IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

#118818

LUCAS CALBREATH, BRAYDEN CALBREATH, MERCEDES REVELS, Petitioners,	)
v.	) No._____
HONORABLE WILLIAM D. LAFORTUNE, Judge of the District Court of Tulsa County, 14th Judicial District, Respondent,	) Tulsa County Case No. SC-2020-5176) Tulsa County Case No. SC-2020-5247
PECAN CREEK - GMC LP and WOODLAND APARTMENTS LLC, Real Parties in Interest.	)

BRIEF IN SUPPORT OF APPLICATION TO ASSUME ORIGINAL JURISDICTION AND PETITION FOR WRIT OF PROHIBITION

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ATTORNEYS FOR PETITIONERS

June 1, 2020

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SUMMARY OF THE RECORD

Real Parties in Interest, PECAN CREEK - GMC LP and WOODLAND APARTMENTS LLC, filed Forcible Entry and Detainer Actions in the Tulsa County District Court in SC-2020-5176 and SC-2020-5247. A Summons was issued and served for each case. The Summonses direct the Petitioners/Tenants to appear for trial at 500 S Denver Avenue, Room 112, Tulsa, Oklahoma 74103. The Summons in SC-2020-5176 was served on Petitioner Mercedes Revels on April 27, 2020; the Summons in SC-2020-5247 was served on Petitioners Lucas and Brayden Calbreath on May 11, 2020.

On May 27, 2020, the Tulsa County District Court temporarily moved the location of future Small Claims Actions to 500 West Archer Street, Room 6, Tulsa, Oklahoma 74103, more than half a mile away. A press release was issued by the Tulsa County District Court detailing the changed location. Tenants affected by the change in location were not given any new or additional notice about the change. On May 29, 2020, the Tulsa County Administrate Order Phase Two permanently changed the location of the small claims docket.

INTRODUCTION

The Oklahoma Constitution commands:

> "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."
>
> and that
>
> "No person shall be deprived of life, liberty, or property, without due process of law."
>
> *Okla. Const. art. 2, §§6 and 7.*

"Article 2, Section 7 of the Oklahoma Constitution incorporates the principle of access to the courts in its meaning of due process" and "notice and an opportunity to be heard are two essentials of due process of law." *Johnson v. Scott*, 1985 OK 50, 702 P.2d 56, 58 citing *Jackson v. Independent School District No. 16 of Payne County*, 648 P.2d 26 (1982), *State v. Mauldin*, 602 P.2d 644 (1979) and *Greco v. Foster*, 268 P.2d 215 (1954).

"Due process is violated by the exercise of judicial power upon an action not reasonably calculated to apprise interested parties of pendency of the action, and it logically follows that due process is violated by the exercise of judicial power upon an action where a party is not given a reasonable opportunity to be heard." *Id.* "It has long been recognized that equal access to the courts, and modes of procedure therein, constitute basic and fundamental rights. The courts must be open to all on the same terms without prejudice." *Thayer v. Phillips Petroleum Co.,* 1980 OK 95, 613 P.2d 1041, 1044–45.

In this case, fundamental rights and liberties are involved and the Administrative Orders and actions of the District Court at issue that impinge on these rights are subject to strict scrutiny. "Access to the courts and those procedures utilized therein are clearly fundamental rights. The guarantee of procedural due process under Article II, § 7 assures litigants notice of pending proceedings which might affect their rights and an opportunity to appear and be heard." *Id.*, citing *Gee v. All 4 Kids, Inc.,* 2006 OK CIV APP 155, ¶ 7, 149 P .3d 1106, 1108."[T]he Due Process Clause, like its forebear in the Magna Carta, was intended to secure the individual from the arbitrary exercise of the powers of government[.]" and while Art. 2, § 6 of the Oklahoma Constitution has no analogue in the United States Constitution, the language in the provision is "strikingly similar" to the Magna Carta which provides that "To no one will we sell, to no one will we deny, or delay the right of justice."

Deal v. Brooks, 2016 OK CIV APP 81, ¶ 30, 389 P.3d 375, 384–85 citing *Daniels v. Williams*, 474 U.S. 327, 331, 106 S. Ct. 662, 88 L.Ed.2d 662 (1986) and *Woody v. State, ex rel. Dep't of Corr.*, 1992 OK 45, 833 P.2d 257, 259–60.

The language of Article 2, § 6 "requires that the courts must be open to all on the same terms without prejudice" and this petition is presented to this Court to insure that "[t]he constitutional guarantee of access to the courts is not an empty formality that "can be avoided or ignored" and to stop the Tulsa County District Court from using its power for the purpose of oppression. *Id.*

The *sine qua non* for access, from a defendant's perspective is meaningful notice and opportunity to be heard. The Oklahoma Court of Civil Appeals properly noted "prior notice of proceedings affecting one's rights sits at the core of due process protection." *Jones v. Integris Baptist Medical Center*, 2008 OK CIV APP 14, 13, 178 P.3d 191. In *Jones*, the Oklahoma Court of Appeals backed up this opinion by citing to this Court's holding in *Booth v. McKnight*, 2003 OK 49, 20, 70 P.3d 855:

> Notice is a sine qua non element of personal jurisdiction, without which the court wields no authority over the persons sought to be haled before it. 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. Notice that satisfies due process performs two functions. It not only informs interested persons that litigation is pending (in the sense of telling them that it exists and informing them of time and place where the forensic battle will be waged), but also affords them an opportunity to present a defense against the adversary's claim. At the bare minimum, a constitutionally adequate notice must apprise one of the antagonist's pressed demands and of the result consequent upon default.

To be clear, this case does not challenge the jurisdiction of the district court over the subject matter of the underlying FED actions. Neither does it necessarily involve *in*

personam jurisdiction as such. Rather, Petitioners challenge the authority of a district court judge, *qua* "rule maker," to adopt rules which impede access to the court and place them in danger of judgment by default and dependent upon the uncertain vehicle of post-judgment relief for vindication of those rights.[1]

PROPOSITION I

A RULE WHICH TENDS TO REDUCE ACCESS TO THE COURT BY ITS APPLICATION IS BOTH UNCONSTITUTIONAL AND MOVES IN OPPOSITION TO PROGRESSIVE JURISPRUDENCE

"At its core, the right to due process reflects a fundamental value in our American constitutional system" and there is no doubt that "the deprivation of life, liberty or property by adjudication (must) be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Boddie v. Connecticut,* 401 U.S. 371, 374, 378 (1971), (quoting *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313 (1950)).

It rests beyond cavil that the State, and the courts themselves, have legitimate interests in responding to the pandemic while at the same time ensuring efficient operation of the courts, but the judicial response to the exigent circumstances-cannot be at the expense of justice and fundamental fairness. The position occupied by the Judiciary stands above the Executive and Legislative Branches to the extent it operates on the level of individual citizens. Its rulings may trump the acts and decisions of the other Branches, even when those other Branches express the majority will. This Brief is not an essay on Separation of Powers.

[1] In practice, the challenged rule will likely prove counterproductive in many cases. The need to revisit and adequately consider post-judgment motions will further tax the resources of both the court and the litigants, many of whom may be expected to be indigent or close to it to begin with.

For a more in-depth discussion, see Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. Rev. 333, 343 (1998).

Suffice it to say that the judiciary stands in the role of guardian of individual rights, specifically those of the litigants before them. Here we have a "salt of the earth" quandary. If the salt loses its flavor, with what shall we season it? If a court, as repository of justice, sets up impediments to access, who shall remove them? In this case, at least, we have a clear answer – this Court must remove those impediments by writ of prohibition.

So, at this juncture, in the context of notice, the United States Supreme Court has established that "[a]n elementary and fundamental requirement of due process [in a civil proceeding] is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (citations omitted). To provide notice that meets constitutional muster, "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it[,]" and

> [t]he reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected . . . , or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

Id. at 315 (internal citations omitted).

To determine whether notice in a particular case is constitutionally sufficient, this Court must balance the interests of the state or the giver of notice against the individual interest sought to be protected by the Fourteenth Amendment. In *Jones v. Flowers*, for example, the United States Supreme Court addressed the issue of "whether due process

entails further responsibility when the government becomes aware prior to the taking that its attempt at notice has failed." 547 U.S. 220, 227 (2006). In *Jones,* the state mailed a letter notifying the petitioner of his tax delinquency and his right to redeem his property within two years via certified mail to petitioner's last known address, but the letter was returned, marked as "unclaimed." *Id.* at 223-24. Two years later, the state published a notice of public sale in the newspaper, and, upon receiving an offer, mailed a notice of tax sale, again via certified mail, to petitioner at the same address. This letter was also returned as "unclaimed." *Id.* at 224. Notice via first-class mail was not sent. After the property was purchased, the petitioner's daughter, who had received an unlawful detainer notice while residing at the address, finally notified petitioner of the sale, and the petitioner filed a lawsuit challenging, on due process grounds, the state's failure to provide sufficient notice. *Id.*

In *Jones,* the Supreme Court ultimately concluded that "the State should have taken additional reasonable steps to notify [the petitioner], if practicable to do so" upon receiving the returned form indicating that the petitioner had not received the notice. *Id.* at 234. The Court began its analysis by recognizing that it "has deemed notice constitutionally sufficient if it was reasonably calculated to reach the intended recipient when sent" in cases in which "the government attempted to provide notice and heard nothing back indicating that anything had gone awry[.]" *Id.* at 226 (citations omitted). In the Court's view, however, "[a]lthough the State may have made a reasonable calculation of how to reach [the petitioner], it had good reason to suspect when the notice was returned that [the petitioner] was 'no better off than if the notice had never been sent.'" *Id.* at 230 (quoting *Malone v. Robinson,* 614 A.2d 33, 37 (D.C. App. 1992)).

"Deciding to take no further action is not what someone 'desirous of actually informing' [the petitioner] would do; such a person would take further reasonable steps if any were available." *Id.* Therefore, although the Supreme Court did not prescribe the form of service that state governments should adopt, the Court determined that "[i]t suffices for present purposes that we are confident that additional reasonable steps were available for [the state] to employ before taking [the petitioner's] property." *Id.* at 238.

In this case, distinctions of fact with *Jones* make prohibitory relief more, rather than less, critical. In *Jones*, the property owner may or may not have consciously evaded service. Here, however, litigants in already pending cases with notice of hearings at a specific time and place, find the finish line has moved. This movement of the finish line had its genesis in the mind of the court, rather than the defendants themselves. Arguably, the impetus for small claims courts came from Chief Justice Taft's call for a system "by which everyone however lowly and however poor, however unable by his means to employ a lawyer and to pay court costs, shall be furnished the opportunity to set the fixed machinery of justice going".[2] However, in most cases the "lowly and poor" appear most frequently as defendants on small claims and FED dockets. Often, they face government agencies or private business who *do* have the advantage of attorneys and agents who appear frequently before those same courts. It takes little imagination to reckon that, with literally thousands of small claims cases filed each year across Oklahoma, the potential for plaintiff upon defendant abuse haunts the process already. Actions in which valid defenses or set-offs exist often end up ground down

[2] Shontz, Speedy, Informal Justice of Small Claims Court described by Judge, 15 **CALIF. S.B.J.** 273, 275.

in the process because the overwhelming number of small claims defendants appear *pro se* and do not know what defenses they possess or how to raise them.

For many FED defendants this will be their first experience with a court. Some may hold dim awareness that small claims court exists until they receive their official looking summons ordering their appearance. Often that summons comes to them via a deputy sheriff. They do not to know what to expect, what evidence or witnesses they should bring, and they are not accustomed to the organized chaos happening in the courtroom. The FED defendants find themselves opposed by a landlord, polished business agent or attorney, who offers a settlement on a take it or leave it basis. Getting hauled into court is a scary thing. To arrive and find the location has changed, a change coming about through a last minute order from an invisible judge, underscores the need for preserving the defendants' right to reasonable notice and, for the elderly, disabled, or non-English speaker, and those without transportation, the unannounced change adds an additional impermissible barrier to their access to the court.

Petitioners and other FED defendants who are prejudiced by the lack of notice as to the location of the hearing do not come by this injury through any act or omission of their own; rather, the harm is caused by the rulemaking action of the court itself. As such, it is appropriate and reasonable to expect that, at minimum, hearings would be continued, new notices of hearing would issue, and tardiness and resultant defaults excused. This is not what is happening. Instead, the risk of default or other penalty for lack of timely appearance under the administrative rule as written falls exclusively upon the FED defendants absent the lightning strike of a successful post-trial motion. And the consequence? Additional strain on an already limited household budget, loss of housing (and possible disqualification for public

housing), homelessness during a pandemic, loss of all possessions that cannot be safely stored and possible bankruptcy. All potentially life altering events in the life of a family.

Constitutionally sufficient due process requires notice in a manner "reasonably calculated...to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 313. This standard serves as a constitutional minimum resting on the Due Process Clause of the Fourteenth Amendment. *Greene v. Lindsey*, 456 U.S. 444, 449 (1982).

Post-*Mullane jurisprudence* favors individual fairness over expediency. Per *Jones,* the United States Supreme Court has answered the due process question presented here: whether the state has met its obligation to provide notice and an opportunity to be heard when it knows that its method of service has not reached its intended recipient. It answered that question with an emphatic "no." Where, as here, the means are readily at hand to provide notice that is more likely to reach the defendant, the State cannot simply shrug its shoulders and claim that it has met its obligations. *Id.*

The Supreme Court's holdings in the long line of cases beginning with *Mullane* leave no doubt that in this case, the State failed to meet its obligation to use a method of service "reasonably calculated" to reach those who will be affected by judgments rendered because they were not given adequate notice to be heard and to defend against eviction. Accord: *Armstrong v. Manzo,* 380 U.S. 545 (1965) and *Peralta v. Heights Medical Center,* 485 U.S. 80 (1988). The *Peralta* decision leaves no doubt that when a default judgment has been entered without providing the notice required by the Due Process Clause, the only remedy is to "wipe[] the slate clean" and begin the proceedings anew. *Id.* The injured party may not be relegated to some lesser proceeding. *Armstrong*, 380 U.S. at 552.

In *Armstrong*, the United States Supreme Court held that when a judgment is entered without first affording the defendant notice and an opportunity to be heard, the due process violation can be cured only by setting aside that judgment and requiring the State to begin the proceedings anew. *Armstrong*, 380 U.S. at 552; accord, *Peralta v. Heights Medical Center*, 485 U.S. at 87 (holding that default judgment must be set aside even where defendant had no meritorious defense to the proceedings). *Armstrong* grew out of a Texas adoption case. Armstrong's ex-wife instituted proceedings to enable her new husband to adopt Armstrong's child. In order to avoid having to obtain Armstrong's consent, the ex-wife filed an affidavit in the juvenile court alleging that he had not met his child support obligations. Under Texas law, that was sufficient to empower the juvenile court to issue a consent to the adoption. Based on that consent, the adoption court granted the adoption. "[A]lthough the Manzos well knew his precise whereabouts in Fort Worth, Texas[,]" all of these proceedings went forward with no notice to Armstrong until after the adoption was a fait accompli. *Armstrong*, 380 U.S. at 546-548.

Armstrong moved to set aside the adoption decree and, as part of those proceedings, the lower court took evidence on the child support issue. The trial court then denied Armstrong's motion to set aside the decree. The ex-wife argued that, although Armstrong might have initially been denied his right to notice and an opportunity to be heard, the due process violation had been remedied since he was ultimately permitted to litigate the child support issue. The United States Supreme Court disagreed:

> The trial court could have fully accorded [petitioner his right to be heard at a meaningful time and in a meaningful manner] only by granting [the] motion to set aside the decree and consider[ing] the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded him in the first place.

Armstrong, 380 U.S. at 552. That is what must be done here as well.

The potential argument that the District Court of Tulsa County has done the best it could under the circumstances may have a certain superficial appeal; however, we cannot get around the fact that the court itself created the circumstances. Court records in FED actions have the addresses of defendants who have already been served and the burden of reissuing notices of hearing so the correct location of the court hearing is contained in the summons should be placed on the plaintiffs who instituted the proceedings themselves. To do so may involve delay, expense, and some inefficiency but the burden of the expense to the Respondent pales when compared to FED defendants' loss of access to the court. Besides, as this Court has unanimously ruled: "Messiness has never been a valid reason for dispensing with one's fundamental rights. Indeed, it is often a hallmark of the assertion of those rights." *In re Holly*, 2007 OK 53, 24, 164 P.3d 137.

PROPOSITION II

THE ADMINISTRATIVE ORDER CANNOT BE SQUARED WITH THE NORMS OF OKLAHOMA CIVIL PROCEDURE

12 O.S. § 2005 (2011) provides:

> Except as otherwise provided in this title, every order required by its terms to be served, every pleading subsequent to the original petition unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party or any other person unless the court otherwise orders, every written motion other than one which may be heard ex parte, and *every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties* (emphasis added). Oklahoma statutes provide a hierarchy of service methods.

12 O.S. § 2004 (B)(1) (2011) serves as a baseline:

> *The summons shall* be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, *state* the name and address of the plaintiff's attorney, if any, otherwise, the plaintiff's address, and *the time within which these rules require the defendant to appear and defend*, and shall notify the defendant that in case of failure to appear, judgment by default will be rendered against the defendant for the relief demanded in the petition. (emphasis added)

Thus, the statutes mandate minimum due process steps taken as per our Proposition I. The statutes are affirmative mandates of law and not mere theoreticals or niceties. Section 2004 even establishes a hierarchy of notice. Personal service stands supreme, though mailing may be chosen. Then:

> "Service of summons upon a named defendant may be made by publication when it is stated in the petition, verified by the plaintiff or the plaintiff's attorney, or in a separate affidavit by the plaintiff or the plaintiff's attorney filed with the court, that with due diligence service cannot be made upon the defendant by any other method."

12 O.S. § 2004 (C)(3)(A).

Even the *Rules for the District Court of Tulsa County* provide:

> The Judge will reject all defaults submitted with incorrect court files, with files showing pleadings making default inappropriate, or without proof of service. *CV Rule 7* (2003).

Positive Oklahoma law requires maximum, rather than minimum, effort to provide civil defendants the information they need to meaningfully have their day in court. While it remains flexible, the arc of due process in Oklahoma bends towards the ceiling rather than the floor. As this Court emphatically held in *Rodgers v. Higgins*, 1993 OK 45, 34, 871 P.2d 398:

> *[F]undamental fairness in litigation process cannot be afforded except within a framework of orderly procedure*. We cannot provide a dismissal-proof environment for lawyers. No area of the law may lay claim to exemption from the range of orderly

> procedure's basic strictures - not even the process by which a general unreserved jury verdict is transmuted into judgment by operation of § 696.1. Chaos, caprice and ad hoc pronouncements would inevitably follow from the slightest departure. *Procedural rules must be applied mechanically to avoid the uncertainties that arise when exceptions are created. Evenhanded fairness calls for undeviating enforcement of conformity to orderly process.*

There have been articles regarding the changed location published in local media, but like publication notice in general, such notice "is clearly insufficient with respect to one whose name and address are known or readily ascertainable from sources at hand. Further, the mere gesture of attempting personal service does not rise to the level of due diligence." *Mare Oil Co. v. Deep Blue Royalties, L.L.C.,* 2003 OK CIV APP 21, 11, 65 P.3d 294, 297. See also, *Bomford v. Socony Mobil Oil Co.*, 1968 OK 43, 12, 440 P.2d 713, 718, and *In re Marriage of Padilla & Chacon*, 2015 OK CIV APP 31, 7, 346 P.3d 451, 453.

> "If possible, actual notice must be given. Because publication notice is not reasonably calculated to provide actual notice, it is constitutionally insufficient when more effective means of notice, such as mailing or personal service, are available. *Harry R. Carlile Trust v. Cotton Petroleum Corp.,* 1986 OK 16, 13, 732 P.2d 438, 444. Publication notice does not satisfy due process, unless due diligence is first used to find the affected party. *Bomford v. Socony Mobil Oil Co.,* 1968 OK 43, 12, 440 P.2d 713, 718."

State ex rel. Christian v. McCauley, 2008 OK CIV APP 77, 20, 193 P.3d 615, 620. This Court, in reviewing the sufficiency of notice by publication of a trial court's disposition docket, has held:

> "if the setting to take place may result in an end-of-the-line order - one marking an event dispositive of or terminating the litigation - personal notice is required, whether it be effected by personal service or by mail."

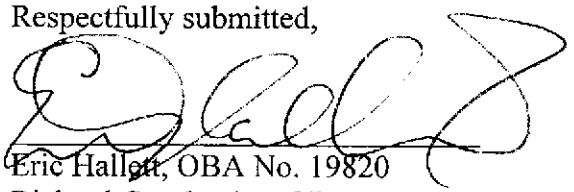
Heiman v. Atl. Richfield Co., 1991 OK 22, 9, 807 P .2d 257, 261.

CONCLUSION

This case pits a well-intentioned court management rule against the fundamental due process rights of Oklahoma citizens called upon to defend themselves or their interests in court. in many instances, these citizens already find or feel themselves marginalized by several factors including poverty, age, and disability. The District Court rule places access to justice another step beyond their reach, resulting in that least favored of judicial actions- the default judgment. It falls to this Court to remedy this situation via preemptive writ both the reasons set forth in this Brief and the maintenance of both justice and the appearance of justice in the rial courts.

June 1, 2020

Respectfully submitted,



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CERTIFICATE OF MAILING

I certify that a true and correct copy of the BRIEF IN SUPPORT OF APPLICATION TO ASSUME ORIGINAL JURISDICTION AND PETITION FOR WRIT OF PROHIBITION was mailed this 1st day of June, 2020, by depositing it in the U.S. Mail, postage prepaid to:

Honorable William LaFortune
Tulsa County District Courthouse
500 S. Denver Ave, # 508
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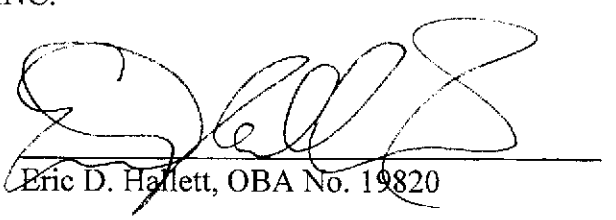

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