



ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

IN RE THE MARRIAGE OF:)
)
 [REDACTED])
)
) Petitioner/Appellee,)
)
 and)
)
 [REDACTED])
)
) Respondent/Appellant.)

Case No. [REDACTED]

Tulsa County District Court

Case No. [REDACTED]

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 SUPREME COURT
 STATE OF OKLAHOMA

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RESPONSE TO APPELLANT'S SHOW CAUSE BRIEF AND MOTION TO STRIKE

CLERK

COMES NOW, the Petitioner/Appellee, [REDACTED], by and through her attorney of record, Patrick H. McCord of N. SCOTT JOHNSON & ASSOCIATES, P.L.L.C., and in response to the Appellant's *Show Cause Brief*, filed October 16, 2017, would show the Court as follows:

I.

In the first portion of his Argument, Appellant misapprehends Rule 1.11 of the Oklahoma Supreme Court Rules. Rule 1.11 provides that Appendices shall not be filed except in very specific circumstances. Appellant latches onto one of the enumerated circumstances, misinterprets it to fit the situation, and misapplies it to his benefit. Particularly, Rule 1.11(i)(1) permits an Appendix to include "attachments provided by Rule 1.11(e)(1) relating to complaints about admission or exclusion or insufficiency of evidence." OKLA. SUP. CT. R. 1.11(e)(1). Appellant would have this Court believe that this permits him to include anything in an Appendix, so long as he makes the argument that the trial court's judgment was contrary to the weight of the evidence. This is a subversion of the Rule.

II.

Subsection (i) of Rule 1.11 must be read in harmony with subsection (e)(1). In relation to Appendices, subsection (e)(1) provides that

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Where a party complains of the admission or rejection of testimony, that party shall set out the testimony to the admission or rejection of which the party complains, stating specifically the objections thereto. Where a party complains of an instruction given or refused, the party shall cite to the place in the record on appeal where said instruction may be found, together with the objection thereto.

When a party desires to set out instructions or requested instructions, or if it is necessary to set out admitted or rejected testimony, the party may set forth such material in either the Summary of the Record in the brief or in an appendix to the brief as described in Rule 1.11(i). A party need not include in the Summary of the Record all of the evidence in support of a claim that the record does not show or tend to show a certain fact, **but when such a question is presented, the adverse party shall include in that party's brief or appendix so much of the evidence claimed to have had that effect.**

The Summary of the Record need include only a general statement of the substance of those parts of the record over which there is no controversy and which are not required to be shown in detail in order to present the issues to this Court, and such parts of the record as are purely formal and immaterial to the consideration of any issue presented to this Court may be omitted therefrom.

OKLA. SUP. CT. R. 1.11(e)(1) (emphasis supplied). It is only where a party asserts error regarding the admission or exclusion of testimony that an Appendix may be filed. This is not the case in the instant appeal.

III.

Any argument that Appellant's Brief in Chief will make no sense if his Appendix is stricken is not this Court's concern and does not provide an excuse for failure to follow the clear directives of the Oklahoma Supreme Court Rules. To allow such an argument would be to not only excuse willful violation of the Rules, but it would further encourage litigants to purposefully violate the Rules where it benefits their position and then claim that enforcement of same prejudices their position. Such an "ask for forgiveness rather than permission" policy creates a slippery slope and should not be ratified by this Court.

IV.

The single case cited by Appellant does not support avoidance of the Rules in this matter. Said case is clearly distinguishable from the matter at hand. In *Hamburger v. Fry*, the question before the Court was whether a refusal to grant a Motion to Vacate a default judgment was an abuse of judicial discretion. The matter had nothing to do with enforcement or avoidance of the Oklahoma Supreme Court Rules or appellate procedure. *Hamburger v. Fry*, 1958 OK 287, 338 P.2d 1088. In fact, opinion of this Court makes absolutely no mention of the Oklahoma Supreme Court Rules or any appellate procedure whatsoever. *Id.* Appellant has excised dicta from that Opinion and represented same as controlling in this matter. Such is not the case, and Appellee would emphasize the following language from the very same portion of the Opinion cited by Appellant, to wit:

The object of the institution of courts is to administer justice according to law, and lawsuits are allowed for that purpose alone. Rules of procedure regulating the conducting of business in courts are instituted solely to facilitate these ends. **They are necessary, and their due observance should be enforced by the court.**

Id. at 1092 (emphasis supplied).

V.

Even more troubling than Appellant's attempted avoidance of the Rules is his attempt to place before this Court documents and records not properly included in the record. In his *Show Cause Brief*, Appellant admits that his Appendix is a "completion of the entire designated record." *See*, Appellant's *Show Cause Brief*, p. 6. This is not how the completion of a record on appeal works. The record is to be compiled and submitted by the Court Clerk as directed by the parties' respective Designations of Record. OKLA. SUP. CT. R. 1.28. During the course of the appellate process, if Appellant discovers that certain documents or other items have been inadvertently or

mistakenly omitted, he has available relief in the form of the procedure dictated by OKLA. SUP. CT. R. 1.32. That Rule allows parties to seek amendment to the record. Appellant neglected or refused to invoke this Rule. Rather, he simply placed whatever materials he desires this Court to consider into his Appendix and filed it (in violation of Rule 1.11). This further demonstrates Appellant's disobedience and utter lack of respect for this Court's Rules.

VI.

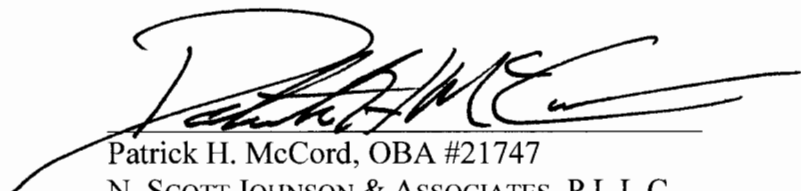
In the midst of preparing this *Response*, Appellee's undersigned counsel discovered a minute entry on the Court's docket indicating that consideration of Appellant's *Show Cause Brief* will be deferred to the decisional stage of this appeal. Appellee hereby requests this Court reconsider that ruling in light of the prejudice that will befall Appellee if Appellant's Appendix is permitted to remain in the record, even temporarily. Deferring consideration of the instant situation will force Appellee to prepare and construct her Answer Brief with Appellant's Appendix as part of the record. It will make no difference if the Appendix is later stricken as the damage will have already been done. The Appellant's behavior in either negligently or purposefully ignoring the Rules will have been ratified and the Appellee will have already incurred additional time and expense in considering Appellant's Appendix (which includes documents not indexed in the record). Appellee hereby requests the Court reconsider the deferral of the matter of inclusion of Appellant's Appendix in the record.

VII.

At its core, the instant situation boils down to a consideration of diligence and respect. Appellant, via his counsel, has an affirmative duty to know and follow the Rules of this Court. Whether his failure to abide by the Rules was purposeful (to inject additional, potentially prejudicial materials into the record) or simply due to a lack of knowledge and diligence, is unclear.

What is crystal clear is that Appellant's filing of an Appendix is a strict violation of Rule 1.11, and Appellant has failed to show cause why this violation should be excused. Regardless of reason or intent, such conduct should not be ratified by permitting the Appendix to remain in the record.

WHEREFORE, premises considered, Appellee prays that the Court reconsider the deferral of consideration of this issue to the decisional stage of these proceedings; for an Order striking Appellant's Appendix; for all other relief requested herein; and for all further relief the Court deems just and equitable.



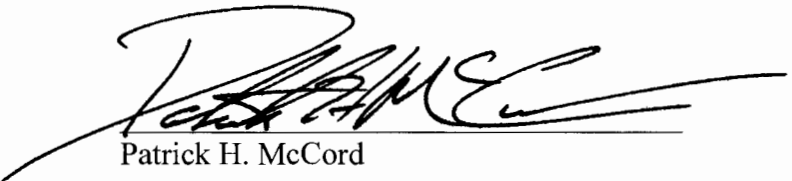
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CERTIFICATE OF MAILING TO PARTIES

I certify that a true and correct copy of the foregoing instrument was mailed this 19th
day of October, 2017, to:

Brian R. Swenson, Esq.
SWENSON & SWENSON, PLLC
1719 East 71st Street
Tulsa, OK 74136
Attorney for Respondent/Appellant

by depositing same in the U.S. Mail, postage prepaid.



Patrick H. McCord