated the policy, the individual stores purchased their own supplies, and the brand, supplier, and cost of the supplies varied from store to store. On appeal from a certification order, the Supreme Court reaffirmed that Oklahoma applies the doctrine of *lex loci contractus*, codified at 15 O.S.2001 § 162, to resolve conflict of law questions in contract cases.<sup>7</sup> The Court also noted that, under this choice of law rule, the provisions of a motor vehicle insurance contract are determined by the laws of the state where the contract was made unless: (1) the provisions of the contract are contrary to Oklahoma public policy, or (2) the facts demonstrate that another jurisdiction has the most significant relationship with the subject matter and the parties.<sup>8</sup> *Id.* at ¶ 14 and n. 23, 164 P.3d at 1034.

¶24 In the present case, it appears that the policy was made in Kansas and that Kansas law applies. The Declarations Page of the Farmers' policy states: "The policy shall not be effective unless countersigned on the Declarations Page by a duly authorized representative of the Company named on the Declarations Page." The page contains a signature of an "authorized representative" which is different than the named Farmers' agent, and also indicates that the policy was issued out of Shawnee Mission, Kansas. Accordingly, we find that this policy was made in Kansas, and that Kansas law applies. Therefore, Farmers' argument that the law of 14 states applies is not supported by the record.

¶25 Even if this were not true as to the policies of all putative class members, we would reach the same result. In *Harvell*, the Supreme Court denied certification because each class member had a different contract with each service center and "[t]hese individualized determinations, coupled with the application of the law of 37 states, precludes a finding of predominance and defeats the purpose of certifying a class." *Id.* at ¶ 16. Here, on the other hand, each putative class member has a policy with identical med-pay language, each class member will claim that Farmers breached the policy provision for the same reasons, and all 14 states with putative class members apply essentially the same legal rules on these core liability issues.<sup>9</sup> This latter conclusion is not surprising since the general policies regarding contract interpretation and the elements of breach have tended to be uniform from state to state. *See*

*Collins v. Int'l Dairy Queen, Inc.*, 168 F.R.D. 668, 676 (M.D. Ga. 1996); see also *Harvell*, 2006 OK 24 at ¶ 15, 164 P.3d at 1034.

¶26 Farmers correctly observes that there are other relevant legal issues on which state laws differ. Specifically, it notes the states have differing laws on statutes of limitation,<sup>10</sup> the ability to bifurcate contract claims from bad faith claims, the enforceability of arbitration provisions, the availability and measurement of damages (including non-economic and punitive damages), and the availability of attorney fees.<sup>11</sup> However, these legal differences do not relate to core liability issues and, therefore, do not necessarily prohibit class certification; rather, they bear upon whether the class is manageable and whether certification is a qualitatively superior means of adjudication.

¶27 The Oklahoma Supreme Court has held that mere differences in limitations periods is usually not an impediment to class certification. *Shores v. First City Bank Corp.*, 1984 OK 67, ¶ 16, 689 P.2d 299, 304. Likewise, while the states also disagree with respect to the calculation of damages and the enforcement of arbitration provisions, the trial court may address these issues by creating subclasses, as suggested in *Cuesta v. Ford Motor Co.*, 2009 OK 24, ¶ 19, 209 P.3d 278, 285-86. Finally, differences regarding the bifurcation of contract and bad faith claims do not impact class certification since putative class members may opt out if that is an issue.

¶28 As noted above, the Court in *Harvell* held that the “individualized determinations, coupled with the application of the law of 37 states, precludes a finding of predominance and defeats the purpose of certifying a class.” 2006 OK 24 at ¶ 16, 164 P.3d at 1034. In contrast, the present case presents no individualized factual determinations, the laws applicable to the core liability issues of the case are identical in the 14 states with putative class members, and the remaining legal issues may be dealt with by the creation of subclasses. We note that the trial court clearly believed that the class and issues presented were manageable, and we are unable to conclude that its decision was flawed.<sup>12</sup> We find *Harvell* distinguishable on the facts, and we reject Farmers’ argument on this issue.<sup>13</sup>

¶29 We also reject Farmers’ related due process argument, that Oklahoma may not apply its own law to insureds in other states who have no relationship with Oklahoma. The trial

court did not decide that Oklahoma laws applied over those of the other 13 jurisdictions. It merely found that class certification should be granted because the legal rules applicable to the core issues were identical, and the legal issues which did vary from state to state (those related to limitations, damages, arbitration, etc.) could be addressed by the use of subclasses. Taken to its extreme, Farmers’ argument would severely limit our own class action statute and eliminate multi-state class actions.

¶30 Third, Farmers asserts that common issues cannot predominate since many class members have never experienced any damage and have no basis for a claim. Farmers notes that actual damage is a required element in proving a breach of contract action. *Digital Design Group, Inc. v. Information Builders, Inc.*, 2001 OK 21, ¶ 33, 24 P.3d 834, 843.

¶31 As we have previously noted, it is inappropriate to inquire into the merits of a class action dispute in deciding whether a class should be certified. Furthermore, [f]actual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory.” *Ysbrand*, 2003 OK 17 at ¶ 21, 81 P.3d at 627. In this case, the core liability issues of all class claims have common questions of fact and law which predominate over questions affecting individual members.

#### B. A Class Action is Superior to Other Methods of Adjudication

¶32 Having found that common factual and legal issues related to the core liability issue predominate, we must still determine whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. 12 O.S. 2001 § 2023(B)(3). Here, the trial court found that each claim was small and costly to litigate individually, and such litigation would be unduly burdensome to the courts. The record supports that finding.

¶33 Nevertheless, Farmers asserts that a class action is not superior to individual claims because Plaintiffs and putative class members have filed additional claims that are not part of the present class action and there will still be “hundreds of thousands” of trials. Even if this were true, a class action may dispose of at least one claim common to all the parties in a more

consistent and efficient manner. This is precisely why 12 O.S.2001 §2023(C)(4)(a) approves of class actions for particular claims. Requiring a class action to dispose of all claims between the parties would render the language of § 2023(C)(4)(a) meaningless. This argument fails.

¶34 Having considered all the facts and circumstances, we find that the core issues of the case present common factual and legal questions, and also find that a class action is superior to other forms of adjudication. Thus, predominance exists.

## CONCLUSION

¶35 Because each of the §2023 prerequisites exist, we conclude that the trial court did not abuse its discretion. Accordingly, the class certification order is affirmed.

¶36 AFFIRMED.

FISCHER, J., and GOODMAN, J., sitting by designation, concur.

1. This is the description given by the Oklahoma Supreme Court in Appeal No. 100,829, wherein the Court appointed Judge Edward Cunningham as coordinating judge to preside over the individual “Farmers Med-Pay Litigation” cases.

2. These are the states in which Farmers wrote policies with the identical med-pay language at issue.

3. This appeal is authorized by 12 O.S.2001§ 993(A)(6). We have captioned our Opinion in accordance with the trial court’s order, but have included the names of the parties pursuant to Sup. Ct. R. 1.25.

4. Title 12 O.S.2001 § 2023 states, in relevant part:

A. PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if:

1. The class is so numerous that joinder of all members is impracticable;
2. There are questions of law or fact common to that class;
3. The claims or defenses of the representative parties are typical of the claims or defenses of the class;
4. The representative parties will fairly and adequately protect the interests of the class.

B. CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subsection A of this section are satisfied and in addition:

1. . . .
2. The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
3. The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:
  - a. the interest of members of the class in individually controlling the prosecution or defense of separate actions,
  - b. the extent and nature of any litigation concerning the controversy already commenced by or against members of the class,
  - c. the desirability or undesirability of concentrating the litigation of the claims in the particular forum, and
  - d. the difficulties likely to be encountered in the management of a class action.

5. Moreover, if certain insureds in the class decide they were benefitted by Farmers’ conduct, the class action statute allows them to opt out of the lawsuit. 12 O.S.2001 § 2023(C).

6. The trial court erred in making this particular finding because it constitutes an improper determination of the merits.

7. Title 15 O.S.2001 § 162 provides: “A contract is to be interpreted according to the law and usage of the place where it is to be performed, or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.”

8. This rule was first applied to insurance contracts in *Bohannon v. Allstate Ins. Co.*, 1991 OK 64, 820 P.2d 787; see also *Bernal v. Charter County Mut. Ins. Co.*, 2009 OK 28, 209 P.3d 309. However, the Supreme Court has continued to apply the most significant relationship test to class actions that include breach of warranty theories. See *Cuesta v. Ford Motor Co.*, 2009 OK 24, 209 P.3d 278, and *Masquat v. DaimlerChrysler Corp.*, 2008 OK 67, 195 P.3d 48. However, neither exception appears to apply in this case.

9. Oklahoma law provides that contracts be “interpreted as to give effect to the mutual intention of the parties, as it existed at the time of contracting, so far as the same is ascertainable and lawful.” 12 O.S.2001 §152. In ascertaining such intent, we must look only to the language of the contract, if the language is clear and explicit and does not involve an absurdity. 15 O.S.2001 §154. In order to prove a breach of contract, a plaintiff must prove three elements: 1) the formation of a contract; 2) a breach thereof; and 3) actual damages suffered from that breach. *Digital Design Group, Inc. v. Information Builders, Inc.*, 2001 OK 21, ¶ 33, 24 P.3d 834, 843.

The other 13 states involved in the present litigation have similar requirements for interpreting contracts and proving breach thereof: See *Woodmen of the World Life Ins. Soc’y v. Harris*, 740 So.2d 362, 368 (Ala. 1999)(“Contract interpretation is guided by the intent of the parties, which, absent ambiguity, is evidenced by the plain language of the contract.”); *Reynolds Metals Co. v. Hill*, 825 So.2d 100, 105-06 (Ala. 2002)(the elements of a breach of contract action are a valid binding contract, plaintiff’s performance thereof, defendant’s non-performance, and resulting damages); *Wolf v. Walt Disney Pictures and Television*, 76 Cal. Rptr. 3d 585, 601 (Cal. Ct. App. 2008)(contracts must be interpreted by giving effect to the mutual intent of the parties as it existed at the time the contract was entered into); *McKell v. Wash. Mut., Inc.*, 49 Cal. Rptr. 3d 227, 254 (Cal. Ct. App. 2006)(the elements of breach of contract are the existence of a valid contract, plaintiff’s performance or excuse for nonperformance, defendant’s breach, and resulting damage to plaintiff); *Lamprecht v. Jordan, LLC*, 75 P.3d 743, 746 (Idaho 2003)(when the language in a contract is clear and unambiguous, its interpretation is a question of law and the language will be given its plain meaning as intended by the contracting parties at the time the contract was entered); *Johnson v. McPhee*, 210 P.3d 563 (Idaho Ct. App. 2009)(a breach of contract requires the existence of a binding contract and damages); *Nicor, Inc. v. Assoc. Elec. and Gas Ins. Servs.*, 860 N.E.2d 280, 286 (Ill. 2006)(when interpreting an insurance policy or other contract, the primary goal is to give effect to the intent of the parties as expressed in the agreement); *Village of South Elgin v. Waste Mgmt. of Ill., Inc.*, 810 N.E.2d 658, 669 (Ill. Ct. App. 2004)(elements of a breach of contract are an offer and acceptance, consideration, definite and certain terms, performance by the plaintiff of all required conditions, breach, and damages); *Merrill v. Knauf Fiberglass GmbH*, 771 N.E.2d 1258, 1268 (Ind. Ct. App. 2002)(contracts are interpreted by ascertaining intent of parties at the time the contract was executed as disclosed by the language used to express their rights and duties); *Gatto v. St. Richard Sch., Inc.*, 774 N.E.2d 914, 920 (Ind. Ct. App. 2002)(elements of breach of contract are the existence of a contract, the defendant’s breach thereof, and damages); *Walsh v. Nelson*, 622 N.W.2d 499, 503 (Iowa 2001)(the cardinal rule of contract interpretation is to determine what the intent of the parties was at the time they entered into the contract); *Berryhill v. Hatt*, 428 N.W.2d 647 (Iowa 1988)(the elements of breach of contract are the existence of a contract, the terms and conditions thereof, the plaintiff has performed all the terms and conditions required of him and now requires the defendant to perform, the contract was breached by the defendant in some way, and the plaintiff has suffered damages); *Watson v. Dundas*, 136 P.3d 973, 977-78 (Mont. 2006)(when interpreting a contract, the ultimate objective is to “ascertain the paramount and guiding intent of the parties” as it existed at the time of contracting and to give effect to that mutual intent); *Cut Bank School Dist. No. 15 v. Rummel*, 58 P.3d 159 (Mont. 2002)(a breach of contract requires the element of damages proximately caused by the breach, and the damages must be proven with a reasonable degree of certainty); *Davis v. Nev. Nat’l Bank*, 737 P.2d 503, 505 (Nev. 1987)(in interpreting a contract “the court shall effectuate the intent of the parties, which may be determined in light of the surrounding circumstances if not clear from the contract itself”); *Clark County School Dist. v. Richardson Const., Inc.*, 168 P.3d 87 (Nev.

2007)(causation is an essential element of a claim for breach of contract, and, if the damage which the promisee seeks would not have been avoided by the promisor's not breaking his promise, then the breach cannot give rise to damages); *Coral Prod. Corp. v. Central Res., Inc.*, 730 N.W.2d 357, 369 (Neb. 2007)(the court's primary duty in interpreting a contract is to ascertain the true intent of the parties); *Barks v. Cosgriff Co.*, 529 N.W.2d 749, 754 (Neb. 1995)(elements of breach of contract are the existence of a contract and its terms, plaintiff's compliance therewith, defendant's breach, and damages); *Medina v. Sunstate Realty, Inc.*, 889 P.2d 171, 173 (N.M. 1995)(contracts are to be interpreted "to give force and effect to the intent of the parties"); *Exum v. Ferguson*, 637 P.2d 553, 554 (N.M. 1981)(an injured party is "entitled to all damages that flow as a natural and probable consequence from a breach" of contract); *Skivolocki v. East Ohio Gas Co.*, 313 N.E.2d 374, 374 (Ohio 1974)(contracts should "be interpreted so as to carry out the intent of the parties, as that intent is evidenced by the contractual language"); *Lawrence v. Lorain Cty. Comm. College*, 713 N.E.2d 478, 480 (Ohio Ct. App. 1998)(the elements of breach of contract are the existence of a contract, the plaintiff fulfilled his or her contractual obligations, the opposing party failed to fulfill his or her contractual obligations, and the plaintiff incurred damages as a result thereof); *Frost v. Williams*, 50 N.W. 964 (S.D. 1892)(a contract should be interpreted to give effect to the parties' common intent at the time of its making); *Guthmiller v. Deloitte & Touche LLP*, 699 N.W.2d 493, 498 (S.D. 2005)(the elements of breach of contract are an enforceable promise, a breach of the promise, and resulting damages); *Gilstrap v. June Eisele Warren Trust*, 106 P.3d 858, 862 (Wyo. 2005)(determining the parties' intent is the court's prime focus in interpreting or construing a contract); *Reynolds v. Tice*, 595 P.2d 1318, 1323 (Wyo.1979)(the elements of breach of contract are a lawfully enforceable contract, an unjustified failure to timely perform all or any part of what is promised therein, and entitlement of injured party to damages).

10. According to Farmers, the 13 states other than Oklahoma have applicable limitations periods ranging from four to fifteen years. Farmers' Brief in Chief, p. 13.

11. These differences are thoroughly discussed in Farmers' Brief in Chief, pages 13 & 14.

12. Furthermore, if the trial court later determines that its certification order should be modified, it has the power to do so.

13. Plaintiffs request that we apply the doctrine of false conflict to this case. Generally, where the laws of two or more jurisdictions would produce the same result as to the particular issue presented, there is a false conflict, and the court should avoid the choice of law question. *Williams v. Stone*, 109 F.3d 890, 893 (3rd Cir. 1997). In those cases, the presumptive local law is applied. *Seizer v. Sessions*, 940 P.2d 261 (Wash. 1997). However, we find application of such a doctrine inconsistent with Oklahoma's choice of law rule.

### 2010 OK CIV APP 13

**ROBERT WARD, Petitioner/Appellant, v.  
VALERIE WARD now HANCOCK,  
Respondent/Appellee.**

**No. 105,521. December 11, 2009**

AN APPEAL FROM THE DISTRICT COURT  
OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE ALAN WELCH, JR.,  
TRIAL JUDGE

### WRIT OF PROHIBITION DENIED

Steven S. Kerr, Oklahoma City, Oklahoma, for  
Petitioner/Appellant

John W. Gile, Roe T. Simmons, JOHN W. GILE,  
P.C., Edmond, Oklahoma, for Respondent/  
Appellee

DOUG GABBARD II, PRESIDING JUDGE:

¶1 Petitioner, Robert Ward (Father), appeals the trial court's order finding him in contempt of court for failure to pay child support. Having recast this appeal as an application for a writ of prohibition, we deny same.

### BACKGROUND

¶2 In 1995, Father and Respondent, Valerie Ward (Mother), were divorced. It is not disputed that the divorce decree awarded Mother custody of the couple's three children, born in 1983, 1985, and 1989, and required Father to pay "reasonable child support until the children of the marriage reach the age of majority as provided in 43 O.S. (1991) Sec. 112 or until further order of this court in the amount of \$1,750.00 per month . . ."

¶3 Father paid child support as ordered until his oldest child graduated from high school in May 2002. He then reduced his child support payment to \$1,200 per month beginning in June 2002, and further reduced his child support payment to \$600 per month beginning in June 2004 after the next oldest child graduated.

¶4 In late 2006, Mother contacted the Oklahoma Department of Human Services, Child Support Division, to obtain assistance in collecting unpaid child support. Shortly thereafter, Father filed a motion to modify requesting that his child support be reduced because his two oldest children had reached majority and graduated from high school. Mother responded by filing an application for contempt citation, alleging that Father had failed to pay more than \$50,000 in child support, medical bills and insurance. Father denied that he was in contempt, asserting that he had a right to reduce child support, and, if not, that Mother's actions were barred by laches. Father also requested that he be awarded the right to claim the tax deduction on the youngest minor child.

¶5 The trial court found that the support order was not automatically reduced as each of the children reached majority, and based upon the parties' stipulations,<sup>1</sup> that Father owed \$55,142 in past due support. The court also found that Father might be entitled to a set off for child support payments made directly to the older children after they reached majority. After an August 2007 hearing, the trial court entered the following orders: (1) It sustained Father's motion to modify, found that Father and Mother's incomes were \$10,000 and \$2,800

per month, respectively, and reduced child support to \$1,002.80 per month beginning February 1, 2007; (2) it sustained Father's request that he be given the tax deduction for the year 2007; (3) it found that Father was guilty of contempt of court because he had failed to pay child support in the total arrearage amount of \$55,142, had failed to pay medical bills in the total arrearage amount of \$373.52, and had failed to pay health insurance premiums since January 2006 in the total arrearage amount of \$1,997.50; (4) it granted Mother an arrearage judgment against Father in the total sum of \$57,513.42; and (5) it deferred Father's sentencing until February 13, 2008, directed him to make a "substantial payment" on the judgment, and ordered him to submit a payment plan if the judgment was not satisfied by that date. Father appeals.

### STANDARD OF REVIEW

¶6 In this case, the parties do not dispute the facts, and the only issues raised are questions of law. i.e., whether Father had a right to reduce support payments and, if not, whether Mother's claim is barred by laches. We review questions of law *de novo*. *Salve Regina College v. Russell*, 499 U.S. 225, 111 S. Ct. 1217 (1991).

### PROCEDURAL MATTERS

¶7 Initially, we must address two procedural questions. First, when the Notice of Completion of Record was not timely filed in this case, the Oklahoma Supreme Court gave Father until August 29, 2008, to obtain the filing, or face the possibility that his appeal would be dismissed. Father did not meet the Court's deadline, but he eventually secured the filing of the Notice of Completion of Record.<sup>2</sup> The Supreme Court did not dismiss this matter, but assigned the case to this Court. After reviewing the briefs, and noting that the appellee has not raised the issue, we decline to dismiss this case. See *Clay v. Choctaw Nation Care Center*, 2009 OK CIV APP 35, n. 1, 210 P.3d 855, 857.

¶8 Second, the trial court found Father guilty of contempt, but deferred sentencing until February 13, 2008. Although a check of Oklahoma County District Court records does not reveal whether sentencing has occurred, Father asserts that the trial court deferred his sentencing upon condition that he continue making regular payments on the arrearage. Generally, a contempt order which defers sentencing is not an appealable order. *First Nat'l Bank & Trust Co.*

*of Ada v. Arles*, 1991 OK 78, 816 P.2d 537. However, in *Arles*, the Supreme Court held that, because the appellant sought relief from a ruling prohibiting enforcement of a trial court order, it would recast the appeal as an original proceeding seeking a writ of prohibition. *Id.* at ¶ 6, 816 P.2d at 539. This Court has the same power, pursuant to 20 O.S.2001 § 30.1:

The Court of Civil Appeals shall have jurisdiction to issue writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition, or any other process when this may be necessary in any case assigned to it by the Supreme Court.

Thus, we recast this appeal as an application for writ of prohibition.

### ANALYSIS

¶9 In his only proposition of error, Father asserts the trial court erred in determining that he did not have a right to automatically reduce support as each child reached majority. He relies upon the original divorce decree which provides, in part:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff shall pay to the Defendant a reasonable child support until the children of the marriage reach the age of majority as provided in 43 O.S. (1991), Sec. 112 or until further order of this court in the amount of \$1,750.00 per month for the care and maintenance of the minor children in accordance with Child Support Guidelines as set forth in 43 O.S. Suppl. (1989), Sec 119 which are attached hereto.

¶10 At the time the divorce decree was entered, 43 O.S.1991 § 112 provided that a child was entitled to support until the child reached 18 years of age, or through age 18 if the child was still in high school.<sup>3</sup> However, 43 O.S. Suppl. 1995 § 118(19)(later renumbered as § 118(E)(16)(c), and currently found at § 118I(C)) stated, in pertinent part:

A child support order shall not be construed to be a per child order unless specified by the district or administrative court in the order. Child support is not automatically modified in a child support order which provides for more than one child when one of those children reaches majority or is not otherwise entitled to support

pursuant to the support order; however, such circumstance shall constitute a material change in circumstances[.]<sup>4</sup> (Emphasis added)

¶11 This provision clearly indicates that child support is not automatically modified as each child reaches majority. A parent who is paying child support for multiple children may not unilaterally reduce his or her child support payment as each child reaches majority, unless the divorce decree so provides. Absent specific authorizing language in the decree, a party seeking to reduce child support because one or more of his children has reached majority must request a modification hearing.

¶12 There are several reasons for requiring such a hearing. First, as Father admits in his appellate brief, a child support award for multiple children cannot be ratably reduced when a child reaches majority. In Oklahoma, child support must be awarded in accordance with the Uniform Child Support Guidelines, now found at 43 O.S.2001 § 119. The guidelines do not calculate child support for multiple children as a multiple of the guideline amount for one child, nor can it be reduced in that manner. In other words, a child support award for three children cannot be reduced by one-third when one of the children reaches majority. Second, every modification of child support must be based upon the parents' income at the time modification is sought. See § 119. In fact, the trial court's modification order set Father's child support at \$1,002.80, an amount far greater than one-third of the original decree amount. This occurred because Father's income had increased. Third, every modification is within the sound discretion of the trial court. The fact that a child has reached majority is simply one factor, although a compelling one, which the trial court must consider in granting or denying modification and in setting the amount of an award.

¶13 Here, the divorce court did not set total child support based upon a specific amount for each child, and, therefore, § 118 does not allow that total award to be construed to be an amount per child. Father could not automatically reduce his child support payment, but was required to request modification. He failed to do so, and his child support cannot now be retroactively modified. *Greeson v. Greeson*, 1953 OK 111, 257 P.2d 276.

¶14 Nevertheless, Father asserts that this subsection of § 118 is subject to, and in conflict with, former subsection § 118(E)(21) (now found at § 118D(F)), which provides in pertinent part:

The court, to the extent reasonably possible, shall make provision in an order for prospective adjustment of support to address any foreseen changes including, but not limited to, changes in medical insurance, child care expenses, medical expenses, [and] extraordinary costs...

Father asserts that a child reaching majority is one of the "foreseen changes" implicitly contemplated by this provision. We disagree.

¶15 Provisions in statutes must be construed in a manner so as to reconcile them, if possible, and to render them consistent and harmonious, and to give intelligent effect to each. *AMF Tuboscope Co. v. Hatchel*, 1976 OK 14, ¶ 22, 547 P.2d 374, 380. Father's construction of these statutes would render the language of former § 118(19) and § 118(E)(16)(c) meaningless. The only reasonable construction of the statutes is that the term "foreseen changes" in § 118(E)(21) does not include a child reaching majority, a circumstance specifically addressed by former § 118(19) and § 118(E)(16)(c). This is consistent with the rule of statutory construction that where two statutes or provisions deal with the same subject matter, the specific controls over the general. *City of Tulsa v. Smittle*, 1985 OK 37, ¶ 17, 702 P.2d 367, 371.

¶16 Father also asserts that laches bars Mother's right to obtain an arrearage judgment. He argues that since Mother accepted his reduced payments for five years, he should not be required to pay any deficiency. In *Hedges v. Hedges*, 2002 OK 92, 66 P.3d 364, the Oklahoma Supreme Court found that equitable defenses may be asserted in child support actions, but noted that a party who asserts laches must prove: (1) that the plaintiff unreasonably delayed the commencement of proceedings to enforce the claim, and (2) that the defendant was materially prejudiced by this delay. *Id.* at ¶ 8, 66 P.3d at 369. Father failed to prove material prejudice because he is paying no more money now than that ordered by the original decree.

## CONCLUSION

¶17 Finding no error in the trial court's ruling, the writ of prohibition is denied.

¶18 WRIT OF PROHIBITION DENIED.

WISEMAN, V.C.J., (sitting by designation), and BARNES, J., (sitting by designation), concur.

1. The parties had previously stipulated, in part, as follows:

Should the Court determine the Petitioner's position that he is entitled to credit for payments made to the adult children is correct but the \$1750/mo is not automatically modified, then Petitioner owes child support in total amount of \$55,142 through Dec. 2006. Said amount is computed by subtracting total payments shown in Petitioner's Aid to Court attached to Trial Brief from total obligation of \$126,000 for Jan. 2001 to Dec. 2006.

2. The Notice of Completion was not timely filed because each party's designation of record included a transcript of the August 20, 2007, hearing, and that transcript was never filed. In fact, a record of the August hearing could not be prepared because it had not been transcribed by a reporter. The matter was eventually resolved after the attorneys for both parties notified the court clerk that such a transcript was unnecessary. The court clerk then forwarded the record and notice to the Clerk of the Supreme Court.

3. The current version of the statute is similar, but provides for child support through the age of 20 if the child is still in high school.

4. This statute, amended but with substantially similar language, was later moved to § 118(E)(16)(c), which was in effect when Father began making unilateral reductions, and when his motion to modify was filed. The statute is now found at § 118(I)(C), which also states that "[w]hen the last child of the parents ceases to be entitled to support, the child support obligation is automatically terminated as to prospective child support only."

**2010 OK CIV APP 14**

**PATRICIA RUDDY & WILLIAM RUDDY,  
Plaintiffs/Appellants, v. ROGER AND  
DONNA SKELLY d/b/a SKELLY  
ENTERPRISES & McANAW & COMPANY  
REALTORS, Defendants/Appellees.**

**Case No. 106,710. October 30, 2009**

APPEAL FROM THE DISTRICT COURT OF  
WASHINGTON COUNTY, OKLAHOMA

HONORABLE RUSSELL C. VACLAW, JUDGE

REVERSED AND REMANDED

Jason B. Reynolds, Billy D. Griffin, Griffin,  
Reynolds & Associates, Oklahoma City, Okla-  
homa, for Appellant,

Micky Walsh, Jerry Fraley, Beeler, Walsh &  
Walsh, P.L.L.C., Oklahoma City, Oklahoma, for  
Appellees.

Larry Joplin, Judge:

¶1 Plaintiffs/Appellants Patricia Ruddy and William Ruddy (Plaintiffs) seek review of the trial court's order granting a motion for summary judgment by Defendants/Appellees Roger Skelly and Donna Skelly d/b/a Skelly Enterprises and McAnaw & Company Realtors (collectively, Defendants) and entering judgment in Defendants' favor based upon the statute of repose embodied in 12 O.S. §109. In this appeal, Plaintiffs argue the trial court mis-

construed the legal theory asserted in their lawsuit and consequently erred in its application of law.

¶2 Plaintiffs commenced the instant action asserting Plaintiff Patricia Ruddy was injured after she completed her business on September 14, 2006, exited Defendants' building, tripped on an unmarked step near a landing, and fell. Plaintiff William Ruddy claimed damages due to a loss of consortium.

¶3 Defendants filed a motion for summary judgment in which they asserted the step was unchanged since it was constructed in 1984, and Plaintiffs' claims based upon the incident in 2006 were barred by the statute of repose found in 12 O.S. §109. That statute provides:

No action in tort to recover damages

(i) for any deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property,

(ii) for injury to property, real or personal, arising out of any such deficiency, or

(iii) for injury to the person or for wrongful death arising out of any such deficiency,

shall be brought against any person owning, leasing, or in possession of such an improvement or performing or furnishing the design, planning, supervision or observation of construction or construction of such an improvement more than ten (10) years after substantial completion of such an improvement.

According to Defendants, Plaintiffs' claim must fail because §109 prevents the assertion of a negligence *per se* claim which arises more than ten years after construction is completed.

¶4 Plaintiffs contended the statute of repose was inapplicable since they were not relying upon construction defects<sup>1</sup> as the source of the wrong for which they sought damages, but instead upon breach of a duty to warn of hidden traps, snares, or pitfalls. They claimed the concrete and aggregate composition of a curb and adjacent walk made the step just such a hidden danger.

¶5 The trial court granted Defendants' motion. Plaintiffs present a single question of law for consideration in their appeal, and that

is, does the statute of repose apply to bar the prosecution of their claims?

¶6 “Summary judgment is appropriate only where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law.” *Wathor v. Mutual Assur. Adm’rs, Inc.*, 2004 OK 2, ¶4, 87 P.3d 559, 561. (Citation omitted.) “In reviewing a summary judgment grant an appellate court engages in a plenary, independent and non-deferential re-examination of the trial court’s ruling, i.e., a *de novo* review.” *Wylie v. Chesser*, 2007 OK 81, ¶3, 173 P.3d 64, 66. (Emphasis original.) (Citation omitted.) “If the uncontroverted facts support legitimate inferences favoring well-pleaded theory of the party against whom the judgment is sought or if the judgment is contrary to substantive law, the judgment will be reversed.” *Wathor*, 2004 OK 2, ¶4, 87 P.3d at 561. (Citation omitted.)

¶7 The owner of premises owes “the duty to exercise reasonable care to keep the premises in a reasonably safe condition and to warn invitees of conditions which are in the nature of hidden dangers.” *Rogers v. Hennessee*, 1979 OK 138, ¶3, 602 P.2d 1033, 1034. However, “[t]he invitee assumes all normal or ordinary risks attendant upon the use of the premises, and the owner or occupant is [not] liable for injury to an invitee resulting from a danger which was obvious or should have been observed in the exercise of ordinary care.” *Williams v. Tulsa Motels*, 1998 OK 42, ¶6, 958 P.2d 1282, 1284. That is to say, “[t]he owner . . . of the premises has no obligation to warn an invitee, who knew or should have known the condition of the property, against patent and obvious dangers.” *Buck v. Del City Apartments*, 1967 OK 81, ¶20, 431 P.2d 360, 365.

¶8 In the trial court, Defendants contended they were entitled to judgment under §109 and cited in support, *Gorton v. Mashburn*, 1999 OK 100, 995 P.2d 1114, in which the plaintiff fell on a pedestrian bridge, structurally unchanged since its substantial completion more than ten years prior. The Oklahoma Supreme Court held in *Mashburn* that “§109 preclude[d] the claims asserted” and affirmed the trial court’s order summarily adjudicating the plaintiff’s claim. 1999 OK 100, ¶11, 995 P.2d at 1117.

¶9 In response, Plaintiffs argued *Mashburn* did not apply and that their cause of action rested on allegations of common law negligence, as in *Abbott v. Wells*, 2000 OK 75, 11 P.3d

1247. In *Abbott*, the plaintiff was injured when she tripped at the point where a floor changed elevation between a hallway and a restroom, a condition present since the building was constructed in 1918. 2000 OK 75, ¶1, 11 P.3d at 1248. The Oklahoma Supreme Court concluded the plaintiff’s cause of action was based on common law negligence for failure to warn an invitee of a hidden danger, rather than on defective design or construction and distinguished in *Mashburn*. 2000 OK 75, ¶4, 11 P.3d at 1248.

¶10 As in *Abbott*, the Plaintiffs’ claims here are “based on common law negligence for failure to warn an invitee of a hidden danger, not liability, statutory or otherwise, based on design and construction defects.” 2000 OK 75, ¶4, 11 P.3d at 1248. Consequently, we hold §109 does not apply to bar Plaintiffs’ claim in the present case.

¶11 The trial court erred as a matter of law in granting the motion for summary judgment in favor of Defendants based on §109. The order of the trial court is REVERSED and the cause is REMANDED for further proceedings.

HANSEN, P.J., and MITCHELL, C.J., concur.

1. In point of fact, Plaintiffs contended that absent a revelation during discovery that the premises had been altered somehow within the ten years preceding the fall, they “unambiguously agree that they have no cause of action for negligence in design or construction of the Defendants’ premises.” However, they re-iterated that design was *not* the basis of their cause of action.

## 2010 OK CIV APP 15

**IZZA ROBERT JONES, JR., d/b/a  
PROFESSIONAL PLUMBING SERVICES,  
Plaintiff, v. PURCELL INVESTMENTS, LLC,  
Defendant/Cross-Plaintiff/Appellant/Cross-  
Appellee, v. EXPRESS FIRE PROTECTION,  
INC., Third Party Defendant/Cross-  
Defendant/Appellee/Cross-Appellant.**

**No. 106,986. October 8, 2009**

APPEAL FROM THE DISTRICT COURT OF  
McCLAIN COUNTY, OKLAHOMA

HONORABLE CHARLES GRAY, JUDGE

AFFIRMED

Collier H. Pate, Stuart A. Knarr, PATE & KNARR, PC, Oklahoma City, Oklahoma, for Plaintiff/Appellant/ Counter-Appellee,

Terry Stokes, Brandon Baker, McALISTER, McALISTER, McKINNIS & TUGGLE, P.C.,

Edmond, Oklahoma, for Defendant/Appellee/Counter-Appellant.

Kenneth L. Buettner, Judge:

¶1 Defendant/Cross-Plaintiff/Appellant/Cross-Appellee Purcell Investments, LLC, (Purcell) appeals from the trial court's March 27, 2009 Journal Entry of Judgment which granted summary judgment against Purcell and Defendant Kerr 3 Construction Group, LLC, in favor of Third-Party Defendant/Cross-Defendant/Appellee/Cross-Appellant Express Fire Protection, Inc. (Express). The trial court interpreted 42 O.S.2001 §142.6 and found that Express's pre-lien notice was timely and therefore its mechanics' lien was valid and enforceable by foreclosure. The trial court dismissed with prejudice Purcell's claims against Express and overruled Purcell's Cross-Motion for Summary Judgment. Finally, the trial court awarded Express \$6,159.00 in principal and \$858.13 in interest, as well as \$2,683.20 in attorney fees and \$50.00 in costs. Express appeals the amount of attorney fees awarded. The record presents no dispute of material fact. The dispute is one of law: whether pre-lien notice required by 42 O.S.2001 §142.6(B) must be sent no later than 75 days after the first or last date materials or labor were supplied. On *de novo* review of this first impression issue, we find the statute requires pre-lien notice to be sent no later than 75 days after the last day the lien claimant supplied labor, services, materials or equipment on the project. We therefore affirm summary judgment in favor of Express. We find no abuse of discretion in the trial court's decision on the amount of attorney fees, and therefore we also affirm that award.

¶2 Summary judgment proceedings are governed by Rule 13, Rules for District Courts, 12 O.S.2001, Ch. 2, App.1. Summary judgment is appropriate where the record establishes no substantial controversy of material fact and the prevailing party is entitled to judgment as a matter of law. *Brown v. Alliance Real Estate Group*, 1999 OK 7, 976 P.2d 1043, 1045. The parties agree on the facts material to this dispute. Where the facts are not disputed, an appeal presents only a question of law. *Baptist Bldg. Corp. v. Barnes*, 1994 OK CIV APP 71, ¶ 5, 874 P.2d 68, 69. In its Petition in Error, Purcell has alleged the issue of law is the interpretation of 42 O.S.2001 §124.6(B). We review issues of law *de novo*.<sup>1</sup>

¶3 The record shows that Purcell entered a contract with Kerr 3 for the construction of a strip mall on property owned by Purcell in McClain County. Kerr 3 subcontracted with Express, among other parties.<sup>2</sup> Express first supplied labor, services, materials, or equipment for the project July 17, 2006, and Express last supplied materials, services, labor, or equipment February 20, 2007. Express filed its Lien Statement with the McClain County Clerk April 10, 2007. The parties do not dispute that Express timely filed the lien statement within 90 days of the date on which material was last furnished, as required by 42 O.S.2001 §143.

¶4 However, as a subcontractor, Express also was charged with providing a "pre-lien notice" to the property owner pursuant to 42 O.S.2001 §142.6.<sup>3</sup> Express mailed its Pre-Lien Notice to Purcell March 28, 2007 and it was received April 2, 2007. The parties purport to dispute whether Express sent the pre-lien notice within the time allowed by §142.6, but the dispute is over when the time allowed by §142.6 begins.

¶5 Whether the 75 days begins after services or materials are first supplied, after they are last supplied, or sometime in between, is unclear. At the hearing on attorney fees, the parties and the trial court agreed the statute was not clear.<sup>4</sup> The test for ambiguity in a statute is whether the statutory language is susceptible to more than one reasonable interpretation. Whether language is ambiguous is a question of law." *YDF, Inc. v. Schlumar, Inc.*, 2006 OK 32, ¶6, 136 P.3d 656. Because the mechanics' lien statutes provide for deadlines triggered by both the beginning and end of lienable service, yet §142.6 does not include a specific modifier of "after . . . supplied," we find §142.6(B) is susceptible to more than one reasonable interpretation. Accordingly, we find the time limit imposed for providing pre-lien notice is ambiguous as a matter of law.<sup>5</sup> In construing ambiguous statutory language, we look to the various provisions of the legislative scheme to determine the legislative intent and the public policy underlying that intent. *Id.*<sup>6</sup>

¶6 Mechanics' liens are statutory liens which protect the right to payment of those supplying material, labor, services, or equipment in the construction, alteration, or repair of any improvement on land. *First Nat. Bank of Pauls Valley v. Crudup*, 1982 OK 132, 656 P.2d 914, 917; 56 C.J.S. Mechanics' Liens, §1. In Oklahoma, statutory provisions for mechanics' liens are

codified at 42 O.S.2001 §§141-154. Because such liens are created by statute, they exist in derogation of the common law and therefore must be strictly construed. *Riffe Petroleum Co. v. Great Nat. Corp., Inc.*, 1980 OK 112, 614 P.2d 576, 579. However, once a mechanic's lien is found to exist, it will be liberally enforced. *Id.* "The purpose of the mechanic's & materialmen's lien statute is to protect materialmen and laborers, to secure payment of claims, and to give notice to the owners and to third parties of the intent to claim a lien for a definite amount. The recording requirement also protects innocent purchasers." *Davidson Oil Country Supply Co., Inc. v. Pioneer Oil & Gas Equipment*, 1984 OK 65, 689 P.2d 1279, 1280-1281.

¶7 Oklahoma law protects property owners by requiring subcontractors to give owners notice of mechanics' liens, which allows owners to withhold payment to the general contractor until they are sure the subcontractor will be paid by the general contractor. The Oklahoma Supreme Court long ago explained that the lien and notice statute:

fully provides protection to the owner by staying action by the contractor against the owner for 60 days against having impressed upon his property liens of submaterialmen for material furnished in the erection of a building. That the defendant did not avail itself of such protection against loss, but paid the contractor prior to the expiration of the 60 days from the time the material was furnished, for the payment of which the lien is invoked, cannot be considered as defeating the lien.

'The provisions of the mechanics' lien law should be interpreted so as to carry out the object had in view by the Legislature in enacting it, namely, the security of the classes of persons named in the act, upon its provisions being in good faith substantially complied with on their part.'

It therefore clearly appears that any payment made to the original contractor by the owner, prior to the expiration of 60 days, is paid at his own risk, and if, during said time a subcontracting materialman files his lien and gives notice to the owner, as is admitted in this case, the lien of such subcontracting materialman is a valid one upon the lands and buildings embraced in the original contract. That such subcontracting materialman has a direct lien upon

the condition of filing same and giving notice to the owner, . . . .

*W.E. Caldwell Co. v. John Williams-Taylor Co.*, 1915 OK \_\_, 50 Okla. 798, 150 P. 698, 699-700 (citations omitted).<sup>7</sup>

¶8 Prior to 1977, mechanics' liens were granted to subcontractors who 1) had filed a lien statement within 90 days after the date labor or services were last provided and 2) had served written notice of the lien on the owner of the land. 42 O.S.1971 §143. Oklahoma courts held that this notice must be given "within a reasonable time" after filing the lien statement. *Curry v. Morgan*, 1958 OK 36, 321 P.2d 973, 974; *Union Bond & Investment Co. v. Bernstein*, 1914 OK 162, 139 P. 974, 40 Okla. 527.

¶9 In 1977, the legislature deleted the requirement of written notice to the owner from §143 and instead included the notice requirement in a new statute. 42 O.S.Supp.1977 §143. The new section directed that "on the date of the filing of the lien statement, . . . a notice of such lien shall be mailed . . . to the owner of the property on which the lien attaches. . . ." 42 O.S.Supp.1977 §143.1 (emphasis added). Section 143.1 also directed that the notice was to be mailed by the county clerk. *Id.* In 1979, §143.1 was again amended to provide that notice must be mailed "within one (1) business day after the date of filing of the lien statement . . ." 42 O.S.Supp.1979 §143.1 (emphasis added).

¶10 In 2000, §143.1 was changed more dramatically. The previous §143.1 was renamed subsection A, and a subsection B was added. Section 143.1(B) provided that a lien claimant who was owed payment by a contractor was required to send written notice of the unpaid amount to the property owner and the contractor "not later than the tenth day of the third month following each month in which the unpaid" services or materials were furnished.

¶11 That language lasted only one year, when in 2001, §142.6 was added, and the language from §143.1(B) quoted above was deleted. Section 142.6 has not been amended since, nor has it been interpreted. The long-standing rule that notice to the owner is an inherent element of a mechanic's lien's validity has evolved from requiring notice within a reasonable time after the filing of the lien, to requiring notice at the time of the lien statement, and now to the deadline in §142.6.<sup>8</sup> The trial court's interpretation of the statute effectively gives the owner

15 days notice before the lien statement must be filed — if the pre-lien notice is filed within 75 days and the lien statement is filed within 90 days, both from the last date lienable services or materials were supplied.

¶12 Both its name and the text of §142.6 establish that a subcontractor's "pre-lien" notice must be filed before the lien statement.<sup>9</sup> As noted above, a subcontractor has up to 90 days *after the last date* materials or labor are supplied in which to file the lien statement. The Oklahoma Supreme Court has explained that "a subcontractor has a 'lienable claim' upon the commencing of work or furnishing of materials . . . such lienable claim remains *inchoate* throughout the construction period and for 90 days after the date upon which the subcontractor last furnished materials or performed labor . . ." *Shawver & Son, Inc. v. Tefertiller*, 1989 OK 60, 772 P.2d 396, 399.

¶13 In its brief opposing summary judgment, Purcell relied on the language in §142.6(B)(2), stating that a subcontractor need only file one pre-lien notice, which will "protect the claimant's lien rights for any subsequent supply of material, services, . . . furnished during the course of a construction project." Purcell contended this language established that the legislature intended for the pre-lien notice to be filed within 75 days of the date materials were first provided, based on Purcell's assertion that there would be no need for a pre-lien notice to remain effective for subsequent supplies if the notice could be filed after the materials were last supplied. At first blush, Purcell's contention appears reasonable. However, effectively, such an interpretation would require every person providing services or materials which could possibly be subject to a mechanic's lien to file a pre-lien statement, even if the subcontractor is being paid, as a precautionary measure in case payments later stop more than 75 days after labor or materials are first provided, but before the project ends. We will not presume the legislature intended for every subcontractor to give a pre-lien notice, regardless of whether he is being paid. If the legislature had such an intent, it could simply have included all subcontractors in the §142.1 requirement of notice prior to first commencing work on owner-occupied dwellings. The 75 days after provision is superfluous if all subcontractors must give notice.

¶14 Additionally, even before the enactment of §142.6, the Oklahoma Supreme Court noted that a mechanic's lien claimant is not required to file a separate lien statement for each order of materials. *Roofing & Sheet Metal Supply Co. v. Golzar-Nejad Khalil, Inc.*, 1996 OK 101, 925 P.2d 55, 59. The court noted its previous holding that where materials are ordered at different times, but all for use on one construction project, the orders form one account on which a lien statement may be filed within 90 days after the last material was furnished. *Id.* citing *Cushing Country Club v. Boardman, Co.*, 1963 OK 83, 381 P.2d 856. In the case of large projects, the subcontractor may have no way of knowing the lien amount, or whether one will be required, within 75 days of first providing services, before final payment is due.<sup>10</sup>

¶15 We next note that the lien notice requirement remains in §143.1, which leads to the question whether the new provision for a "pre-lien notice" is a new, additional notice required, rather than a modification of the existing notice requirement. The title of the bill creating §142.6 suggests that the bill addressed the existing notice requirements for liens and, as noted above, notice of liens has been required since long before §142.6.<sup>11</sup> The title of the bill does not suggest that the legislature intended to create an additional notice, such that the "pre-lien" notice would be required, followed by the §143.1 notice. Instead, we find §142.6 simply elaborates on the long-standing requirement of notice of a mechanics' and materialman's lien. By contrast, §142.1 provides for a specific type of notice, along with a separate deadline of before commencement of work, for potential liens against owner-occupied dwellings. That section has been interpreted as providing for a "specific pre-enforcement notice of potential materialman's liens." *C & C Tile and Carpet Co., Inc. v. Aday*, 1985 OK CIV APP 8, 697 P.2d 175.

¶16 The content of the §142.1 notice required for owner-occupied dwellings differs dramatically from the content required in the §142.6 pre-lien notice. Those differences also support a finding that the pre-lien notice is not analogous to the notice for owner-occupied dwellings and do not support a finding that the pre-lien notice is required early in the project, as the notice for owner-occupied properties is required before lienable labor or materials are first provided.

¶17 As noted above, in interpreting an ambiguous statutory provision we look to the purpose and intent of the statutory scheme. Our decision in this case is supported by the fact that none of the purposes of the mechanics' lien statutes would be served by adopting Purcell's interpretation that pre-lien notice must be given within 75 days after labor or materials were first supplied. Purcell's interpretation would serve only to render otherwise valid liens unenforceable despite timely notice to the owner, before the lien statement was filed, at a time when the owner remained able to protect his interests. Notice to the owner before the lien statement is filed protects the interests of owners and subcontractors. On the other hand, declaring a lien unenforceable solely by virtue of making notice of a lien due before payment is due (and indeed before it is known whether a lien will be necessary) serves only to benefit the property owner at the unnecessary expense of the subcontractor.

¶18 We recognize that the legislature may have intended to require pre-lien notice to be filed early in a project, as urged by Purcell. Nevertheless, because as noted above, historically, notice of a lien was required to be given at the time of filing the lien statement, along with the fact that owners are still protected by the timing rules in the mechanics' lien statutes, we do not find an intent to institute such a sweeping change in policy with §142.6. This is particularly so because such change would not further the purpose of the lien statutes. In the Journal Entry, the trial court announced "(t)he applicable time to serve pre-lien notice is not prior to performing labor or supplying materials; but rather, no later than seventy-five (75) days after the last date of work." We affirm the trial court's finding that Express's pre-lien notice was timely under the statute. However, we clarify that under §142.6(B), the time period for pre-lien notice is not 75 days after the last date of work; it is 75 days after the lien claimant last supplied lienable services or materials on the job.

¶19 For the reasons expressed above, we conclude the trial court correctly interpreted §142.6(B). The statute requires a pre-lien notice to be given no later than 75 days after labor, services, material or equipment have last been supplied by the lien claimant.

¶20 In its cross-appeal, Express complains that the trial court abused its discretion in the amount of attorney fees it awarded. Express

was entitled to an award of fees because it prevailed in an action to enforce a lien. 42 O.S.2001 §176; 12 O.S.2001 §936. Where a party is entitled to an award of fees, the determination of the amount is left to the trial court's discretion, and we will not disturb that finding absent an abuse of discretion. *Finnell v. Seismic*, 2003 OK 35, ¶8, 67 P.3d 339. In its Motion to Assess Costs and Attorney's Fees, Express sought an award of \$8,277.25 in attorney fees.<sup>12</sup> Purcell objected, in part based on its claim that the amount of fees requested exceeded the amount of the lien. At the hearing on attorney fees, the parties stipulated that \$89.42 was a proper blended hourly rate. In the Journal Entry, the court awarded \$2,683.20, which was based on 30 hours at \$89.44 per hour. The court indicated it reduced the amount to which the parties stipulated based on the amount of Express's lien. The trial court acted within its discretion in making the fee award. The trial court has discretion to award fees lower than the amount of hours actually billed after consideration of the factors announced in *State ex rel. Burk v. City of Oklahoma City*, 1979 OK 115, 598 P.2d 659. *Southwestern Bell Telephone Company v. Parker Pest Control, Inc.*, 1987 OK 16, 737 P.2d 1186.

AFFIRMED.

MITCHELL, C.J. (sitting by designation), and BELL, P.J., concur.

1. The appellate court has the "plenary, independent and non-deferential authority to re-examine a trial court's legal rulings." *Neil Acquisition, L.L.C. v. Wingrod Inv. Corp.*, 1996 OK 125, 932 P.2d 1100, n. 1. Matters involving legislative intent present questions of law which are examined independently and without deference to the trial court's ruling. *Salve Regina College v. Russell*, 499 U.S. 225, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991).

2. The record on appeal suggests this case included the following additional parties:

Defendants Rose Rock Bank, Kerr 3 Design Group, Inc., Binswanger, Robert Baxter Electric, Inc., and Luis Chaparas, d/b/a Deseret Construction; Third-Party Plaintiff Robert Baxter Electric, Inc., d/b/a Baxter Electric; Third-party Defendants Oklahoma Natural Gas Company, a Division of Oneok, Inc., Pendergraft Investments, L.L.C., d/b/a S & J Heating and Air Conditioning; Cross-defendants Dan's Custom Canvas Awnings, Inc.; Luis E. Chaparas, d/b/a Deseret Construction; First Service Companies, LLC; Bishop Paving Company, Inc.; Onsite Construction, Inc.; and Aluminum Specialties, Inc.

The Oklahoma Supreme Court entered its Order April 20, 2009, in which it directed Purcell to show cause why this appeal should not be dismissed for lack of a final, appealable order disposing of all the claims and parties, and directed that the caption of the case to read as styled above. Purcell responded with orders disposing of most but not all the parties. The Oklahoma Supreme Court issued its Order May 12, 2009, in which it directed this appeal to proceed.

The record on appeal does not indicate disposition of all claims by or against Robert Baxter Electric, Inc., d/b/a Baxter Electric; Oklahoma Natural Gas Company, a Division of Oneok, Inc.; Pendergraft Investments, L.L.C., d/b/a S & J Heating and Air Conditioning; Rose Rock Bank; and Kerr 3 Design Group, Inc.

3. Section 142.6 provides, in pertinent part (emphasis added):

A. For the purposes of this section:

1. "Claimant" means a person, other than an original contractor, that is entitled or may be entitled to a lien pursuant to Section 141 of Title 42 of the Oklahoma Statutes; and

2. "Person" means any individual, corporation, partnership, unincorporated association, or other entity.

B. 1. *Prior to the filing of a lien statement pursuant to Section 143.1 of Title 42 of the Oklahoma Statutes, but no later than seventy-five (75) days after the date of supply of material, services, labor, or equipment in which the claimant is entitled or may be entitled to lien rights, the claimant shall send to the last-known address of the original contractor and owner of the property a pre-lien notice pursuant to the provisions of this section.*

2. The provisions of this section shall not be construed to require:

- a. a pre-lien notice with respect to any retainage held by agreement between an owner, contractor, or subcontractor, or
- b. more than one pre-lien notice during the course of a construction project in which material, services, labor, or equipment is furnished.

A pre-lien notice sent in compliance with this section for the supply of material, services, labor, or equipment that entitles or may entitle a claimant to lien rights shall protect the claimant's lien rights for any subsequent supply of material, services, labor, or equipment furnished during the course of a construction project. \* \* \*

D. Failure of the claimant to comply with the pre-lien notice requirements of this section shall render that portion of the lien claim for which no notice was sent invalid and unenforceable.

4. In addition to the time period provided by §142.6, Oklahoma's mechanics' lien statutes contain various deadlines, both before or after a lienable project begins, for giving notice of the lien and filing the lien statement (emphasis added):

42 O.S.2001 §141:

Any person who shall, under oral or written contract with the owner of any tract or piece of land, perform labor, furnish material or lease or rent equipment used on said land for the erection, alteration or repair of any building, improvement or structure thereon . . . shall have a lien upon the whole of said tract or piece of land, the buildings and appurtenances. . . . compliance with the provisions of this act shall constitute constructive notice of the claimant's lien to all purchasers and encumbrancers of said property or any part thereof, *subsequent to the date of the furnishing of the first item of material or the date of the performance of the first labor . . . .*

42 O.S.2001 §142:

Any person claiming a lien as aforesaid shall file in the office of the county clerk of the county in which the land is situated a statement setting forth the amount claimed and the items thereof as nearly as practicable, the names of the owner, the contractor, the claimant, and a legal description of the property subject to the lien, verified by affidavit. *Such statement shall be filed within four (4) months after the date upon which material or equipment used on said land was last furnished or labor last performed under contract as aforesaid; . . . .*

42 O.S.2001 §142.1:

No lien arising under the provisions of Sections 141 through 153 of this title which affects property presently occupied as a dwelling by an owner shall be enforceable unless, *prior to the first performance of labor or the first furnishing of materials by the lien claimant, the original contractor, subcontractor, laborer, or materialman shall have provided to one of the owners a written notice . . . .*

42 O.S.2001 §143:

Any person who shall furnish any such material or lease or rent equipment used on said land or perform such labor as a subcontractor, or as an artisan or day laborer in the employ of the contractor, may obtain a lien upon such land, or improvements, or both, from the same time, in the same manner, and to the same extent as the original contractor, for the amount due him for such material, equipment and labor; . . . by filing with the county clerk of the county in which the land is situated, *within ninety (90) days after the date upon which material or equipment used on said land was last furnished or labor last performed under such subcontract, a statement, verified by affidavit, setting forth the amount due from the contractor to the claimant, and the items thereof, as nearly as practicable, the name of the owner, the name of the contractor, the name of the claimant, and a legal description of the property upon which a lien is claimed. . . . The risk of all payments made to the original contractor shall be upon such owner until the expiration of the ninety (90) days herein specified, and no owner shall be liable to an action by such contractor until the expiration of said ninety (90) days, and such owner may pay such subcontractor the amount due him from such contractor for such labor, equipment used on said land and material, and the*

amount so paid shall be held and deemed a payment of said amount to the original contractor.

42 O.S.2001 §143.1:

A. Within one (1) business day after the date of the filing of the lien statement provided for in Sections 142 and 143 of this title, a notice of the lien shall be mailed by certified mail, return receipt requested, to the owner of the property on which the lien attaches. The claimant shall furnish to the county clerk the last-known mailing address of the person or persons against whom the claim is made and the owner of the property. The notice shall be mailed by the county clerk.

5. In addition to the ambiguity revealed by the dispute at issue in this case, we also note that §142.6(B)(1) provides that the pre-lien notice must be sent "prior to the filing of a lien statement pursuant to (§143.1), but no later than . . . (75) days after the date of supply . . ." Yet §143.1 does not reference the filing of a lien statement. Instead, it is §143 which provides for filing a lien statement by a subcontractor. And, §142.6 defines "claimant" as "a person, other than an original contractor, that is entitled . . . to a lien pursuant to Section 141 . . ." yet §141 expressly applies only to the original contractor.

While the fact that other mechanics' lien statutes indicate the legislature is aware of the necessity for more precisely defining the event triggering the 75 days, the lack of clarity in §142.6 makes the lack of definition less surprising.

6. "In interpreting a statute, legislative intent is of primary concern and the plain language of the statute usually controls. Rules of statutory construction should be used only when legislative intent cannot be ascertained from the language of the statute, as in cases of ambiguity or conflict with other statutes or the Constitution." *Bank of Oklahoma v. Ashley*, 2009 OK CIV APP 50, ¶13, 212 P.3d 507 (citations omitted).

7. The following excerpt elaborates on how the timing of lien statements protects the rights of the parties involved:

(A) The effect of an "absconding" general contractor on the subcontractor's lien amount.

Let's first consider the problem of the "absconding" general contractor. By this, we mean a situation in which the owner pays the general contractor, but the general contractor does not pay the subcontractors, who then lien the owner's property. . . . First, the general contractor can abscond without paying the subcontractors, and the subcontractors can fairly assert that they are still unpaid, even if the owner can prove he paid the general contractor.

Let's use a simple example of a contract for \$200,000. The general contractor uses subcontractors and completes the job on Day 100. On Day 101 the general contractor presents his claim for \$200,000 payment, and on Day 102 the owner pays him the full \$200,000. The general contractor then absconds and does not pay the subcontractors - perhaps the general just disappears, or perhaps he takes bankruptcy. On Day 103 the subcontractors file their lien claims totaling \$200,000.

This example poses two real questions:

- (1) The owner has already paid the agreed \$200,000 price for the building; is he now going to have to pay that same price a second time? Is this \$200,000 building going to cost him \$400,000?
- (2) Was there some way the owner could have prevented this situation?

The answer to the first question is: "Yes, the owner is going to have to pay twice (a total of \$400,000) for this building if he pays the general contractor on Day 3 and does not demand lien releases." Now, let's get to the second question: How does the owner prevent this?

The law is very clear: if the owner pays inside 90 days after completion, and the general contractor then absconds with the money, the owner is liable to the subcontractors on their lien claims . . . . Thus, 42 O.S. §143 allows the subcontractors to file their lien claims up to 90 days after the job is completed. . . . The statute then tells us that:

"The risk of all payments made to the original contractor shall be upon such owner until the expiration of the ninety (90) days . . ." That same law also specifies that the owner is statutorily entitled to withhold the final payment from the general contractor until 90 days after work is completed; the statute states:

"... no owner shall be liable to an action by such contractor until the expiration of said ninety (90) days ..."

. . . When the job is complete, the general contractor will be demanding payment; he will not want to wait 90 days. However, if the owner pays the general contractor on Day 102 — as in our example — then thereafter, the general contractor can abscond with that final payment, and the subcontractors will have 88 more days to lien the owner's property. When the general contractor clamors for immediate payment on Day 102, the owner's response must be:

"We can do this two ways:

- (1) I can wait until Day 91 to pay you, that way I am absolutely sure that no subcontractor is going to lien my property, or,
- (2) You can bring me signed lien waivers from all of your subcontractors and I will give you your final payment today on Day 102, or as soon as you get the lien waivers.

In other words: No lien waivers? No payment before Day 91.

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the owner can wait 90 days. If liens are filed during that 90 days, the owner deducts the lien amounts from the general contractor's check, and then issues joint-checks to the general and the subcontractors for the lien amounts.

It is important to remember that person at most risk from an "absconding" general contractor is the owner, not the general contractor and not the subcontractors. Consequently, it is only the owner who can act to protect himself from this risk. The owner either selects one of these methods of protection, or he exposes himself to the risk.

9792 NBI-CLE 1, National Business Institute, *Mechanics' Lien Law and Strategies in Oklahoma* (2004).

8. Statutes establishing deadlines for giving notice of liens vary widely among the states. For example, in Ohio, notice of a mechanics' lien must be filed within 21 days of *first* performing labor or providing materials (Ohio R.C. §1311.05); in Florida and Minnesota, a notice of lien must be filed within 45 days after the lien claimant *first* furnished labor, services, or materials (Fla.S.A. §713.06; Minn.S.A. §514.011(2)(a)); in Texas, the mechanics' lien claimant must give notice to the owner not later than the 15th day of the second month following each month in which all or part of the claimant's labor was provided or material delivered (V.T.C.A. §53.056); Pennsylvania requires a preliminary notice on or before the date the work is completed, along with a formal notice at least 30 days before the lien claim is filed (49 Pa.C.S. §1501); Missouri requires a subcontractor to give notice of the lien 10 days before filing the lien (V.A.M.S. §429.100); and in Kansas, notice is given simply by mailing a copy of the lien statement to the owner, apparently contemporaneously with the filing of the lien (Kan.S.A. §60-1103).

9. The language requiring the pre-lien notice to be filed before the lien statement would be superfluous if we accepted Purcell's contention that the pre-lien notice must be filed within 75 days of the date labor is first supplied.

10. And by its terms, §142.6 excludes small projects (those whose aggregate claim is less than \$2,500) and residential projects.

11. The title of the bill provides:

**LIENS — NOTICE AND FILING REQUIREMENTS**

An Act relating to liens; defining terms; requiring certain notice; construing act; excluding certain claims from notice requirements; providing for contents of notice; providing for notice; requiring original contractor to provide certain information and stating consequences; stating satisfaction of notice; requiring filing of certain affidavit; stating certain consequences; . . .

2001 Okla. Sess. Law Serv. Ch. 21(S.B. No. 112), Approved April 3, 2001.

12. Express later amended its request based on supplemental fees expended and sought an award of \$9,214.75.

## 2010 OK CIV APP 16

**SEQUOYAH QUINTON, Petitioner, v.  
CHEROKEE NATION ENTERPRISES,  
HUDSON INSURANCE COMPANY, and  
the WORKERS' COMPENSATION COURT,  
Respondents.**

**Case No. 107,128. December 18, 2009**

**PROCEEDING TO REVIEW AN ORDER OF  
A THREE-JUDGE PANEL OF THE  
WORKERS' COMPENSATION COURT**

**HONORABLE RICHARD L. BLANCHARD,  
TRIAL JUDGE**

### **SUSTAINED**

**Gregory G. Meier, MEIER & ASSOCIATES,  
Tulsa, Oklahoma, for Petitioner**

**Jay L. Jones, WALLS WALKER HARRIS &  
WOLFE, PLLC, Oklahoma City, Oklahoma, for  
Respondents**

**DOUG GABBARD II, PRESIDING JUDGE:**

¶1 Claimant, Sequoyah Quinton, seeks review of an order from a workers' compensation court three-judge panel affirming the trial court's dismissal of his claim. The trial court found that the Oklahoma workers' compensation court lacked subject matter jurisdiction. We sustain the panel's decision.

### **BACKGROUND**

¶2 Claimant is a member of the Cherokee Nation. He was injured October 29, 2007, during the course of his employment as a security supervisor at Cherokee Nation Enterprises, L.L.C.'s (Employer's) casino in Catoosa, as he attempted to arrest a customer. He filed a Form 3 in Oklahoma workers' compensation court in January 2008, asserting injury to his neck, back, shoulder, and knee as the result of a work-related incident. Employer entered a special appearance and moved to dismiss, citing lack of subject matter jurisdiction.

¶3 At an April 2008 hearing, the parties submitted the following stipulations:

1. The Cherokee Nation is a federally-recognized tribe.
2. Cherokee Nation Enterprises, L.L.C. is a wholly-owned entity of the Cherokee Nation.
3. The Cherokee Nation has not expressly waived its sovereign immunity with regard to workers' compensation.
4. The U.S. Congress has not waived the sovereign immunity of the Cherokee Nation for workers' compensation purposes.
5. The Cherokee Nation has enacted and utilized its own workers' compensation ordinances and arbitration act.
6. The Cherokee Nation provides a forum for contested workers' compensation matters in its own tribal court system.
7. Claimant is a member of the Cherokee Nation.
8. Claimant is an employee of the Cherokee Nation and specifically of Cherokee Nation Enterprises.

## ANALYSIS

¶4 Without objection, Employer also admitted into evidence the workers' compensation and arbitration acts of the Cherokee Nation and its workers' compensation insurance policy with Hudson Insurance Group. The Cherokee Nation's Workers' Compensation Act states, at Section 4(A):

All Employees shall be conclusively presumed to have acknowledged the exclusive applicability of the terms, conditions and provisions of this Act, and that the Cherokee Nation is a sovereign Nation for the purposes of workers' compensation, governed by the laws set forth by the Council of the Cherokee Nation and that no other workers' compensation law, including but not limited to that of the State of Oklahoma, is applicable to injuries or death sustained by them.

The Act also requires Employer to conspicuously post a notice advising all employees of the applicability of the act, including notice that it is "the exclusive remedy" against Employer, and that "no other workers' compensation law, including that of the State of Oklahoma, is applicable to injuries or death sustained by" Employer's employees.

¶5 After reviewing the stipulations and evidence, the trial court dismissed Claimant's claim for lack of subject matter jurisdiction, finding that Employer admitted Claimant had sustained a work-related injury to his back,<sup>1</sup> that Employer's workers' compensation act provided a forum for Claimant in tribal court, that Employer's workers' compensation insurance policy did not subject Employer to the Oklahoma court's jurisdiction, and that Claimant had presented "no other evidence which would constitute a waiver" of Employer's sovereign immunity. Claimant appealed to a three-judge panel, which unanimously affirmed the trial court's decision. Claimant appeals.

### STANDARD OF REVIEW

¶6 Whether the Oklahoma workers' compensation court has subject matter jurisdiction over a claim presents an issue of law. *Hall v. Cherokee Nation*, 2007 OK CIV APP 49, ¶ 10, 162 P.3d 979, 982. This Court reviews issues of law *de novo*, that is, "a non-deferential, plenary and independent review of the trial court's legal ruling." *Cossey v. Cherokee Nation Enters. LLC*, 2009 OK 6, ¶ 3, 212 P.3d 447, 450.

¶7 The facts underlying this case are identical in all material respects to those of two published Court of Civil Appeals opinions, *Hall v. Cherokee Nation*, 2007 OK CIV APP 49, 162 P.3d 979, and *Pales v. Cherokee Nation Enterprises*, 2009 OK CIV APP 65, 216 P.3d 309. In those cases, the Court sustained dismissal of a claim filed in the Oklahoma workers' compensation court against a federally-recognized Indian tribe for lack of subject matter jurisdiction.

¶8 However, unlike the claimants in both *Hall* and *Pales*, which held that Oklahoma's "Estoppel Act," 85 O.S.2001 § 65.2, did not afford subject matter jurisdiction to the Oklahoma workers' compensation court, Claimant asserts that barring him from the Oklahoma workers' compensation courts violates his constitutional rights to equal protection and due process of law. He contends this is so because the provisions of Oklahoma's Workers' Compensation Act are more favorable to workers than the provisions of the Cherokee Nation's Workers' Compensation Act.<sup>2</sup> Essentially, he contends that the Oklahoma court's refusal to hear his suit based on its recognition of Employer's sovereign immunity is unconstitutional, and, therefore, subject matter jurisdiction lies with the Oklahoma court to decide his claim and award a workers' compensation judgment against Employer. This argument misunderstands the nature of sovereign immunity and its effect on an Oklahoma court's ability to entertain a private civil claim — regardless of its basis — against Employer.

¶9 "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 118 S. Ct. 1700, 1702 (1998). "It is the sovereignty that gives rise to the immunity from private suit in order to protect the dignity of the sovereign." *Bittle v. Bahe*, 2008 OK 10, ¶ 22, 192 P.3d 810, 819.

¶10 Here, Employer, an Indian tribe, is a sovereign entity that has not waived its immunity from being sued in and subjected to the jurisdiction of Oklahoma courts, at least in the area of workers' compensation. Regardless of whether Employer's workers' compensation statutes treat employees better or worse than the Oklahoma workers' compensation statutes, an Oklahoma workers' compensation court lacks jurisdiction to hear Claimant's claim

because Employer has not consented to allowing such an action to be brought against it — which is the essence of sovereignty. *See Bittle* at n. 10 (“Immunity from private suit is central to sovereign dignity.”). Employer’s immunity from suit means that Oklahoma courts cannot entertain Claimant’s workers’ compensation claim against Employer. The court was correct in dismissing Claimant’s claim.

### CONCLUSION

¶11 Accordingly, the order of the three-judge panel affirming dismissal of Claimant’s action for lack of subject matter jurisdiction based on Employer’s sovereign immunity is sustained.

¶12 SUSTAINED.

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

1. Employer stipulated that Claimant had sustained such an injury and that it was paying Claimant temporary total disability benefits pursuant to its workers’ compensation act.

2. The transcript of the workers’ compensation trial court hearing does not indicate that Claimant raised the constitutional arguments in that tribunal. However, he clearly asserted violation of his equal protection and due process rights in his petition for review before the three-judge panel, and Employer does not contend Claimant has waived this argument

### 2010 OK CIV APP 11

**NICHOLAS E. MARTINEZ, Plaintiff/  
Appellee, v. STATE OF OKLAHOMA *ex rel.*  
DEPARTMENT OF PUBLIC SAFETY,  
Defendant/Appellant.**

**Case No. 107,323. December 30, 2009**

APPEAL FROM THE DISTRICT COURT OF  
POTTAWATOMIE COUNTY, OKLAHOMA

HONORABLE DOUGLAS L. COMBS

### AFFIRMED

Gordon R. Melson, Seminole, Oklahoma, for  
Plaintiff/Appellee

Brian K. Morton, Assistant General Counsel,  
DEPARTMENT OF PUBLIC SAFETY, Oklahoma  
City, Oklahoma, for Defendant/Appellant

JANE P. WISEMAN, VICE CHIEF JUDGE:

¶1 State of Oklahoma *ex rel.* Department of Public Safety (DPS) appeals the trial court’s order denying DPS’s motion for new trial after having entered an order directing DPS to permit an administrative hearing on a notice of revocation of a driver’s license issued to Nicholas E. Martinez (Plaintiff). Based on our review of the facts and law, we affirm.

### FACTS AND PROCEDURAL BACKGROUND

¶2 On October 31, 2008, the Asher Police Department issued Plaintiff an “Officer’s Affidavit and Notice of Revocation/Disqualification” (notice of revocation) of his driver’s license based on the results of a blood-alcohol test. Although the notice of revocation issued to Plaintiff contained a notice that his driver’s license would be revoked within 30 days from service of the notice, it did not inform him of his right to request an administrative hearing on the revocation.

¶3 Plaintiff testified he did not become aware of his right to request an administrative hearing until January 2009 when he hired counsel to represent him. On January 21, 2009, Plaintiff’s counsel sent a letter to DPS requesting an administrative hearing on the notice of revocation. The letter stated that even though the statutory time in which to request a hearing had expired, Plaintiff was never given any oral or written notice of his right to request a hearing. In response, DPS denied Plaintiff’s request for an administrative hearing because Plaintiff failed to make a written request within 15 days after receiving the notice of revocation.

¶4 On February 18, 2009, Plaintiff filed his petition appealing the revocation to the Pottawatomie County District Court. His petition alleges that the notice of revocation “failed to inform [him] of his right to request an Administrative Hearing on the revocation within fifteen (15) days, and he therefore was unaware of that time requirement until he consulted with counsel in January 2009.” Plaintiff asked the district court to direct DPS to restore his driver’s license or, alternatively, order DPS to modify the revocation/suspension “to allow him continued driving privileges during the period of revocation/suspension.”

¶5 On April 20, 2009, Plaintiff filed an instrument entitled “Brief of Plaintiff” arguing that the notice of revocation provided to him at the time of his arrest “was facially defective causing him in effect to waive his right to an administrative hearing allowing [DPS] to revoke his driver’s license without due process.” Plaintiff contended that 47 O.S. Supp. 2008 § 754 requires the arresting officer to notify the driver both of the license revocation and of the right to request an administrative hearing within 15 days after service of the revocation notice. Plaintiff argued 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.

¶6 On May 4, 2009, the district court ordered DPS to provide Plaintiff an administrative hearing on the notice of revocation and restore his driving privileges pending the outcome of the DPS Appeal Hearing. Specifically, the district court held as follows:

7. The Court finds that the request in the Petition . . . [is] sufficient to raise the issue of an improper Notice for failure to inform the Plaintiff of his right to request an Administrative Hearing within fifteen (15) days after the issuance of the Order of Revocation.

8. The Court finds that the Notice issued to Plaintiff was different from all other forms prescribed by Defendant during that time period, in that it contained no second sheet (usually found on the reverse side of the Notice), where the Notice of a right to request an Administrative Hearing within fifteen (15) days was set out.

¶7 On May 14, 2009, DPS filed a "Motion for New Trial/Reconsideration and Brief in Support" arguing the district court erred in finding that 47 O.S. Supp. 2008 § 754(D) requires DPS to notify a licensee of the right to request an administrative hearing within 15 days. DPS also argued that the above paragraph 8 of the district court's May 4, 2009, order contained facts and findings not introduced during trial, thus depriving DPS of the right to challenge this evidence.<sup>1</sup> Plaintiff responded arguing the district court was correct in its ruling and that DPS's motion should be denied.

¶8 On June 17, 2009, Plaintiff filed a "Motion to Supplement the Record" requesting the district court to "consider a copy of an 'Officer's Affidavit & Notice of Revocation Form' that was in use at the time of this case and is now in dispute by [DPS]." On June 19, 2009, the district court denied both DPS's motion for new trial and Plaintiff's motion to supplement the record. DPS appeals.

### STANDARD OF REVIEW

¶9 "A district court exercises broad legal discretion when it considers a motion for new trial." *Ward v. State ex rel. Dep't Pub. Safety*, 2006 OK CIV APP 1, ¶ 10, 127 P.3d 643, 644. "Unless the court either clearly erred in resolving a

'pure simple question of law' or acted arbitrarily, we will not disturb its refusal to grant a new trial." *Id.* (quoting *Dominion Bank of Middle Tenn. v. Masterson*, 1996 OK 99, ¶ 16, 928 P.2d 291, 294).

¶10 To determine whether the trial court abused its discretion in refusing to grant the motion for new trial, we must examine the trial court's decision to set aside the revocation of Plaintiff's driver's license pending the outcome of the DPS appeal hearing. *Ward*, 2006 OK CIV APP 1 at ¶ 12, 127 P.3d at 645. "When reviewing an order on an implied consent revocation, this Court may not reverse or disturb the trial court's decision unless it is erroneous as a matter of law or without 'sufficient evidentiary foundation.'" *Id.* at ¶ 12, 127 P.3d at 645 (quoting *Abdoo v. State ex rel. Dep't of Pub. Safety*, 1990 OK CIV APP 2, ¶ 11, 788 P.2d 1389, 1393). We also review *de novo* a legal question regarding statutory interpretation, *i.e.*, "a non-deferential, plenary and independent review of the trial court's legal ruling." *Heffron v. District Court of Oklahoma County*, 2003 OK 75, ¶ 15, 77 P.3d 1069, 1076.

### ANALYSIS

¶11 DPS contends the trial court erred as a matter of law in finding that "47 O.S. § 754(D) requires an individual be given notice of the opportunity to have an administrative hearing."<sup>2</sup> DPS argues that the trial court interpreted the word "notice" in § 754(D) and § 2-116 "to refer to notice of an opportunity to be heard." DPS asserts, however, that the "plain meaning of the language shows that the word 'notice' used in 754(D) is referring to notice of revocation or denial, not notice of the right to an administrative hearing." Because the notice of revocation provided notice to Plaintiff that his driver's license privileges had been revoked and provided notice that this document was a "receipt and temporary driver's license which is valid for 30 days" from service of notice, DPS argues the statutory notice requirement in § 754 was met.<sup>3</sup>

¶12 In response to this argument, Plaintiff contends the notice of revocation must include both a "notice" that a driver's license will be revoked within 30 days *and* a notice of the right to an administrative hearing in order to comply with due process and the "Legislative intent in enacting the Implied Consent Statute 47 O.S. § 754."

¶13 A driver's license is a property interest protected by due process safeguards contained directly within the regulations. "[T]he right to a driver's license is a protectable property interest which may not be terminated without due process, but such due process rights are built into the regulatory procedures for the revocation of driver's licenses." *Burriss v. State ex rel. Dep't of Pub. Safety*, 1989 OK CIV APP 64, ¶ 8, 785 P.2d 332, 334; *see also Price v. Reed*, 1986 OK 43, ¶ 11, 725 P.2d 1254, 1260 ("One's claim to a driver's license is indeed a protectable property interest that may not be terminated without due process guaranteed by the Fourteenth Amendment." (Footnote omitted.))

¶14 The Oklahoma Supreme Court in *Robertson v. State ex rel. Lester*, 1972 OK 126, 501 P.2d 1099, addressed the constitutional due process requirement of Oklahoma's Implied Consent Law finding that the "Implied Consent Law conforms to the constitutional due process requirement by providing notice and opportunity for hearing, providing for administrative hearing subject to judicial review and applying to all licensed motorists in an identical manner." *Id.* at ¶ 12, 501 P.2d at 1101 (emphasis added).

¶15 In *Dablemont v. State of Oklahoma Department of Public Safety*, 1975 OK 162, 543 P.2d 563, the Oklahoma Supreme Court again addressed constitutional challenges asserted against the Implied Consent Law. Although in the final analysis the Supreme Court did not address the constitutional challenges because the licensee lacked standing, it noted that if the licensee did have standing, consideration of the impact of the United States Supreme Court case of *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586 (1971) "might" be necessary. *Dablemont*, 1975 OK 162 at ¶ 7, 543 P.2d at 564. The United States Supreme Court in *Bell* set forth minimal due process requirements for driver's license revocation cases finding that except in emergency situations, due process requires that a State must give "'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective." *Bell*, 402 U.S. at 542, 91 S. Ct. at 1591 (quoting *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 656-57 (1950)); *see also Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S. Ct. 1983, 1994 (1972) ("[T]he central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'")

¶16 It is fundamental that "due process of law" includes more than a party's right or opportunity to be heard; "it begins with a party's right to notice of the pendency of the action against them, and of the nature of any relief sought." *Baker v. Baker*, 1995 OK CIV APP 111, ¶ 14, 904 P.2d 616, 619. "The classic statement of constitutionally adequate notice is that which is reasonably calculated, under the circumstances, to inform interested persons of the pending litigation and to afford them an opportunity to advocate their interest in the cause." *Jones v. Integris Baptist Med. Ctr.*, 2008 OK CIV APP 14, n. 7, 178 P.3d 191.

¶17 DPS does not challenge the constitutionality of 47 O.S. Supp. 2008 § 754, but it does contend that the trial court misinterpreted the notice requirements set forth in this provision. Plaintiff, in contrast, asserts that the trial court properly interpreted the statute and that DPS's statutory interpretation conflicts with the legislative purpose and intent of the Implied Consent Statute in that "it would offend due process and dismiss the necessary constitutional safeguards." Plaintiff argues a violation of due process occurred when DPS failed to notify him that he had a right to request an administrative hearing.

¶18 "A principal object of statutory construction is to determine the legislative intent from an analysis of the whole act." *Maule v. Independent Sch. Dist. No. 9 of Tulsa County*, 1985 OK 110, ¶ 11, 714 P.2d 198, 203 (footnote omitted). "It is a well-accepted rule of statutory construction that a presumption of constitutionality must be applied. If a statute is susceptible of two constructions, one which will uphold the Act and its constitutionality, while the other will strike it down, it is our duty to apply the former course." *Id.* at ¶ 13, 714 P.2d at 204.

¶19 We find that when read together with all of its provisions, the statute 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. Our conclusion today both upholds legislative intent and is consistent with previous findings made by the United States Supreme Court and the Oklahoma Supreme Court.

¶20 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. The record

shows 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. We affirm its decision.

### CONCLUSION

¶21 We find the trial court correctly ordered DPS to provide an administrative hearing on a notice of revocation of Plaintiff's driver's license and correctly denied DPS's motion for new trial.

¶22 **AFFIRMED.**

BARNES, P.J., and GOODMAN, J., concur.

1. We note that because DPS does not assert these arguments on appeal, we will not consider them.

2. This provision states:

D. Upon the written request of a person whose driving privilege has been revoked or denied by notice given in accordance with this section or Section 2-116 of this title, the Department shall grant the person an opportunity to be heard if the request is received by the Department within fifteen (15) days after the notice. The sworn report of the officer, together with the results of any test or tests, shall be deemed true, absent any facial deficiency, should the requesting person fail to appear at the scheduled hearing. A timely request shall stay the order of the Department until the disposition of the hearing unless the person is under cancellation, denial, suspension or revocation for some other reason. The Department may issue a temporary driving permit pending disposition of the hearing, if the person is otherwise eligible. If the hearing request is not timely filed, the revocation or denial shall be sustained.

47 O.S. Supp. 2008 § 754.

Section 2-116 of Title 47 states in part:

Whenever the Department of Public Safety is authorized or required to give any notice under this act or other law regulating the operation of vehicles, unless a different method of giving such notice is otherwise expressly prescribed, such notice shall be given either by personal delivery thereof to the person to be so notified or by deposit in the United States mail of such notice in an envelope with first class postage prepaid, addressed to such person at the address as shown by the records of the Department. The giving of notice by mail is complete upon the expiration of ten (10) days after such deposit of said notice. Proof of the giving of notice in either such manner may be made by the certificate of any officer or employee of the Department or affidavit of any person over eighteen (18) years of age, naming the person to whom such notice was given and specifying the time, place and manner of the giving thereof.

47 O.S. Supp. 2008 § 2-116 (footnote omitted).

3. This provision states:

B. If the evidence of driving privilege surrendered to or seized by the officer has not expired and otherwise appears valid, the officer shall issue to the arrested person a dated receipt for that driver license, permit, or other evidence of driving privilege on a form prescribed by the Department of Public Safety. This receipt shall be recognized as a driver license and shall authorize the arrested person to operate a motor vehicle for a period not to exceed thirty (30) days. The receipt form shall contain and constitute a notice of revocation of driving privilege by the Department effective in thirty (30) days. The evidence of driving privilege and a copy of the receipt form issued to the arrested person shall be attached to the sworn report of the officer and shall be submitted by mail or in person to the Department within seventy-two (72) hours of the issuance of the receipt. The failure of the officer to timely file this report shall not affect the authority of the Department to revoke the driving privilege of the arrested person.

47 O.S. Supp. 2008 § 754..

2010 OK CIV APP 5

IN THE MATTER OF S.F., C.G., and M.G.,  
Alleged Deprived Children. STATE OF  
OKLAHOMA, Petitioner, v. SAMUEL  
GIVENS and DONNA GIVENS,  
Respondents, and MICHAEL WOOD,  
Respondent/Appellant, and MUSCOGEE  
(CREEK) NATION, Intervenor/Appellee.

No. 106,601. December 4, 2009

APPEAL FROM THE DISTRICT COURT OF  
OKFUSKEE COUNTY, OKLAHOMA

HONORABLE DAVID N. MARTIN, JUDGE

REVERSED AND REMANDED

Aaron T. Corbett, CORBETT LAW FIRM, PLLC,  
Oklahoma City, Oklahoma, for Respondent/  
Appellant,

Shanna Burgin, ASSISTANT ATTORNEY GEN-  
ERAL, MUSCOGEE (CREEK) NATION, Ok-  
mulgee, Oklahoma, for Intervenor/Appellee.

Kenneth L. Buettner, Judge:

¶1 Respondent/Appellant Michael Wood, natural father of S.F., appeals from the trial court's denial of his motion to reconsider the trial court's order transferring jurisdiction of this case to the Muscogee (Creek) Nation Tribal Court. The Indian Child Welfare Act (ICWA) provides that either parent may object to a request to transfer a proceeding to tribal court. The trial court transferred this deprived action to tribal court at the request of the natural parents of S.F.'s half siblings. The trial court erred in directing the transfer of the case as to S.F. over Wood's objection. We therefore reverse and remand for further proceedings.

¶2 In its Juvenile Petition, filed September 17, 2008, the State alleged that S.F., C.G., and M.G. were deprived as a result of domestic violence in the home of Respondents Donna Givens (Mother) and Samuel Givens (Step-Father) while the children were in their custody. The petition named Wood as the natural father of S.F. At a hearing held October 7, 2008, Mother and Step-Father stipulated that the children were deprived.<sup>1</sup> The parties indicated Step-Father and Mother had begun divorce proceedings in tribal court, and counsel for Mother stated her intent to file "a motion that this case be removed to tribal court for final disposition." The trial court indicated it was willing to transfer the case.

¶3 Step-Father filed a Petition to Transfer Jurisdiction of this Proceeding to the Muscogee (Creek) Nation November 5, 2008.<sup>2</sup> Hearing was held the same day. At the hearing, Wood objected to the transfer as to S.F. Counsel for Mother asserted that Mother “joins in the petition to transfer it to tribal court and [S.F.] is, the child is eligible for enrollment through . . . the natural mother.” The trial court found federal law required it to transfer the case, and entered an order transferring the case to the tribal court the same day.

¶4 Wood filed his Motion for Reconsideration November 19, 2008. Wood asserted that he is a parent as defined by ICWA and he had objected to the transfer of the case. Wood asserted that 25 U.S.C. §1911(b) provides that a state court may transfer a deprived case “absent the objection of either parent.” Wood urged the court to limit the transfer to C.G. and M.G. only.

¶5 Hearing on the Motion for Reconsideration was held December 1, 2008. The trial court entered its order denying the motion December 18, 2008. Wood timely filed his Petition in Error.

¶6 We first address the Tribe’s claim that once the court transferred the case to tribal court, the state courts lost jurisdiction, so that this appeal must be dismissed. The Tribe raised a similar argument in an earlier motion to dismiss this appeal, which the Oklahoma Supreme Court denied in an order filed April 1, 2009. The order on appeal meets the statutory definition of a final, appealable order. 12 O.S.2001 §953. We are not persuaded that Wood’s failure to request a stay of the transfer pending appeal is fatal to this court’s jurisdiction.<sup>3</sup> See *Matter of J.B.*, 1995 OK CIV APP 91, 900 P.2d 1014, where the Oklahoma Court of Civil Appeals reversed and remanded an order transferring a deprived proceeding to tribal court without a stay issued in the trial court. Rather, denying Wood a right to appeal the transfer order would be a fundamental denial of due process. *Wells v. Shriver*, 1921 OK 122, 81 Okla. 108, 197 P. 460, 478. The transfer order cannot be final until an appellate decision is final, or the time to appeal has expired.<sup>4</sup>

¶7 The applicable provision of ICWA is 25 U.S.C. §1911(b), which provides:

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled

or residing within the reservation of the Indian child’s tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, *absent objection by either parent*, upon the petition of either parent or the Indian custodian or the Indian child’s tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(Emphasis added). Wood contends that the statutory language plainly allows either parent to object. The tribe responds that the trial court must consider whether there is good cause to deny the transfer.

¶8 Only Step-Father, who is not a parent of S.F., filed the petition to transfer the case. Mother announced in court that she joined in Step-Father’s petition. Even if we assume Mother’s request to join Step-Father’s petition amounted to a petition to transfer by a parent of S.F., we nevertheless conclude the plain language of the statute requires us to hold that the trial court did not have authority to transfer the proceeding as it applied to S.F.

¶9 The right of either parent to object is absolute and such objection serves as a veto over transfer of the case to tribal court. 42 CJS, *Indians*, §161. See also, cases cited in *State in Interest of D.A.C.*, 933 P.2d 993 (Utah App.1997), where the Utah Court of Appeals noted that the majority view is that a trial court errs when it rejects a parent’s objection to transferring a case to tribal court under §1911(b). In a case addressing the applicability of §1911(a), the Supreme Court has noted there are three distinct and equally viable avenues for jurisdiction of an ICWA case to remain in state court under §1911(b):

Section 1911(b), on the other hand, creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation: on petition of either parent or the tribe, state-court proceedings for foster care placement or termination of parental rights are to be transferred to the tribal court, except in cases of “good cause,” objection by either parent, or declination of jurisdiction by the tribal court.

*Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S.Ct. 1597, 1601-1602, 104 L.Ed.2d 29, 57 USLW 4409 (1989). The Tribe’s argument that the statute requires the parent to

show good cause for his objection to the transfer is not supported by the one published case cited by the Tribe. We must interpret §1911(b) to make every word and sentence operative. *Matter of J.B., supra*, 900 P.2d at 1016. The interpretation suggested by the Tribe would require us to ignore the plain language of the statute.

¶10 The trial court abused its discretion in denying Wood's motion to reconsider. As a parent of S.F., Wood had an absolute right to object to the transfer of the deprived proceedings to tribal court.<sup>5</sup> Accordingly, the trial court's decision is REVERSED AND REMANDED for further proceedings consistent with this decision.

BELL, P.J., and HETHERINGTON, J., concur.

1. Counsel for Wood indicated that Wood was returning from military service in Iraq, but his wife had visited with S.F., and Wood hoped to get visitation and establish a relationship with S.F. Counsel indicated Wood is not a tribal member, but S.F. is. Counsel for Wood also indicated he would stipulate to the petition. The trial court set the case for a disposition hearing.

2. In his Petition, Givens asserted he was the father of C.G. and M.G., but he sought to have the entire matter transferred to the tribal court. Givens noted the Muscogee (Creek) Nation's motion to intervene had been granted October 7, 2008. 25 U.S.C.A. §1911(c) provides for intervention by the tribe:

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

3. The Tribe claims that Wood should have requested relief under the Servicemembers Civil Relief Act, 50 U.S.C. §501, *et seq.* While Wood could have done so, his objection through counsel was sufficient under §1911(b). There is no requirement that a party must personally appear and object.

4. A trial court's finding on the issue of jurisdiction is subject to direct review. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376, 60 S.Ct. 317, 319, 84 L.Ed 329 (1940).

5. We express no opinion as to whether the trial court can or should transfer separately the proceedings as to C.G. and M.G., or whether good cause would exist to deny the transfer, because that question has not been decided by the trial court.

## 2010 OK CIV APP 9

### **ARROW TRUCKING CO., INC., and OWN RISK, Petitioners, v. FELIX M. JIMENEZ and THE WORKERS' COMPENSATION COURT, Respondents.**

Case No. 106,729. December 30, 2009

PROCEEDING TO REVIEW AN ORDER OF THE WORKERS' COMPENSATION COURT

HONORABLE GENE PRIGMORE,  
TRIAL JUDGE

#### VACATED WITH DIRECTIONS

R. Jay McAtee, Tulsa, Oklahoma, for Petitioners  
Charles J. Kania, James M. Wirth, KANIA LAW OFFICE, Tulsa, Oklahoma, for Respondent Felix M. Jimenez

DEBORAH B. BARNES, PRESIDING JUDGE:

¶1 Arrow Trucking Company, Inc., and Own Risk (Employer) appeal the trial court's December 31, 2008, Order in which Felix M. Jimenez (Claimant) was awarded temporary total disability payments (TTD) and permanent partial disability payments (PPD). The Order also denied Employer's request for overpayment of TTD.

¶2 Employer asserts the trial court erred by awarding Claimant 14 weeks and one day of TTD and by denying Employer's request for credit for overpayment of TTD because Claimant should only be entitled to eight weeks of TTD. We vacate the TTD award and the denial of overpayment of TTD because we find Claimant is only entitled to eight weeks of TTD pursuant to 85 O.S. Supp. 2005 § 22(3)(d).<sup>1</sup> We direct the trial court to enter an order reflecting an overpayment of \$2,477.85, the amount having been stipulated to by the parties.<sup>2</sup>

#### **FACTS AND PROCEDURAL BACKGROUND**

¶3 On November 12, 2007, Claimant suffered an accidental, work-related injury to his neck and back arising out of and in the course of his employment with Employer. Claimant, in his brief, does not dispute that his injuries are soft tissue injuries. Claimant underwent medical treatment, but not surgery. The record does not contain any physician's recommendation of surgery.<sup>3</sup>

¶4 In the March 4, 2008, Order, the trial court found Claimant entitled to TTD "not to exceed 52 weeks." This Order expressly reserved the "determination of underpayment and/or overpayment of temporary total disability compensation . . . for future hearing."<sup>4</sup> The hearing on this matter occurred on December 18, 2008, for which both parties filed briefs. In its December 31, 2008, Order, from which Employer now appeals, the trial court found Claimant entitled to TTD benefits "for 14 weeks and 1 day" and denied Employer's overpayment claim.

#### **STANDARD OF REVIEW**

¶5 It is well-known that a decision of the Workers' Compensation Court will not be vacated on review if it is supported by any competent evidence. *Owings v. Pool Well Service*, 1992 OK 159, 843 P.2d 380; *Parks v. Norman Municipal Hospital*, 1984 OK 53, 684 P.2d 548. Under the any competent evidence standard, this Court must simply "canvass the facts, not

with an object of weighing conflicting proof to determine where the preponderance lies, but only for the purpose of ascertaining whether those facts support the tribunal's decision." *Oklahoma Gas & Electric Co. v. Black*, 1995 OK 38, ¶ 6, 894 P.2d 1105, 1107. (Citation omitted.) The meaning of statutory language, however, is a pure issue of law that stands before us for *de novo* review. *Conaghan v. Riverfield Country Day School*, 2007 OK 60, 163 P.3d 557. Our review of the Workers' Compensation Court's legal rulings is plenary, independent and non-deferential. *Id.*

## ANALYSIS

### I. Vague or Ambiguous

¶6 Employer asserts the trial court erred by not limiting Claimant's TTD benefits to eight weeks under the unanimous opinion of the Oklahoma Supreme Court set forth in *Bed Bath & Beyond, Inc. v. Bonat*, 2008 OK 47, 186 P.3d 952. In *Bed Bath & Beyond, Inc.*, the Oklahoma Supreme Court considered a first impression issue — a patent ambiguity contained in a 2005 amendment to § 22 of the Workers' Compensation Act concerning the length of time a temporarily and totally disabled worker is entitled to disability benefits for a soft tissue injury. The claimant in *Bed Bath & Beyond, Inc.* injured her back at work. She was treated conservatively at first, but was later recommended for surgery. The employer refused to authorize the surgery. The Oklahoma Supreme Court, analyzing 85 O.S. Supp. 2005 §§ 22(2)(c) and (3)(d), stated:<sup>5</sup>

"Soft tissue injury" is defined as "damage to one or more of the tissues that surround bones and joints. [It] includes, but is not limited to: sprains, strains, contusions, tendonitis, and muscle tears." Okla. Stat. tit. 85, § 22(3)(d) (Supp.2007). It is clear that the Legislature intended to limit the period of TTD for certain soft tissue injuries. Section 22(3)(d) limits benefits to eight weeks for non-surgical soft tissue injuries. If surgery is recommended, a claimant may receive court approval for an additional period of up to sixteen weeks in which the surgery may be performed on the soft tissue. Section 22(3)(d) is silent as to the period of time TTD and medical benefits are to be provided when surgery to the soft tissue is performed. Therefore, such an injury is subject to the limits imposed generally on TTD found at section 22(2)(c) which permit a maximum of 156 weeks of TTD and

medical benefits and up to 300 weeks for good cause shown.

¶7 In this case, it is undisputed that Claimant had soft tissue injuries and no surgery or surgery recommendation. As such, the trial court erred in not limiting Claimant's TTD to eight weeks.

¶8 Although Claimant asserts these statutory provisions are unconstitutionally ambiguous and vague, we note the trial court did not rule on the constitutionality of the statutes and certainly did not find the statutes unconstitutionally ambiguous or vague. The trial court, did, however, err in not limiting the TTD benefits to eight weeks.

¶9 While Claimant argues that there is "no interpretation [of the above statutory sections, § 22(2)(c) and § 22(3)(d)] that would render every part operative and therefore no interpretation can render [them] constitutional," the *Bed Bath & Beyond, Inc.* Court disagreed, stating that its analysis was intended "as binding authority for resolution of the ambiguity" between the two sections. *Id.* at ¶ 10, 186 P.3d at 955.<sup>6</sup> As a result, *Bed Bath & Beyond, Inc.* is not limited to the specific circumstances presented in that case, but construes the statute generally. Sections 22(2)(c) and 22(3)(d) are not unconstitutionally ambiguous or vague and we thus are:

... duty-bound to give effect to legislative acts, not to amend, repeal or circumvent them. ... [A] court is without authority to rewrite a statute merely because the legislation does not comport with the court's conception of prudent public policy.

*Boston Avenue Management, Inc. v. Associated Resources, Inc.*, 2007 OK 5, ¶ 11, 152 P.3d 880, 885, quoting *Fulsom v. Fulsom*, 2003 OK 96, 81 P.3d 652. Therefore, because surgery was neither recommended nor performed, § 22(3)(d) limits Claimant's TTD for soft tissue injury to eight weeks.

### II. Equal Protection

¶10 Claimant also disputes Employer's urging the application of *Bed Bath & Beyond, Inc.* to the instant appeal on the grounds that the statutory classification division between "claimants with non-surgical soft tissue injuries and all other claimants" effectuated by § 22(3)(d) "is an unconstitutional violation of equal protection." Claimant argues that such a division lacks "a rational basis."<sup>7</sup> According to the Oklahoma Supreme Court:

Rational-basis scrutiny is a highly deferential standard that proscribes only that which clearly lies beyond the outer limit of a legislature's power. A statutory classification is constitutional under rational-basis scrutiny so long as there is any reasonably conceivable state of facts that could provide a rational basis for the classification. The rational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. For these reasons, legislative bodies are generally presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.

*Gladstone v. Bartlesville Independent School District No. 30*, 2003 OK 30, ¶ 12, 66 P.3d 442, 448. (Footnotes and internal quotations omitted.)

¶11 In determining whether § 22(3)(d) is an unconstitutional violation of equal protection “[t]he critical question is whether the classification rests upon a difference which bears a reasonable relationship to any of the goals of the Workers’ Compensation Act.” *Rivas v. Parkland Manor*, 2000 OK 68, ¶ 13, 12 P.3d 452, 457. The goals of the Workers’ Compensation Act are:

. . . to provide compensation to covered workers for loss of earning capacity, while placing the burden of supporting injured workers on the industries responsible for those injuries. In the interest of the public good and creation of a more orderly system of compensation, the injured worker is not required to establish employer negligence in his pursuit of compensation. However, in exchange for the employer’s greater and more certain exposure the Act provide[s] the employer with certain advantages. It [offers] the employer a maximum loss and [makes] the employer’s liability more certain and predictable.

*Id.* at ¶ 12, 12 P.3d 452, 456. (Citations omitted.)

¶12 In sum, we look to see whether there is any reasonably conceivable state of facts that could make the classification division between claimants with non-surgical soft tissue injuries and all other claimants with soft tissue injuries reasonably related to any of the goals of the Workers’ Compensation Act. We find there are. First, it is reasonable to conceive that a worker who does not have surgery performed on his/her soft tissue injury would be in less need of extended compensation. It is reasonable to con-

ceive that a worker who does not have surgery performed suffered a soft tissue injury of lesser severity than a worker who does have surgery recommended or performed. A worker who does not have surgery, it is reasonable to conceive, would need less time to recover than a worker who does have surgery, and would, therefore, require less compensation.

¶13 Second, the classifications of surgical and non-surgical soft tissue injuries, within the vast array of soft-tissue injuries, increase the certainty and predictability of an employer’s liability. Absent § 22(3)(d), the trial court could conceivably require an employer to pay between one and 300 weeks of TTD to a claimant who suffered an on-the-job soft tissue injury. Section 22(3)(d) increases the certainty and predictability of employer liability (eight weeks of TTD) as to claimants with non-surgical soft tissue injuries.

¶14 Although § 22(3)(d) may favor employers and result in some inequality between claimants with soft tissue injuries, under the highly deferential rational-basis standard of constitutional review, we find that the statutory classification is reasonably related to legitimate government goals contained in the Workers’ Compensation Act and, therefore, is not an unconstitutional violation of equal protection.<sup>8</sup>

### III. Delegation of Judicial Power

¶15 Claimant also takes issue with Employer’s assertion that *Bed Bath & Beyond, Inc.* be applied to this case by arguing that § 22(3)(d) is unconstitutional because it delegates judicial power “to the treating physician by arbitrarily allowing the physician’s determination on surgical prospects to determine TTD status.” According to Claimant, this improperly delegates judicial authority away from the court in violation of the Oklahoma Constitution<sup>9</sup> and deprives the trial court of its discretion as the sole fact-finder. In support of this argument, Claimant relies on *Conaghan v. Riverfield Country Day School*, 2007 OK 60, 163 P.3d 557. In *Conaghan*, the Oklahoma Supreme Court considered the constitutionality of § 17(A)(2)(b) of the Workers’ Compensation Act that restricted the Workers’ Compensation Court’s determination of impairment and disability within the range of opinions of the treating physician and the independent medical examiner. Because this restriction on the Workers’ Compensation Court as fact-finder was an attempt to pre-terminate the range of adjudicative facts, the

Oklahoma Supreme Court found that portion of the Workers' Compensation Act impermissibly invaded the judiciary's exclusive constitutional prerogative of fact-finding.

¶16 Here, however, § 22(3)(d) is not an unconstitutional delegation of judicial power because it does not predetermine adjudicative facts, but rather limits an available award, based on the facts determined by the fact-finder. The trial court is left to independently determine all factual matters, such as whether the injury was a soft tissue injury and whether surgery was actually recommended or performed. Only after determining the relevant facts must the trial court submit to the compensation limitations set forth in the statute. In other words, the TTD amounts set forth in the statute are post-fact-finding, legislative limitations. Therefore, § 22(3)(d) is not an unconstitutional delegation of judicial power.

#### IV. Special Legislation

¶17 As further response to Employer's urging the application of *Bed Bath & Beyond, Inc.* to this case, Claimant argues that § 22(3)(d) constitutes "special legislation" of a kind prohibited by Okla. Const. art. 5, § 46, which states that "[t]he Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing . . . [the] limitation of civil or criminal actions . . . ." This article, then, is "Oklahoma's constitutional prohibition against special laws limiting civil actions . . . ." *Reynolds v. Porter*, 1988 OK 88, ¶ 1, 760 P.2d 816, 818.

¶18 In determining whether § 22(3)(d) is constitutional, we must first determine whether the statute is a "special law." *Id.* at ¶ 13. "A statute is a special law where a part of the entire class of similarly affected persons is separated for different treatment." *Grant v. Goodyear Tire & Rubber Co.*, 2000 OK 41, ¶ 5, 5 P.3d 594, 597, citing *Reynolds*, 1988 OK 88, 760 P.2d 816. "The number of persons . . . upon which the law has a direct effect may be very few, but it must operate uniformly upon all brought within the class by common circumstances." *Reynolds*, 1988 OK 88, ¶ 14, 760 P.2d at 822. (Footnote omitted.)

¶19 Claimant argues that § 22(3)(d) constitutes "special legislation" because it classifies "part of this homogeneous group as non-surgical and thereby [denies] that class the right to claim TTD benefits beyond eight (8) weeks..." We disagree that this statute constitutes "spe-

cial legislation." Although § 22(3)(d) separates for different treatment under the statutory benefit scheme part of the entire class of employees with soft tissue injuries, employees with soft tissue injuries do not constitute a class "of similarly affected persons." *Grant*, at ¶ 5, 5 P.3d at 597.

¶20 Section 22(3)(d) defines a soft tissue injury as "damage to one or more of the tissues that surround bones and joints. 'Soft tissue injury' includes, but is not limited to: sprains, strains, contusions, tendonitis, and muscle tears." From this language it is clear that the forms soft tissue injuries can take are myriad. Furthermore, the severity of such injuries can vary widely from a "strain" to "muscle tears." We disagree that those suffering from a soft tissue injury are members of a similarly affected class, and, therefore, the different treatment provided to those with soft tissue injuries requiring surgery and to those not requiring surgery does not constitute "special legislation."

¶21 Finally, even if § 22(3)(d) were found to be a "special law," it would be permissible. "For a special law to be permissible, there must be some distinctive characteristic warranting different treatment and that furnishes a practical and reasonable basis for discrimination." *Grant v. Goodyear Tire & Rubber Co.*, 2000 OK 41, ¶ 10, 5 P.3d 594, 598. (Citation omitted.) Whether surgery is recommended for or performed on an employee with a soft tissue injury constitutes a distinctive characteristic warranting the different treatment imposed by § 22(3)(d), and it provides a practical and reasonable basis for the discrimination. In other words, the distinction is not "arbitrary and without relation to the subject matter." *Id.* Even if § 22(3)(d) were found to be a "special law," it would be a constitutionally permissible one.

#### V. Overpayment of TTD Timely Pled

¶22 Claimant asserts that Employer failed to timely plead its claim for overpayment of TTD. Claimant points out that under Rule 16(B)(2) of the Workers' Compensation Court Rules, "[u]nless excused by the Court for good cause shown, denials and affirmative defenses shall be asserted on the Form 10 or Form 10M or shall be waived." Rule 16(B)(2), Workers' Compensation Court Rules, 85 O.S. Supp. 2006, ch. 4, app. Claimant argues that Employer's failure to plead overpayment was never excused by the Court for good cause, and, therefore, it was waived. We disagree.

¶23 The March 4, 2008, Order plainly states "THAT determination of underpayment and/or overpayment of [TTD] is reserved for future hearing." Both parties filed trial briefs, several months after the Oklahoma Supreme Court issued *Bed Bath & Beyond, Inc. v. Bonat*, addressing the impact of that case on the issue of the length of TTD to be awarded. Claimant, in its trial brief, did not object to the trial court's consideration of the issue. At the December 18, 2008, hearing, the trial court reiterated that the issue of underpayment or overpayment was reserved in the March 4 Order. The parties even entered into a stipulation as to the amount of underpayment or overpayment, depending on the trial court's ruling on that issue. For these reasons, we find the trial court implicitly found good cause shown and that, therefore, the issue of overpayment or underpayment was not waived because not specifically set forth on Employer's Form 10.<sup>10</sup> The Workers' Compensation Court has the authority to adopt rules and the authority to relax them within its discretion. *Ed Wright Construction Co. v. McKey*, 1979 OK 25, 591 P.2d 302.

### CONCLUSION

¶24 Based on our review of the record and applicable law, we vacate the TTD award in the December 31, 2008, Order, except as to eight weeks, pursuant to 85 O.S. Supp. 2005 § 22(3)(d), as clarified by the Oklahoma Supreme Court in *Bed Bath & Beyond, Inc. v. Bonat*. We direct the trial court to enter an order reflecting an overpayment of \$2,477.85, the amount having been stipulated to by the parties.

### ¶25 VACATED WITH DIRECTIONS.

WISEMAN, V.C.J., concurs, and GOODMAN, J., concurs in result.

1. Although Employer claims in its Petition in Error that the trial court erred in awarding PPD benefits, this issue is not discussed or supported by any authority in Employer's Brief-in-chief. Rather, Employer, in its Brief-in-chief "urges this Court to find error in the award of 14 weeks and 1 day of Temporary Total Disability and the denial of a request for credit for overpayment of Temporary Total Disability as the Claimant should only be entitled to eight (8) weeks of TTD under 85 Okla. Stat. §22(3)(d). No other issue is appealed." A proposition that is unsupported by citation to any authority is considered waived and will not be considered on appeal. Rule 1.11(k)(1), Okla. Sup. Ct. Rules, 12 O.S.2001, ch. 15, app. 1; *Hough v. Hough*, 2004 OK 45, 92 P.3d 695.

2. Transcript of December 18, 2008, hearing (Tr.), at p. 10.

3. Claimant testified that one of his physicians, David R. Hicks, M.D., brought up the "possibility of surgery," to which Claimant responded that he was "scared of surgery." Tr., at pp. 17-18.

4. Claimant argues that this March 4, 2008, Order, awarding Claimant TTD "not to exceed 52 weeks," was determinative of the TTD issue and that Employer's failure to appeal the March 4, 2008, Order estops Employer from subsequently asserting an overpayment claim. However, the Order plainly reserves determination of underpayment and/or

overpayment of TTD for future hearing. Claimant's estoppel argument has no merit.

5. *Bed Bath & Beyond, Inc.*, at ¶ 12, 186 P.3d at 955.

6. "Noting the 'very different approaches' to the 'patent ambiguity' in § 22 by the various divisions of the Court of Civil Appeals, the Oklahoma Supreme Court set out to provide the proper 'analysis as binding authority for resolution of the ambiguity' in § 22." *CMI/Terex Corporation v. Stevens*, 2008 OK CIV APP 102, ¶ 9, \_\_\_ P.3d \_\_\_, quoting *Bed Bath & Beyond, Inc.*, at ¶ 10, 186 P.3d at 955.

7. Claimant correctly argues under the rational-basis standard of review. "Because we are dealing here neither with a suspect classification nor with an infringement upon a fundamental right, the rational-basis standard of review governs this dispute." *Gladstone v. Bartlesville Independent School District No. 30*, 2003 OK 30, ¶ 12, 66 P.3d 442, 448. (Footnote omitted.)

8. See *Urrutia v. Wendy's Old Fashioned Hamburgers*, 2007 OK CIV APP 104, 171 P.3d 915.

9. This argument has its provenance in art. 4, § 1, of the Oklahoma Constitution, which "divides the powers of state government into three separate departments — Legislative, Executive, and Judicial — and prohibits the departments from exercising powers belonging to the others." *Conaghan v. Riverfield Country Day School*, 2007 OK 60, ¶ 20, 163 P.3d 557, 564.

10. "The trial court's decision is presumptively deemed to include a finding of every fact necessary to support it." *Willis v. Sequoyah House, Inc.*, 2008 OK 87, ¶ 15 n.18, 194 P.3d 1285, 1290 n.18. (Citations omitted.)

### 2010 OK CIV APP 6

**BILLY JOSEPH BEAL and ELLA KAY BEAL,  
Plaintiffs/Appellants, v. WESTERN  
FARMERS ELECTRIC COOPERATIVE,  
a Rural Electric Cooperative,  
Defendant/Appellee.**

**No. 106,963. October 15, 2009**

APPEAL FROM THE DISTRICT COURT OF  
BRYAN COUNTY, OKLAHOMA

HONORABLE MARK R. CAMPBELL, JUDGE

### AFFIRMED

Thomas Hadley, Hugo, Oklahoma, for Plaintiffs/Appellants Billy Joseph Beal and Ella Kay Beal,

Stratton Taylor, Toney D. Foster, Mark H. Ramsey, Clint Russell, TAYLOR, BURRAGE, FOSTER, MALLETT, DOWNS & RAMSEY, P.C., Claremore, Oklahoma, for Defendant/Appellee.

Kenneth L. Buettner, Judge:

¶1 Plaintiffs/Appellants Billy Joseph Beal and Ella Kay Beal ("Landowners") contend that the trial court erred in granting Defendant/Appellee Western Farmers Electric Cooperative's (WFEC) Motion to Dismiss on the grounds of failure to state a claim upon which relief can be granted and another action pending between the parties for the same claims, *viz.*, condemnation. Specifically, Landowners argue that their tort causes of action should not have been dismissed. We disagree and affirm.

¶2 Landowners filed their First Amended Petition September 2, 2004 alleging several causes of action, but the ones remaining on appeal are trespass, unjust enrichment, nuisance, and violation of 42 U.S.C. §1983.<sup>1</sup> The petition alleges that Landowners are residents of Bryan County, Oklahoma and that WFEC filed a petition<sup>2</sup> in August 2002 to obtain a perpetual right of way easement for an electric transmission line which would cross Landowners' property. Landowners assert that since completing the construction, WFEC has been transmitting electricity across the system and the transmissions have caused an emission of an Electro Magnetic Field (EMF) and stray electricity outside of and beyond the easement subject to the condemnation proceeding. Landowners aver that by their nature and/or intensity the transmissions are known by scientific and/or medical evidence to be dangerous and/or harmful to human and animal life.

¶3 Further, Landowners claim WFEC exceeded any authorized easement rights and uses because the EMF radiation and stray electricity crosses over and onto Landowners' nearby real and personal property which is not part of the easement which WFEC is attempting to condemn. Landowners state the stray electricity causes them damage or alternatively denies them the right to the use and enjoyment of their property, property which is not subject to the condemnation action. In that vein, Landowners allege that WFEC's use of their property not subject to the easement constitutes an unjust enrichment.

¶4 WFEC filed a Motion to Dismiss August 9, 2004 based fundamentally on the holding in *Young v. Seaway Pipeline, Inc.*, 1977 OK 249, 576 P.2d 1148, which states that "... the petition alleges that a condemnation proceeding is pending, thus limiting appellant to the assertion of his alleged damage resulting from trespass in the condemnation proceedings." *Id.* at ¶ 10, p. 1151. WFEC argues that Landowners can recover remainder damages in the condemnation proceeding. Remainder damages are damages to property not taken.<sup>3</sup> In *Western Farmers Electric Cooperative v. Enis*, 1999 OK CIV APP 111, 993 P.2d 787, the Court of Civil Appeals held that the perceived fear of an EMF could be considered in the compensation trial as a diminution in property value upon proper evidence. In that case, the condemning authority filed a motion in limine in an attempt to keep out evidence with respect to newspaper

articles and similar materials that the landowner wanted to use. The articles related to power lines and links to cancer. The Court of Civil Appeals stated, at ¶ 19, p. 793, "The offer of proof made it clear that the purpose of Ms. Long's testimony and sponsorship of these items was *not* to show EMFs cause cancer but 'simply to demonstrate that a portion of the general public ... potential purchasers ... might take *that* [i.e., the publicly disseminated information about EMFs] into account in determining whether or not they would buy [and to show] the perception created by these articles would impact the marketability of her property.'" "An expert appraiser's opinion about the impact on value of perceived fear of EMF's based on publicly disseminated information is a relevant factor in determining fair market value." *Id.* at ¶12, p.792.

¶5 Landowners responded that the law found in *Curtis v. WFEC Railroad Company*, 2000 OK 26, 1 P.3d 996, controlled the facts alleged in the present case. In *Curtis*, the Oklahoma Supreme Court held that a landowner may be entitled to damages resulting from the tortious behavior of a condemnor and further, may seek those damages in a lawsuit separately filed from the condemnation action, which is a special proceeding.

¶6 With respect to reviewing a Motion to Dismiss, the Oklahoma Supreme Court stated, in *Fanning v. Brown*, 2004 OK 7, ¶ 4, 85 P.3d 841, 844:

The standard of review for an order dismissing a case for failure to state a claim upon which relief can be granted is *de novo* and involves consideration of whether a plaintiff's petition is legally sufficient. [Citation omitted.] When reviewing a motion to dismiss, the court must take as true all of the challenged pleading's allegations together with all reasonable inferences which may be drawn from them. [Citation omitted.] "A pleading must not be dismissed for failure to state a legally cognizable claim *unless* the allegations indicate *beyond any doubt* that the litigant can prove no set of facts which would entitle him to relief." *Frazier v. Bryan Mem. Hosp.*, 1989 OK 73, ¶ 13, 775 P.2d 281, 287. (emphasis in original). Furthermore, the burden to show the legal insufficiency of the petition is on the party moving for dismissal and a motion made under 12 O.S.2001, §2012(B)(6) must separately state each omission or defect in the petition; if it does not, the

motion shall be denied without a hearing. [Citation omitted.] Motions to dismiss are usually viewed with disfavor under this liberal standard. The burden of demonstrating a petition's insufficiency is not a light one.

¶7 Landowners alleged damage to their property in that the EMF is a trespass. An EMF is intangible and consequently rarely supports a cause of action for the tort of trespass. *Vertex Holdings, LLC v. Cranke*, 2009 OK CIV APP 10, ¶15, \_\_\_P.3d \_\_\_ (“A trespass is the actual physical invasion of the property of another without permission.”) In *San Diego Gas and Electric Company v. The Superior Court of Orange County*, 920 P.2d 669 (Cal. 1996), an EMF case, the California Court, relying on its trespass analysis for noise, extended the “no physical invasion” element to intangibles. Consequently, intangible invasions or intrusions, such as noise, odor, or light, without damage, may be dealt with as nuisance cases, but usually not trespass. At 75 Am.Jur.2d Trespass §27 (2009), it is stated in the observation:

Generally, intangible intrusions, such as by noise, odor, or light alone, are treated as nuisance, not trespass. The basis for this distinction, in the case of intrusive odors, is that they interfere with nearby property owners' use and enjoyment of their land, not with their exclusive possession of it.

To recover in trespass for an intangible invasion to property, a plaintiff must show: (1) an invasion affecting an interest in exclusive possession; (2) the act resulting in the invasion was intentional; (3) reasonable foreseeability that the act could result in an invasion of the plaintiff's possessory interest; and (4) substantial damage to the property. Thus, intangible intrusions on land, such as electric and magnetic fields emitted from power lines, are not actionable as trespasses, unless they cause physical damage to the real property.

As a result, we hold that dismissal of the trespass claim was valid on both grounds relied upon by the trial court. First, the emission of an EMF or stray electricity from an electrical transmission line is insufficient to support a claim of trespass. Secondly, even if such emissions constituted a trespass, it would constitute damage to the remaining property under 66 O.S. 2001 §53(D). *Young, supra* requires that

such a claim be asserted in the pending condemnation action.<sup>4</sup>

¶8 Landowners also fail to state a claim for unjust enrichment. The eminent domain laws grant WFEC the authority to take Landowners' property, but require just compensation for the property taken and any damages to the property not taken. There can be no unjust enrichment under our statutory scheme under the facts alleged.

¶9 With respect to Landowners' §1983 claim, Landowners allege that the claim is not based on damages from the property taken by WFEC under eminent domain. Specifically, Landowners argue their claim does not involve an easement or easement rights. As a result, Landowners rely on no state action, which is a requirement for a §1983 action. 42 U.S.C. §1983. This claim was properly dismissed.<sup>5</sup>

¶10 Finally, we address Landowners' nuisance claim. Paragraph 19 of their Amended Petition alleges that the emission of an EMF and/or stray electricity on non-easement property constitutes a nuisance.

A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either:

First. Annoys, injures or endangers the comfort, repose, health, or safety of others; or

...

Fourth. In any way renders other persons insecure in life, or in use of property, provided, this section shall not apply to preexisting agricultural activities.

50 O.S.2001 §1.

¶11 There have been two previous appeals in this case, both of which addressed the nuisance claim. In No. 104,643, the Court of Civil Appeals held the following:

Additionally, the Court of Civil Appeals [in appeal No. 98,917] rejected landowners' argument that the construction of the power transmission lines constitutes a public nuisance, citing *In re Petition of Grand River Dam Authority*, 1971 OK 48, 484 P.2d 505, and 18 O.S.2001 §§437.2(d), (h), (k) and noting “nothing done under express authority of a statute can be deemed a nuisance.”

Because the Court of Civil Appeals previously addressed and decided these issues in its Opinion on the prior appeal of the injunction in No. 98,917, the decision therein is now the law of the case.

*Western Farmers Electric Cooperative v. Beal, et al.* (May 17, 2007).<sup>6</sup>

¶12 Title 50 O.S.2001 §4 provides: “Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.” In accordance with the law of the case, the dismissal of Landowners’ nuisance action was properly dismissed.

¶13 AFFIRMED.

BELL, P.J., and JOPLIN, J., (sitting by designation), concur.

1. The hearing on WFEC’s Motion to Dismiss was conducted October 5, 2004, and a minute order was filed May 18, 2005. However, no journal entry was prepared and filed until April 30, 2009. In Landown-

ers’ Motion to Reconsider and Request for Findings of Fact and Conclusions of Law, filed January 16, 2009, Landowners state “For purposes of this Motion, Plaintiff would urge only trespass, [negative] unjust enrichment and nuisance. The other claims therein made would be agreed to be dismissed.” However, the Petition In Error includes the §1983 claim and specifically excludes the original assault claim.

2. Condemnation petition filed in Bryan County by WFEC against Landowners in No. CV-2002-409. WFEC advises that damages in the condemnation case are still pending trial.

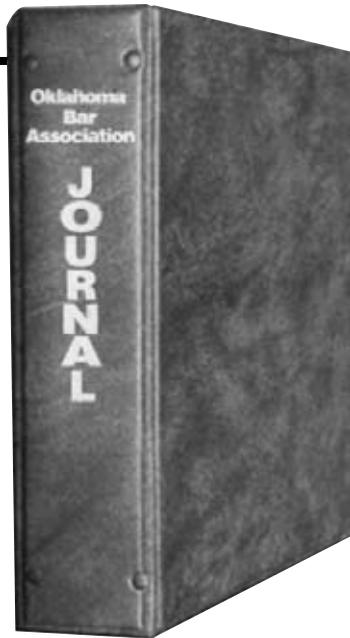
3. OKLA. CONST. art. 2, §24. **Private property — Public use — Character of use a judicial question**

Private property shall not be taken or damaged for public use without just compensation. Just compensation shall mean the value of the property taken, and in addition, any injury to any part of the property not taken....

4. Landowners argue that WFEC should have taken a larger easement which would have alleviated their concern. This demonstrates that any diminution of value of the remaining land can be determined in the condemnation proceeding.

5. While WFEC admitted state action was involved in this claim insofar as eminent domain statutes are considered, this is not the basis of Landowners’ claim. Also, see *Baldwin v. Appalachian Power Co.*, 556 F.2d 241 (4th Cir.1977)(§1983 claim dismissed where power company, by being granted power of eminent domain acted under color of state law, the plaintiff, who complained of power lines on his property, failed to demonstrate a violation of a federally protected right.)

6. Appeal No. 98,917 is styled *Western Farmers Electric Cooperative v. George Cotter, Billy Joseph Beal and Matilda Beal*, filed October 14, 2003.



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**LITIGATION SUPPORT SERVICES:** Need litigation support but want to avoid the expense of hiring an associate? Contact TulsaContractAttorney@yahoo.com to learn how an experienced contract attorney can benefit your practice by providing litigation support services on an as-needed basis. Specializing in appeals, research and writing.

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**EXECUTIVE SUITES FOR LEASE:** Beautifully restored building in Downtown/Midtown Arts District. Walking distance to County and Federal Courthouses. Reception, phone, internet, cable tv, copy/fax/scanner, free parking. Secretarial suites available. Case sharing opportunities with 6 practicing attorneys. (405) 272-0303.

**DOWNTOWN TULSA OFFICE SPACE** – One office for rent with space for support staff. Space includes reception area, conference room, copy machine, fax and Internet access. Additional services available. Contact (918) 583-6964 or (918) 582-8803.

**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.

**POSITIONS AVAILABLE**

**MIDSIZE TULSA LAW FIRM,** seeking trial lawyer with 0-5 years experience to handle all phases of personal injury litigation. Salary commensurate with experience. Please send resume, references and writing sample to Box "W," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

**PARALEGAL /LEGAL ASSISTANT** (Part-time possibly turning into full-time.) Small south central Oklahoma law office looking for a highly knowledgeable individual proficient in Microsoft Word and Outlook. Responsible for maintaining dockets, drafting, editing and proofreading documents and other duties as needed. Please e-mail Resume' and References to cindy@cajohnsonenterprises.com.

**ADMINISTRATIVE ASSISTANT WANTED** for executive offices of the Oklahoma Education Association. Proficiency in all computer applications and electronic media required. Prior experience with client relations and general office management desired. Salary range in low \$30's depending upon experience. Liberal fringe benefits, including employer paid health insurance premium, defined benefit pension plan and matching 401(k) contributions. Send resume to Lynn Tiefertalder, Oklahoma Education Association, P.O. Box 18485, Oklahoma City, OK 73154 by March 12, 2010. EEO Employer.

## POSITIONS AVAILABLE

LESTER, LOVING & DAVIES PC, is looking for a highly skilled legal assistant with experience in federal complex civil litigation including labor and employment, business litigation, bad faith litigation, and cases with significant document management responsibilities and ESI. Send resume to Lester, Loving & Davies, 1701 South Kelly Avenue, Edmond, OK 73013.

PARALEGAL/LEGAL ASSISTANT NEEDED for busy, well-established, north side Personal Injury law firm. Salary DOE. Please email resumes to: Ray@mapleslawokc.com.

OKLAHOMA BASED, MULTI-STATE FIRM SEEKS ASSOCIATES for Oklahoma offices, several locations statewide. Emphasis on Family Law and Child Support Enforcement. Strong work ethic and self motivation skills required. All replies considered confidential. Send resume and salary requirements to: "Box B," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

ESTABLISHED ATTORNEYS IN NORTH OKC are looking for attorney to share office space. Some overflow work available. Experience in oil and gas and title law is required. Also, excellent space to share with established attorney. Send resume to lawyerneeded963@cox.net.

**IN-HOUSE REAL ESTATE ATTORNEY.** Solid OKC-based national corporation seeking an attorney with 3 to 7 years of experience. Strong transactional experience is required. Experience with real estate transactions, especially commercial leasing, is a plus. Position will provide counsel to the company's real estate and construction departments. Duties will include negotiating and drafting commercial lease documents, resolving disputes with existing leases, and providing counsel on a wide variety of real estate and construction issues. Exceptional working environment, competitive salary, medical/dental plan, life ins., 401k, etc. Applications MUST include resume, writing sample, and salary requirements. Send to "Box CC," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

FOLIART, HUFF, OTTAWAY & BOTTOM seeking motivated associate with 0-3 years defense litigation experience for challenging position with heavy emphasis on discovery and trial preparation in defense of medical negligence cases. Must be detail oriented and have excellent writing skills. Competitive salary and benefits. Send resume, transcript and writing sample to davidmcp@mail@oklahomacounsel.com.

## POSITIONS AVAILABLE

SPANISH SPEAKING LEGAL ASSISTANT 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 or fax resume to (405) 232-2276.

OKLAHOMA CITY LAW FIRM, seeking trial lawyer with two to five years experience to handle all phases of Personal Injury litigation. Please send resume and references to "Box T," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

DOWNTOWN OKLAHOMA CITY, AV RATED, INSURANCE DEFENSE LAW FIRM with emphasis on Commercial Trucking Litigation, seeks associate attorney with 0-2 years of litigation experience, good writing skills and looking for new challenges. Compensation package is commensurate with level of experience. Please send resume in confidence via email to karen@millsfirm.com.

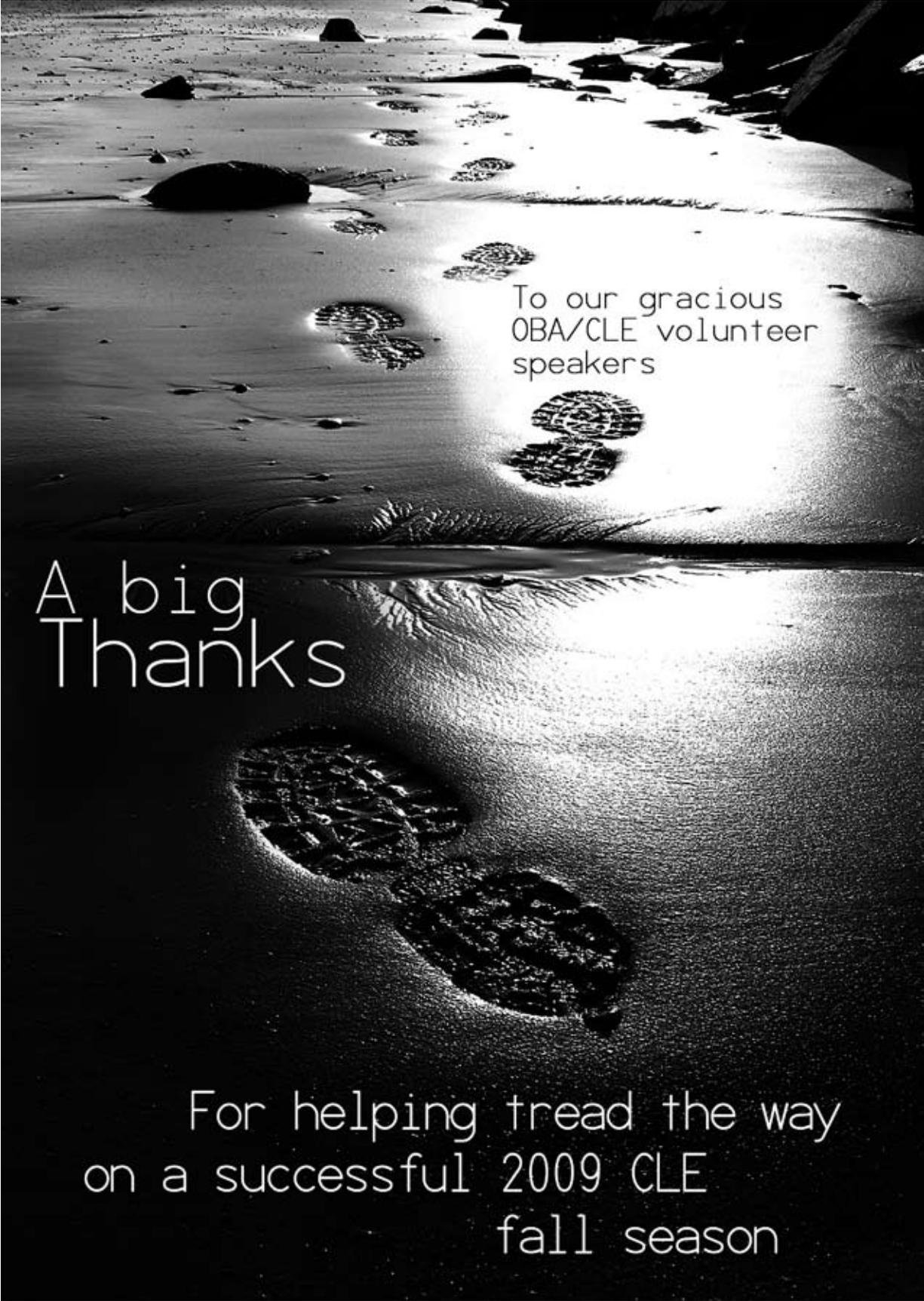
TULSA AV RATED LAW FIRM SEEKS ATTORNEY with ten (10) years of business-corporate/securities experience (specifically 1933 Act and 1934 Act) who is looking for new challenges and affiliation with an established and growing law firm. The ideal candidate will have some existing clients, but not a full load. Competitive compensation package commensurate with level of experience and qualifications. Competitive benefit package including bonus opportunity, health insurance, life insurance, and 401K with match. Applications will be kept in strict confidence. Please send resume to "Box J," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

DOWNTOWN OKLAHOMA CITY, AV RATED, product liability and insurance defense firm seeks attorney with at least 5 years of experience. Please send resumes to "Box L," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

TULSA OKLAHOMA LAW FIRM SEEKS ASSOCIATE ATTORNEY with 1-4 years of litigation experience. Experience in Family, Criminal, or Workers' comp law is helpful. Salary is determined by level of experience. Resume to charles@kanialaw.com.

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