



IN THE DISTRICT COURT OF TULSA COUNTY  
STATE OF OKLAHOMA

FILED  
SUPREME COURT  
STATE OF OKLAHOMA

MAY - 9 2017

MICHAEL S. RICHIE  
CLERK

[Redacted]

Petitioner/Appellee

v.

[Redacted]

Respondent/Appellant.

Received	_____
Docketed	_____
Marshal	_____
COA/GKC	_____
COA/TUL	_____

SP-111  
10

TULSA COUNTY DISTRICT  
COURT CASE NUMBER

[Redacted]

**APPELLANT'S RESPONSE TO MOTION TO DISMISS**

COMES NOW, Respondent/Appellant, [Redacted] [Redacted] (hereinafter "Appellant"), by through his attorneys of record, Brian R. Swenson and Carol L. Swenson, of Swenson & Swenson, PLLC, and pursuant to Rules 1.6, 1.28, and 1.30 of the Oklahoma Supreme Court Rules, and hereby responds to Appellee's Motion to Dismiss the above-styled case. In support thereof, Appellant avers as follows:

I.

Appellant is appealing the trial court's Order on Contempt and Order Reducing Child Support Arrearage to Judgement. Appellant timely and properly filed said Petition in Error on March 9, 2017, pursuant to Sup.Ct.R. 1.3, 1.4 *et seq.*, and 1.5, invoking the Oklahoma Supreme Court's jurisdiction to decide said petition.

As discussed *infra.*, Appellant filed for a Motion for Extension of Time since no notification was given of who would be representing Appellee for this appeal and no responsive proposed narrative had been returned by Appellee. However, the Court did decide Appellant's extension of time request on March 20, 2017, with an Order, to wit:

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“The Court notes appellant’s motion for an extension of time to complete narrative statement, which was filed on March 20, 2017. Any issue regarding the narrative statement should be addressed to the trial court. Rule 1.32 of the Oklahoma Supreme Court Rules. The Court notes that the notice of completion of the record is due August 6, 2017.”  
*Oklahoma Supreme Court’s March 20, 2017 Order* (emphasis added).

The trial court had previously set the hearing for narrative statement for initial hearing on April 25, 2017. *Trial Court Docket, Minute fr. Apr. 3, 2017.* Having not received any proposed statement or objections from Appellee, Appellant filed his proposed narrative statement, by and through his attorney of records, pursuant to Rule 1.30 on April 25, 2017, with the trial court. Appellant’s proposed narrative statement complied with all aspects of Sup.Ct. R. 1.30 and started Appellee’s ten-day (10) clock for amendments and/or objections. The trial court then set a subsequent hearing to settle the narrative statement for May 15, 2017, at 10:00 a.m. *Trial Court Docket, Minute fr. Apr. 25, 2017.*

Pursuant to the Court’s March 20, 2017 Order on appellant’s motion for extension of time, Appellee’s issue of dismissal for lack of narrative statement has already been answered by the trial court. The trial court has set final settlement of the narrative statement for hearing on May 15, 2017. Appellant’s proposed narrative statement was filed on April 25, 2017 at the initial hearing set for settlement of same, the statement was under oath, with proper notice given to Appellee if no amendments or objections are timely raised. This in addition to the trial court’s second setting for hearing on the narrative statement of May 15<sup>th</sup>, 2017, to settle same demonstrates the due diligence required by all actors involved, Appellant, Appellee, and the trial court, that a narrative statement pursuant to

Sup.Ct.R. 1.30 is forthcoming per the Court's March 20, 2017 Order. Therefore, Appellee's motion to dismiss is misplaced and should be denied.

## II.

Once Appellant properly invoked jurisdiction by the Oklahoma Supreme Court, counsel for Appellant properly noticed Appellee's attorney of same with timely notice mailed out upon the Entry of Appearance, Petition in Error, and Designation of Record being filed. After receiving no response from Appellee's counsel, Appellant's attorney phoned Appellee's attorney, Patrick McCord, on Thursday, March 16, 2017. *Appellant's Exhibit A*. During the conversation, Mr. McCord stated he was aware of Appellant's appeal but did not know at the time whether or not he and/or the firm, N. Scott Johnson and Associates, would be representing Appellee for the appeal, *despite having handled the underlying litigation. Id.*

Attorney for Appellant informed Mr. McCord that the due date for the Narrative Statement, pursuant to Sup.Ct.R. 1.30, was Monday, March 20, 2017. However, it was unclear during the discussion whether Rule 1.30 or Rule 1.301 applied. Either way, Appellant's attorney followed up the next day, Friday, March 17<sup>th</sup> with an initial proposed narrative statement via email, *Appellant's Exhibit B*, despite still having no notice from Mr. McCord or his firm on whether they were going to represent Appellee.

While not knowing who was going to represent Appellee and with the due date approaching, Appellant filed a *Motion to Settle Journal Entry*, see Appellant's *Motion for Extension of Time, "Exhibit A"*, with the trial court on March 17, 2017, and subsequently a motion for extension of time with the Oklahoma Supreme

Court, *Court File, Mar. 20, 2017*. Mr. McCord did not give notice until *two days after the March 20, 2017, due date* that he would continue to represent Appellee for the appeal. *Id.*

Appellant properly and timely filed a motion to extend time with the Court. Appellant's motion was not timely responded to by Appellee and the Court issued an Order that any further issues "should be addressed by the trial court," *Order of the Court, Mar. 20, 2017*, which is exactly what has happened with the subsequent hearing dates set by the trial court to settle the narrative statement; therefore, Appellee's motion for dismissal should be denied.

### III.

Appellee's logic for dismissal is as erroneous as it is disingenuous. Appellee's request for dismissal cites a lack of a filed narrative statement within ten (10) days with the trial court while at the same time ignoring that a motion to settle same was filed before the March 20, 2017 due date on March 17, 2017. Appellee further fails to mention that her attorney had intimated that Appellee might not have the same representation for the appeal while having full knowledge of the March 20<sup>th</sup> due date only to give notice of representation *two days afterward. Exhibit A.*

Further, Appellee is also seemingly dismissive of the Court's March 20, 2017 Order which essentially settles whether or not Appellant's request for extension of time was granted. It is clear that both the Oklahoma Supreme Court, by way of its March 20, 2017 Order, and the trial court, by way of setting the narrative statement for hearing, have already answered the question of Appellee's request for dismissal

before it was even filed; the appeal is progressing procedurally as it should and, therefore, Appellee's Motion to Dismiss should be denied.

#### IV.

Appellee's argument that "Appellant's omissions have resulted in a total lack of a record from which the Court can review" is puzzling. As stated in Appellee's own motion, "*both parties waived the court reporter.*" Appellee's Motion at 1 ¶ "I." Appellee's attempt to direct blame is as disingenuous as it is transparent. Appellee then goes on with what can only be characterized as a misstatement: "There are no transcripts, *no exhibits, and no narrative statements* [to review]." *Id.* at 3 ¶ "IV." The statement is wholly incorrect because it is premature; *there are none yet.*

The argument regarding narrative statement has been addressed *supra.* and need not be repeated. However, with regard to a review of exhibits, or lack thereof, the Court need only look at Appellant's designation of record which clearly lists the admitted exhibits of the underlying contempt trial. *Appellant's Designation of Record* at 2 ¶ "B" *et seq.* Moreover, Appellee's *own counter designation* lists "[a]ll exhibits offered and/or admitted." *Appellee's Counter-Designation of Record* at 1 ¶ "B (1)." Exhibits to the trial court during the hearing were absolutely admitted and will be submitted as part of the record for review on appeal. Appellee's argument regarding lack of record for review lacks a factual basis to be taken seriously and as such should be denied.

Appellee seems to argue that the whole process of Appellant's appeal should be bypassed for lack of a record. Appellee's argument for lack of a narrative statement ignores its very purpose; narrative statements are submitted in place of

stenographic records. The very plain language of the rule for narrative statements is unambiguous, to wit:

“If no stenographic report of the evidence or proceedings at a hearing or trial was made or if a transcript of the reporter's notes cannot be prepared or where the judgment involves an involuntary loss of liberty, personal freedom or incarceration and where the appealing party is an indigent, the party desiring to take the appeal under these rules (or any other party) may prepare a statement of the evidence or proceedings in the narrative form from the best available means including the party's recollection for use in lieu of a stenographic transcript.”

*Sup.Ct.R. 1.30 (emphasis added).*

Despite Appellee's desire to skip the process of assembling a proper record for the Court to review from the trial exhibits and narrative statement of the evidence, Appellant is confident the Court will have all the materials necessary to render a decision on Appellant's Petition in Error. This not the first time, nor will it be the last, that a questionable decision as to applicability of the law has come up where the trial court lacked a court reporter. The rules of the Oklahoma Supreme Court are clear on how to handle the lack of a stenographic record. *Sup.Ct.R. 1.30.*

Appellee has filed a request for dismissal with full knowledge of the facts herein. The issues on appeal are not moot for lack of a record; Appellee only wishes they were. The narrative statement has been set by the trial court and will be submitted to the Court timely and properly as will the exhibits from the trial per the designation of records submitted by both parties. As such the Court will have all that is required and needed to review the question of law brought before for this appeal to render a decision. Appellee's motion for dismissal should be denied.

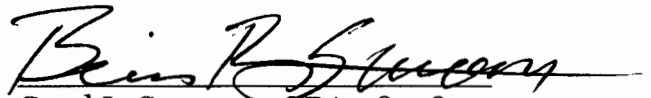
V.

Appellee's final argument for dismissal is conclusively circular and requests a result from her own misstatement of deficient facts. Appellant has properly and timely invoked the Court's jurisdiction and properly, diligently, and timely filed a request to settle the needed narrative statement in lieu of an available stenographic record to ensure a full record is available for review for this appeal despite Appellee's lack of cooperation. There is no record only *because it is currently being assembled* pursuant to the procedural rules of the Oklahoma Supreme Court and, therefore, is not moot. In conflict with Appellee's desire to skip to a favorable conclusion for her by way of usurping the procedural process for compiling a record for the appeal, the Court should instead deny her request for dismissal, allow the process that has been set in motion to progress to a conclusion, and review the record and evidence submitted for a decision to the question of law before it.

For all the reasons set forth hereinabove, Appellant requests the Court deny Appellee's deficient request for dismissal and award Appellant attorney fees and cost for having to respond and defend against Appellee's Motion to Dismiss when the answer for same had already been decided by both the Oklahoma Supreme Court, *March 20, 2017 Order of the Court*, and the trial court and with full knowledge of Appellee.

**WHEREFORE** the reasons stated *supra.*, Appellant, [REDACTED] prays the Court deny Appellee's Motion to Dismiss, and award Petitioner reasonable fees and costs and for such other and further relief to which Petitioner is entitled and which this Honorable Court deems equitable and just.

Respectfully submitted,



Carol L. Swenson, OBA #8798  
Brian R. Swenson, OBA # 30746  
Southbridge Office Park  
1719 East 71st Street  
Tulsa, Oklahoma 74136  
(918) 481-5898  
Fax: 488-5899  
*Attorneys for Appellant*

**CERTIFICATE OF DELIVERY**

This is to certify that on this 9 day of May, 2017, a true, correct and exact copy of the above and foregoing instrument was hand delivered to:

N. Scott Johnson  
Patrick H. McCord  
N. Scott Johnson & Assoc.  
302 East 10<sup>th</sup> Street  
Tulsa, OK 74120



Brian R. Swenson





Brian Swenson &lt;brian.swenz1@gmail.com&gt;

[REDACTED]  
2 messages

Patrick McCord <Patrick@nscottjohnson.com>  
To: Brian Swenson <brian.swenz1@gmail.com>

Thu, Mar 16, 2017 at 4:56 PM

Brian:

To confirm our conversation this date, you'll email me a proposed, narrative statement regarding the appeal for our review, pending our determination of whether we will be handling the appeal on behalf of Ms. [REDACTED]

For Monday, I'll go through my fee app and look for the line items you mentioned that are not related to the Child Support contempt. Also, we've agreed that expert testimony will not be necessary and will enter a stipulation that my rates and those of the other attorneys/staff in my office are in accordance with community standards.

Talk soon. Thanks,

*PATRICK H. McCORD*

N. SCOTT JOHNSON &amp; ASSOCIATES

302 East 10<sup>th</sup> Street

Tulsa, Oklahoma 74120

Telephone: (918) 794-3333

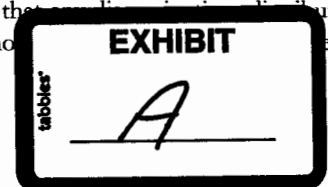
Facsimile: (918) 794-3336

patrick@nscottjohnson.com

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Brian Swenson &lt;brian.swenz1@gmail.com&gt;

Thu, Mar 16, 2017 at 10:10 PM



Brian Swenson &lt;brian.swenz1@gmail.com&gt;

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**Initial Narrative Statement for Appeal in [REDACTED]**

3 messages

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**Brian Swenson** <brian.swenz1@gmail.com>  
To: "Patrick H. McCord" <patrick@nscottjohnson.com>

Fri, Mar 17, 2017 at 11:00 AM

Patrick -

Attached is the Narrative Statement I have so far.

I am still working on it and will send you the updated and revised statement as soon as I have it finished.

However, this should give you an idea of what I am trying to put together from the trial and allow you to put together Ms. [REDACTED]

Very best regards,  
Brian Swenson**Narrative Statement.docx**

16K

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**Patrick McCord** <Patrick@nscottjohnson.com>  
To: Brian Swenson <brian.swenz1@gmail.com>

Wed, Mar 22, 2017 at 4:40 PM

Brian:

Just to let you know, we will be handling the pending appeal for Ms. [REDACTED]. I see that you've filed a Motion to Settle the Narrative Statement. I think this is premature at this juncture as same has yet to be filed, but we might as well set it for hearing as I think we'll need it eventually.

Also, my reading of Rule 1.30 differs from what you expressed over the phone. I don't believe we need to agree on the Statement; rather, I think you submit your statement, I respond and propose amendments, then we meet with Judge Bruce and have her determine the final product. Is the statement you emailed me last week your final version?

Thanks,

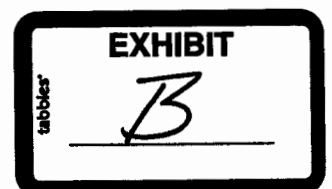
*PATRICK H. MCCORD*

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**From:** Brian Swenson [mailto:brian.swenz1@gmail.com]

**Sent:** Friday, March 17, 2017 11:01 AM

**To:** Patrick McCord <Patrick@nscottjohnson.com>

**Subject:** Initial Narrative Statement for Appeal in [REDACTED]

[Quoted text hidden]

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**Brian Swenson** <brian.swenz1@gmail.com>  
To: Patrick McCord <Patrick@nscottjohnson.com>

Wed, Mar 22, 2017 at 9:51 PM

Patrick -

I believe you are correct and that is also how I interpreted the rule as well by the plain language of it.

However, Rule 1.31 has a different take as well as the Appellate Treatises.

Either way, Judge Bruce is supposed to sign it before it is sent up.

I will be in trial the next two days but will have some time at the beginning of next week to go over this with you if that works?

Thank you.

Very best regards,  
Brian Swenson

[Quoted text hidden]