ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

DON KEENAN,	)	FILED SUPREME COURT STATE OF OKLAHOMA
	)	
PLAINTIFF/APPELLEE,	)	MAY 19 2025
	)	
v.	)	**SUP.CT.CASE NO. 122686** JOHN D. HADDEN
	)	**District Court Case No. CV-2023-302** CLERK
TODD RUSS, in his capacity as The TREASURER of the STATE of OKLAHOMA,	)	
	)	
DEFENDANT/APPELLANT	)	

STATEMENT/BRIEF ON EFFECT OF APPELLEE'S DEATH

Collin R. Walke, for appellee, Don Keenan's ("Appellee"), *Statement/Brief on Effect of Appellee's Death,* states as follows:

Received:
Docketed:
Marshal: 5.19.25
COA/OKC:
COA/TUL: SM

INTRODUCTION

This appeal arises out of a now-deceased taxpayer's constitutional challenge to the Energy Discrimination Elimination Act, Okla. Stat. tit. 74, § 12001, *et seq.* (the "Act"). *See*: ROA, Tab 1, *Verified Petition*, at ¶1 and *Petition in Error*, at Exhibit "C," ¶¶3-7. The trial court entered summary judgment in Appellee's favor and found the Act unconstitutional on five (5) different claims, to-wit: The Act violates Art. 23, § 12, Art. 2, § 7, Art. 2, § 22, Art. 5, § 46, and Art. 2, § 6 of the Oklahoma Constitution. *See*: *Petition in Error,* at Exhibit "C." Accordingly, this appeal does not involve personal injury to an individual, akin to a tort or contract claim, but does present an issue of "[s]ubstantial and broad public interest"[1]; and therefore, as will be shown, either no substitution is required or liberal substitution with a new taxpayer should be permitted.

ARGUMENT AND AUTHORITIES

PROPOSITION I. OKLA. STAT. TIT. 12, § 2025 IS PART OF THE OKLAHOMA PLEADING CODE AND ONLY APPLIES TO DISTRICT COURTS.

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[1] *In re Guardianship of Doornbos*, 2006 OK 94, ¶4, 151 P.3d 126, 126.

As an initial matter, this Court is not bound by the procedures set forth in Okla. Stat. tit. 12, § 2025. Section 2025 is found in the Oklahoma Pleading Code and only applies to district court proceedings. *See*: Okla. Stat. tit. 12, § 2001 (explaining that the Oklahoma Pleading Code "governs the procedure ***in the district courts of Oklahoma"*** and applies to "Sections 1 through 2027 of [Title 12]"; therefore, § 2025 only applies to the "district courts of Oklahoma[.]")(Emphasis supplied.) Thus, per the plain language of § 2001, § 2025 does not apply to appellate proceedings. This reasoning is clearly and unequivocally supported by the Federal Rules of Civil Procedure.[2]

"***While Rule 25(a)(1) governs substitution motions filed before the district court***, substitution motions made before the court of appeals are decided under Fed.R.App.P. 43. Unlike Fed.R.Civ.P. 25(a)(1), ***Rule 43 does not specify any time period for substitution.***" *Servidone Construction Corp. v. Levine*, 156 F.3d 414, 416 (2nd Cir.1998)(citation omitted)(emphasis supplied); *see also, Air Line Pilots Association International v. Texas International Airlines, Inc.*, 567 F.Supp. 78 (S.D.Tex.1983)(providing, in relevant part: "Rule 25(c), Fed.R.Civ.P., has application ***only to actions 'pending' in the district courts***.")(citations omitted)(emphasis supplied). All Fed.R.App.P. 43 provides in a circumstance such as this is that the court of appeals may "direct appropriate proceedings." *See*: Fed.R.App.P. 43(a)(1).

Consequently, Appellant's reliance[3] upon the pre-Pleading Code[4] case of *Gardner v. Boston*, 1977 OK 201, 571 P.2d 437 to suggest that § 2025's district court substitution procedure is equivalent to now-repealed Okla. Stat. tit. 12, § 1080 is misplaced. Okla. Stat. tit. 12, § 1080

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[2] *See: Campbell v. Campbell*, 1994 OK 84, ¶19, 878 P.2d 1037, 1041 (noting that Oklahoma courts may look to federal courts for guidance in interpretation of Okla. Stat. tit. 12, § 2025).
[3] Appellant's *Response to Appellee's Motion for Leave of Court to Substitute Party*, at p.1.
[4] *See e.g., Gens v. Casady School*, 2008 OK 5, ¶9, 177 P.3d 565, 569, (the Oklahoma Pleading Code was adopted in 1984).

used to provide: "When a party dies ***prior to final judgment*** and ***the cause of action*** survives, a motion to substitute the representative or successor in interest of the decedent may be made by any party to the action or by the representative or successor of the deceased party. . . ." *Gardner*, at ¶10, 439 (emphasis supplied). Comparatively, § 2025 says nothing about a "final judgment" or "cause of action," but rather, "[i]f a party dies and ***the claim*** is not thereby extinguished, the court may order substitution of the proper parties." (Emphasis supplied.)

As this Court has often emphasized, there is a distinction between a "claim" and a "cause of action" by explaining that while "different theories of liability may be pressed in support of each claim, only a single cause of action can ordinarily be predicated upon one occurrence or transaction." *Rodgers v. Higgins*, 1993 OK 45, ¶4, 871 P.2d 398, 403. Moreover, Appellee no longer has claims, Appellee has a judgment. *See e.g., Tuttle v. Pilant*, 1994 OK 141, ¶7, 890 P.2d 874, 877 (explaining a court's authority to "***render judgment on [a plaintiff's] claim***")(emphasis supplied); *see also*, Okla. Stat. tit. 12, § 696.2(E)(explaining that "the adjudication of any issue shall be enforceable ***when pronounced*** by the court in...permanent injunction [actions]." (Emphasis supplied.) Therefore, per the plain language of § 2025(A), the same is not applicable because Appellee no longer has claims, Appellee has a judgment. Thus, § 2025 is inapplicable to the case at bar, and *Gardner* is no longer good law.

PROPOSITION II. PURSUANT TO OKLA. STAT. TIT. 12, § 1081, NO SUBSTITUTION IS REQUIRED.

Okla. Stat. tit. 12, § 1081(a) states that if "a party dies after verdict is rendered, judgment may be rendered on the verdict although the representative or successor of the decedent has not been substituted as a party to the action." Here, there was a verdict. *See*: Okla. Stat. tit. 25, § 22 ("The word 'verdict' includes not only the verdict of a jury, but also the finding upon the facts, of a judge, or of a referee appointed to determine the issues in a cause."); *see also, Shrier v. Morrison*,

1960 OK 95, ¶20, 357 P.2d 196, 204 (providing: "this court has consistently held that in a jury-waived law action, a general judgment constitutes a finding of every fact necessary to support it and that it has the same force, effect, and conclusiveness as a judgment in accord with a verdict.") Further, a "judgment" was entered in this matter by virtue of the trial court's disposition of all issues before the court. *See e.g.*, Sup.Ct.R. 1.20(a)("A judgement is the final determination of the rights of the parties in an action. 12 O.S. § 681. The term 'judgment' is synonymous with a final order for the purpose of these rules."); *see also*, Petition in Error, at II (indicating "the judgment or order on appeal dispose[s] of all claims by and against all parties[.]"); *see also*, Okla. Stat. tit. 12, § 696.2(E) (injunction judgments are effective upon pronouncement). Thus, a judgment exists, and nothing within § 1081(a) requires substitution.

Next, Okla. Stat. tit. 12, § 1081(b) provides:

> If a plaintiff dies after verdict or after judgment and the verdict and judgment are in his favor, his representative or successor ***may*** be substituted for him upon motion of any party to the action with notice to the representative or successor, or substitution may be made upon motion of the representative or successor of the decedent. Such motion ***may be made at any time before the judgment becomes dormant*** but it must be made before action is taken to enforce the judgment. A delay in substituting the representative or successor of the decedent shall not affect the validity of a judgment lien.

(Emphasis supplied.) Section 1081(b)'s substitution requirements are completely permissive. *See: Grisham v. City of Oklahoma City*, 2017 OK 69, 404 P.3d 843, n.8 ("A long-standing rule of statutory construction is that 'may' generally denotes permissive or discretional, while 'shall' is ordinarily interpreted as implying a command or mandate. . . .)(citation omitted). The only caveat in § 1081(b) is that substitution is required "before action is taken to enforce the judgment."

However, permanent injunctions become effective upon pronouncement. *See*: Okla. Stat. tit. 12, § 696.2(E); *see also, Barrett v. Barrett*, 1952 OK 327, ¶9, 249 P.2d 88, 90 ("A judgment is

'rendered' when it is pronounced by the court."). Therefore, § 1081 indicates that there is no consequence as to the effect of the judgment upon the passing of a party because ***the judgment is already effective***. Since the judgment is already effective, there is no need to substitute a party in order to "enforce the judgment." Therefore, nothing within § 1081(b) requires substitution.

Indeed, the fact that no substitution is required is evinced by this Court's prior precedents when an individual dies on appeal. For example, in and *Smith v. Kimsey*, 1943 OK 121, 138 P.2d 94, the appellee passed away after submission of the appeal to the Court, but before the appeal was decided. *See: Id.*, at ¶1, 95 (per curiam). Because the death did "***not impair the validity of the judgment***," no substitution was necessary, and the Court instead refiled the opinion as of the date it was submitted in order to avoid prejudice to the parties. *See*: *Id.* (Emphasis supplied.) Alternatively, this Court could look to *House v. Gragg*, 1934 OK 601, 44 P.2d 832, wherein the appellant filed a motion to set aside the Court's opinion "on account of the death [of appellant]." *House*, at ¶1, 838. In response, and relying upon yet another case, *Spencer, Adm'x v. Hamilton*, 1932 OK 87, 13 P.2d 81, this Court said, "'While the fact of said death between the submission and decision ***does not impair the validity of the judgment***, in order to preserve all rights thereunder, said decision and opinion filed herein ...is hereby recalled and set aside, and ***the clerk of this court is directed to refile said opinion and enter the judgment of this court in this cause nunc pro tunc, as of...the date when said cause was submitted***.'" *Id.* (Emphasis supplied.)

Thus, the death of a party on appeal "does not impair the validity of the judgment," but rather, would normally require the Court to reissue its opinion as of the date the appeal was submitted in order to allow enforcement of the judgment by a substituted party. Here, since the death does not impair the validity of the judgment, and the judgment was valid when pronounced, there would be no need to *nunc pro tunc* the date of any opinion back to the date of submission

because the judgment does not need to be "enforced" – it is already in force until this Court says otherwise. Indeed, there is no stay as to the effectiveness of the district court's judgment.

PROPOSITION III. TAXPAYER STANDING IS NOT EQUIVALENT TO INJURY-IN-FACT STANDING, AND THIS COURT POSSESSES THE POWER TO GRANT STANDING.

A. TAXPAYER STANDING IS INHERENTLY REPRESENTATIVE.

This Court has made it clear that taxpayer standing "does not permit private individuals to restrain public officials to correct purely public wrongs, but restricts the right of a private individual to that class of cases which involves the creation of debts illegally against, or the wrongful expenditure of the moneys of, ***the taxpayers***." *Oklahoma Public Employees Association v. Oklahoma Department of Central Services*, 2002 OK 71, ¶14, 55 P.3d 1072, 1079 (citations omitted)(emphasis supplied). As held in *Oklahoma Public Employees Association,* "a taxpayer possesses standing to seek equitable relief when alleging that violation of a statute will result in ***illegal expenditure of public funds.***" *Thomas v. Henry*, 2011 OK 53, ¶6, 260 P.3d 1251, 1254 (emphasis supplied). In other words, the focal point of taxpayer standing is not on the individual, but rather on the taxpayers of Oklahoma writ large, and the expenditure of taxpayer dollars.

"In *Vette v. Childers*...the [C]ourt explained: 'A resident taxpayer has an equitable ownership in funds in the state treasury, and, although ***no private interest***, he may invoke the interposition of a court of equity to restrain the payment of money appropriated by the Legislature in violation of the Constitution." *Fent v. Contingency Review Board*, 2007 OK 27, 163 P.3d 512, n.23 (emphasis supplied). Further, in *Oklahoma Public Employees Association*, *supra*, this Court permitted associational standing based upon the Oklahoma Public Employees Association's members being taxpayers. This is because taxpayer standing is not "personal" to the individual, unlike injury-in-fact standing. "It is certainly true that in some circumstances where a state statute

is violated the plaintiff, regardless of taxpayer status, must seek relief for an injury specific to that individual that is not shared with the public at large." *Oklahoma Public Employees Association,* at 1078, ¶12.

Thus, a cause of action brought by a taxpayer is inherently representative and not personal. Because the cause of action is representative, the concept of a "successor or representative of the deceased party" as contemplated by Okla. Stat. tit. 12, § 1081 or § 2025 cannot be applicable, because a "successor or representative" is limited to some type of an administrator or distributee of the estate of the deceased plaintiff. *See e.g., Ashley v. Illinois Central Gulf Railway Company*, 98 F.R.D. 722, 724 (S.D.Miss.1983)(providing: "Unless the estate of a deceased party has been distributed at the time of the making of the motion for substitution, the 'proper' party for substitution [under Fed.R.Civ.P. 25] would be either the executor or administrator of the estate of the deceased. 'Successors' would be the distributees of the decedent's estate if his estate had been closed."). Thus, unlike a personal injury case, where by law one inherently succeeds to the decedent's claim, in this case ***if, and only if, the administrator or distributees of the decedent's estate are resident taxpayers would the successor be capable of proceeding forward. Indeed, it is wholly unclear whether the estate itself would be a "taxpayer" sufficient to warrant standing.***

In other words, if a "successor or representative" were appointed, standing could be destroyed because there is no guarantee that the "successor or representative" would be a taxpayer. In injury-in-fact cases, this would not be a problem because the injury is personal to the individual. Here, the injury is to the taxpayers of the State of Oklahoma. Therefore, application of the substitution rule would create an absurd situation: If a person died on appeal in a tort action, the claim would inherently continue. However, if a person died on appeal in a taxpayer standing case,

the claim may or may not continue depending on the taxpayer status of the "successor or representative."

One of the purposes of Fed.R.Civ.P. 25 "is to protect the repose of decedents' estates by preventing interminable delays in the distribution of assets and the closing of estates." *Cheramie v. Orgeron*, 434 F.2d 721, 725 (5th Cir.1970). In this case, no assets or liabilities would result to Appellee's estate upon resolution of this matter. Thus, there is no basis for requiring substitution in a case such as this.

B. THIS COURT POSSESSES THE POWER TO GRANT STANDING.

In *Hunsucker v. Fallin*, 2017 OK 100, ¶5, 408 P.3d 599, 602 this Court stated that it "possesses discretion to grant standing to private parties to vindicate the public interest in cases presenting issues of great public importance." This discretion is properly exercised to grant standing where there are "competing policy considerations" and "lively conflict between antagonistic demands." *Id.* In *Application of Goodwin*, 1979 OK 106, ¶3, 597 P.2d 762, 764 this Court stated that "the unanswered questions inevitably would be pressed on us for settlement in litigation yet to follow. An early decision is clearly in the best interest not only of the general public but of the lending institutions and the financial community as well. The same course is also indicated by judicial economy and by a sense of concern for the prompt resolution of important public rights."

Here, there is no question that litigation would ensue again if this matter were dismissed due to a lack of substitution as there is already a taxpayer willing and able to be substituted as a party in this action if necessary. Moreover, there is no question that this matter would be presented right back to this Court, because the Oklahoma County District Court rules require any refiled

action, irrespective of whether the parties are identical, to be assigned to the same judge.[5] Therefore, in the interests of judicial economy, this Court should not require substitution, or, alternatively, substitution should be permitted with a taxpayer in the state of Oklahoma.

C. APPELLEE'S PASSING SHOULD NOT EFFECT A DECISION IN THIS MATTER.

Appellee's counsel acknowledges the long-standing rule in Oklahoma that the "power of an attorney terminates upon the death of his principal and that attorney does not act for the deceased's representatives or successors until those successors are officially appointed as representatives and after they then retain the deceased's attorney." *Warehouse Market, Inc. v. Layman*, 2008 OK CIV APP 78, ¶10, 194 P.3d 786, 789. However, as pointed out previously, the problem with this rule as applied to this case is that Appellee's "representatives or successors" may not be resident taxpayers of the state of Oklahoma.[6] Moreover, this is an expedited appeal under Sup.Ct.R. 1.36, which explains that the "appellate court shall confine its review to the record actually presented to the trial court." Thus, under normal circumstances, no further briefing or action on the part of Appellee's counsel would be necessary – and just like *Smith v. Kimsey*, *House v. Gragg*, and *Spencer, Adm'x v. Hamilton*, *supra*, - a decision could be rendered, and the opinion simply backdated to the date of submission to avoid prejudice to any party.

However, here, the Court has ordered additional briefing per Sup.Ct.R. 1.36(g). The consequence is that Appellee's counsel must now act in order to rebut any brief filed by Appellant. Such response brief would only contain prior arguments already proffered and authorized by Appellee prior to his passing. Therefore, this Court could rescind its order for additional briefing or alternatively, simply permit Appellee's counsel to submit briefs based off of prior arguments.

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[5] *See*: Oklahoma County District Court Rule 8(A).

[6] Appellee's counsel is not aware of the status of any probate or trust matters with regard to Appellee's estate.

To the extent that the Court believes a "person" must actually stand in the shoes of Appellee, Appellee does have a resident taxpayer ready to be substituted, and the same should be permitted. If the need for substitution is based upon a real party in interest test, then any taxpayer fulfills that requirement. Accordingly, substitution of a different taxpayer real party in interest – who would have the exact same interest Appellee had (i.e., taxpayer standing) – would be an appropriate and equitable result. Otherwise, precious judicial resources would be wasted in reinitiating litigation in the district court, only to be appealed back to this Court again. Accordingly, either no substitution is required, or liberal substitution of another taxpayer should be allowed.

WHEREFORE, Appellee, Don Keenan, prays that this Court either permit this matter to move forward without substitution or permit a resident taxpayer to be substituted for Appellee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 19th day of May, 2025, I mailed a true and correct copy of the above and foregoing via U.S. Mail, postage prepaid, to the following persons:

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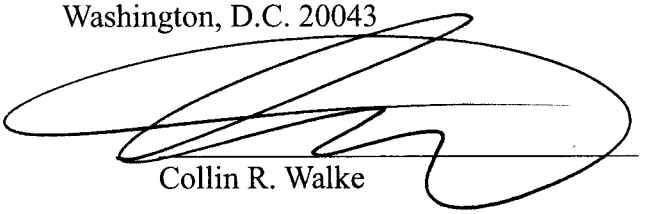

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