THIS OPINION HAS BEEN RELEASED FOR PUBLICATION BY ORDER OF THE COURT OF CIVIL APPEALS[1]

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV (2023)

KRISTA GENO, as Personal Representative of the Estate of Joseph Kent Twyman, Deceased,

Plaintiff/Appellee,

vs.

TYLER WYATT GILLILAND and SHIKI 2 LLC d/b/a SHIKI JAPANESE RESTAURANT,

Defendants,

WAL-MART STORES EAST, LP, d/b/a WAL-MART,

Defendant/Appellant.

Case No. 120,118

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE DON ANDREWS, TRIAL JUDGE

AFFIRMED

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[1] This opinion examines several legal issues. With one Judge dissenting, we find two of these issues merit publication pursuant to Supreme Court Rule 1.200. The first is a discussion of the circumstances under which a state actor that is immune from suit under Oklahoma's Governmental Tort Claims Act must nevertheless be included on the verdict form as an absent tortfeasor. *See, infra*, Section III-A-8 (¶¶ 56-63). The second addresses the meaning of "the amount of the actual damages awarded" in our punitive damages statute. *See, infra*, Section III-B (¶¶ 64-78). Accordingly, the opinion is ordered to be published.

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PRESIDING JUDGE BLACKWELL delivered the opinion of the Court, except as to Part III-B. JUDGE HUBER delivered the opinion of the Court as to Part III-B.

¶1 Wal-Mart Stores East, LP, d/b/a Wal-Mart (Walmart), appeals a judgment, entered on a jury verdict, which awarded the plaintiff, Krista Geno, as personal representative of the estate of Joseph Kent Twyman, $6.2 million in damages. Walmart was found seventy percent liable, which set their damages at $4.34 million. Twyman, Geno's brother, died in a car accident with co-defendant Tyler Gilliland, a nineteen-year-old, who had illegally purchased and consumed beer from Walmart prior to the accident. On appeal, Walmart makes various arguments that the trial court should have directed a verdict in its favor, or, alternatively, that the trial court should have granted its motion for new trial. None of Walmart's arguments are persuasive, and we therefore affirm the trial court's judgment in this regard.

¶2 The jury also awarded $5.7 million in punitive damages against Walmart. However, the trial court granted Walmart's motion for judgment notwithstanding the verdict and reduced that award to $4.34 million, so as to not to exceed Walmart's portion of the actual damages. On appeal, the plaintiff argues that the

trial court's reduction of punitive damages was in error. We disagree and affirm the trial court's reduction of punitive damages.

I.

¶3 On June 9, 2014, defendant Tyler Gilliland purchased forty-eight low-point beers at the Edmond Walmart located at Danforth and Santa Fe. Gilliland was nineteen years old at the time. The cashier asked Gilliland for identification. He gave her an excuse that he did not have his ID with him. She then asked him for his date of birth. Gilliland gave a false date of birth that made him appear over twenty-one. The cashier entered this birthdate into the computer, and the sale was allowed.

¶4 Two days later, on the afternoon of June 11th, Gilliland was moving into an apartment after leaving home because of a dispute with his parents. He began moving in at approximately noon. He testified that he drank eight of the Walmart beers during this process. No one else witnessed his alcohol consumption during this period. While he was moving, he also became acquainted with the apartment leasing agent, Sara Schaff. Ms. Schaff asked Gilliland if he could drive her home after her shift ended because she did not have a working vehicle at that time. Gilliland agreed but suggested that the two eat at a restaurant called Shiki first. Gilliland was known at Shiki because had had played on sport teams with the owner's children and was friendly with the family. Gilliland and Schaff's testimony do not agree as to the exact time they went to Shiki, but it appears to have been between six and seven p.m.

¶5 Gilliland testified that he attempted to order beer at Shiki but was denied service because he had no identification. He testified, however, that he drank "two to four beers" by drinking from beers purchased for Ms. Schaff, who was over twenty-one. Several witnesses appeared for Shiki, and all denied serving alcohol to Gilliland or seeing him drink alcohol that had been purchased for Schaff. Nevertheless, one witness, Han Huong, a son of the owner and a friend of Gilliland, observed that Gilliland stumbled after getting down on one knee to greet Han's little brother, and suspected he might be drunk. Han asked his cousin, server Vy Do, whether she had served Gilliland alcohol. Vy said she had not.

¶6 Ms. Schaff's testimony was largely the opposite. She testified that she ordered only one beer; that Gilliland did not drink from it; that he ordered and was served his own alcohol; and that she did not remember if he was asked for identification. She remembers Gilliland drinking "a beer" but had no further knowledge of his consumption at Shiki. The restaurant was of the "hibachi" type where strangers sit at the same table. Gilliland "picked up the check" for the entire table. As such, it was not possible to tell what Gilliland ordered individually.

¶7 Gilliland and Schaff likely left Shiki sometime between eight and nine p.m., their testimony being contradictory as to the exact time. Ms. Schaff testified that Gilliland dropped her off outside her apartment, some eight miles from Shiki, at approximately 9:30 p.m. and that she saw no signs of intoxication while he was driving.

¶8 Gilliland's exact movements for approximately the next hour and a half are unknown. However, at 11:08 p.m., he was stopped approximately ten miles from Schaff's apartment by a Yukon police officer because he had a defective headlight. The officer testified that he spoke with Gilliland and that Gilliland showed no signs of intoxication that would justify a field sobriety test. The officer released Gilliland from the stop at approximately 11:20 p.m.

¶9 Gilliland testified that he was then trying to get home to his new apartment but became lost. He was unable to use his phone for directions because the battery was depleted. He stopped at a Circle K convenience store and purchased a phone charger. He waited there for several minutes for the phone to charge and then entered his address. He then pulled out from the Circle K and, at some point, ended up traveling east in the westbound lanes of the highway.

¶10 At approximately 11:43 p.m. Gilliland's truck hit, head on, a vehicle driven by eighteen-year-old Joseph Twyman, killing Twyman. An officer on the scene noted that Gilliland was "obviously out of it ... you could smell the alcohol coming off him. You know, he had his bloodshot eyes slurred speech, the whole—you know, all the signs." Tr. Vol. I, pg. 277. Another officer who spoke to Gilliland at the hospital, however, was not able to determine whether Gilliland had been drinking, as "it's so hard to tell, after such an event ...." *Id.* at 373. That officer testified that he did not smell alcohol and that Gilliland was coherent.

¶11 Gilliland's blood alcohol level (BAC) was tested approximately one hour after the accident and showed a level of 0.149 grams per deciliter (g/dL). Scientific testimony indicated that this would equate to a level of approximately

0.166 g/dL (more than twice the legal limit even if Gilliland had been over twenty-one) at the time of the accident, and probably over 0.200 g/dL when Gilliland left Shiki. Gilliland was charged with first-degree manslaughter and was incarcerated until his release in October 2019. He was on post-release probation at the time of trial.

¶12 In April 2014, the plaintiff sued Gilliland. In August 2015, the plaintiff added the Yukon police department, as a department of the City of Yukon, as a defendant. In May 2016, the plaintiff filed a third petition adding Shiki and Walmart as defendants. In February 2017, the court granted summary judgment to the City of Yukon, holding that the city was "'exempt' from tort liability under 51 O.S. § 155."

¶13 The remainder of 2017 and 2018 was consumed by discovery disputes and routine motion practice. In 2019 and 2020, the case went to the Supreme Court on a petition for certiorari related to the trial court's decision that each remaining defendant—Gilliland, Shiki, and Walmart—were severally rather than jointly and severally liable for the harm caused. The Supreme Court denied certiorari on this issue in case number 118,564.[2] Trial was finally held in June 2021.

¶14 The jury found by a 9-3 verdict that Walmart, Shiki, and Gilliland were all liable for Twyman's death. The jury found damages of $6,200,000 and assigned ten percent liability to Gilliland, twenty percent to Shiki, and seventy percent to

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[2] The plaintiff contended that 23 O.S. § 15(A) applies only to *joint* tortfeasors, not to *concurrent* (or possibly *successive*) tortfeasors, as we have in this case. The trial court ruled against the plaintiff on the question but certified its order for immediate review. The Supreme Court denied the petition for interlocutory review and the plaintiff has not pressed the question in this appeal.

Walmart. However, the plaintiff and Shiki had settled during deliberations and thus, no judgment was entered against Shiki.

¶15 On the stage one verdict form, the jury also found Shiki and Walmart liable for "category one" punitive damages, finding that each was "guilty of reckless disregard for the rights of others." 23 O.S. § 9.1. Because of Shiki's settlement, the punitive damages phase proceeded against Walmart only. The jury found by a 10-2 verdict that Walmart was liable for an additional $5,700,000 in punitive damages. The trial court entered a judgment on these verdicts on August 11, 2021.

¶16 Walmart then filed a motion for judgment notwithstanding the verdict, seeking among other things, to reduce the punitive damages award to $4,340,000, being seventy percent of $6,200,000, so as not to exceed the damages assessed against Walmart. The trial court granted the JNOV in this respect and reduced plaintiff's punitive damages award to $4,340,000.

¶17 Walmart appeals numerous aspects of the proceedings below, seeking the entry of a directed verdict, or alternatively, a new trial. The plaintiff counter-appeals the reduction of punitive damages as contrary to law.

II.

¶18 In reviewing a judgment on a jury verdict, the judgment will be affirmed if there is any competent evidence to support the verdict. *Grumman Credit Corp. v. Rivair Flying Service, Inc.*, 1992 OK 133, ¶ 10, 845 P.2d 182. Generally, however, "a legal question involving the District Court's statutory interpretation of law is subject to *de novo* appellate review." *Johnson v. CSAA Gen. Ins. Co.*, 2020 OK

110, ¶ 9, 478 P.3d 422, 426. To find error based on prejudicial remarks of counsel, "[i]t must appear that substantial prejudice resulted from the counsel's alleged misconduct in his/her argument to the jury and that the jury was influenced thereby to the material detriment of the party complaining in order for the alleged misconduct to effect a reversal of the judgment ...." *Nye v. BNSF Ry. Co.*, 2018 OK 51, ¶ 40, 428 P.3d 863, 877 (cleaned up).

III.

A.

¶19 Walmart raised twenty-six propositions of error in its petition in error but briefed only eight issues. We will address these in the order they appear in Walmart's brief-in-chief.[3]

(1) Direct Causation

¶20 Walmart's central argument, repeated in several sections of its brief, is that Tyler Gilliland testified that he drank only eight of the low-point "Walmart beers" on the afternoon of the accident and that such a low quantity would be insufficient to cause the accident. There were no other witnesses to testify to the amount Gilliland consumed that afternoon; no testimony that he appeared intoxicated that afternoon; and no evidence of any kind that he drank alcohol at any place other than his new apartment and the Shiki restaurant. Hence, Walmart argues, his testimony that he drank only eight "Walmart beers" was "undisputed."

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[3] What we view as eight issues are collapsed in Walmart's brief-in-chief into just six propositions in error with various subheadings. We will focus on each of the eight issues separately.

¶21 And indeed, the plaintiff's toxicologist conceded that *if* Gilliland had consumed only eight beers that afternoon, the amount of alcohol in his system at the time of the accident attributable to the beer he purchased at Walmart would be "zero or close to zero." Tr. Vol. IV, pg. 841. Walmart argues that the evidence of Gilliland's afternoon consumption was undisputed, and this degree of consumption would undisputedly have had no effect on his driving almost six hours later. Hence, there was no basis for the jury to find that the "Walmart beers" were a direct cause of the accident or Joseph Twyman's death.

¶22 Although Walmart is correct that there was no other *direct* evidence of the quantity of beer Gilliland consumed before going to Shiki, the circumstantial evidence indicates quite different facts. The blood test results showed that, approximately one hour after the accident, Gilliland's BAC was 0.149g/dL. Only the plaintiff offered any expert testimony on this (or any other) issue, and that testimony established that it was a scientific impossibility for Gilliland to have that BAC at approximately 12:45 a.m. the next morning if he drank only eight beers in the afternoon, two to four beers at Shiki, and nothing else. Gilliland's testimony was therefore *not* undisputed here. At least one, and possibly all three of his material assertions (eight beers in the afternoon, two to four at Shiki, and nothing else), is disputed by credible scientific evidence.[4] Deciding which, if any, of these statements were credible was a task for the jury. We find no error here.

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[4] Although the expert's conclusion regarding where the "missing" alcohol came from was hotly disputed at trial, there appears to be no claim that the blood test itself was inaccurate, or that the result can be somehow reconciled with Gilliland's testimony.

(2) Shiki's Negligence as a Supervening Cause

¶23 Walmart next argues that the negligence of Shiki—in serving alcohol to Gilliland, or failing to prevent him from consuming alcohol purchased by others, or both—constituted a supervening or intervening cause that relieved Walmart of liability as matter of law. "An intervening cause which will break the causal nexus between an original act of negligence and the resulting injury is called a supervening cause." *Brigance v. Velvet Dove Rest., Inc.*, 1986 OK 41, ¶ 21, 725 P.2d 300, 305. "The test to determine whether a cause is supervening is whether it is: '(1) independent of the original act, (2) adequate of itself to bring about the result and (3) one whose occurrence was not reasonably foreseeable.'" *Id.* (quoting *Thompson v. Presbyterian Hosp., Inc.*, 1982 OK 87, ¶ 15, 652 P.2d 260, 264).

¶24 It is clear that Walmart's supervening cause argument rests on the same premise as its "no causation" argument—that it was "undisputed" that Gilliland drank only eight beers, hence the only alcohol in his system at the time of the accident came from Shiki, and any alcohol drunk at Shiki was therefore "adequate of itself to bring about the result." We held in the previous section that this "eight beers" testimony was not undisputed, and it was for jury to determine its plausibility. Although we see no *impediment* to the jury choosing to believe Gilliland's testimony it was not *required* by the record here to find this testimony credible or find Shiki's negligence to be a supervening cause. We find no error on this question.

(3) The Scope of the Cashier's Employment

¶25 Walmart next argues that because its cashier had been expressly instructed not to sell beer to anyone who appeared to be less than forty years old unless the buyer presented a valid identification, it is alleviated of respondeat superior liability. Walmart argues that, because the cashier willfully disregarded its explicit instructions, she was no longer acting to accomplish her assigned work or to effectuate the business of her employer.

¶26 Walmart relies upon *N.H. v. Presbyterian Church (U.S.A.)*, 1999 OK 88, 998 P.2d 592, as analogous to the situation here. In *N.H.*, the Presbyterian Church argued that child molestation by a minister did not, as a matter of law, fall within the scope of the minister's employment with the church. The Court held that "[n]o reasonable person would conclude that [the minister's] sexual misconduct was within the scope of employment or in furtherance of the national organization's business." *Id.* ¶ 17.

¶27 Walmart does not apparently equate selling beer to an underage patron to sexual assault but relies on *N.H.* primarily for the language it uses to distinguish another assault case, *Rodebush v. Oklahoma Nursing Homes, Ltd.*, 1993 OK 160, 867 P.2d 1241, which found that a nursing home employee was acting within the scope of employment when he struck an Alzheimer patient during a bathing procedure. *N.H.* notes that, in *Rodebush,* "[n]o evidence was presented that the aide had been told not to strike patients" and the aide had not received training on how to avoid such situations. *Id.* ¶ 15. Walmart extrapolates *Rodebush* to

hold that, because its cashier *was* told and trained not to sell beer without ID, she acted outside her scope of employment in doing so, even if accidentally.

¶28 Walmart does not explain, however, why we should find these physical assault cases analogous to the position of a cashier at Walmart. Further, as the record establishes that Walmart instructs all its cashiers, at a national level, to never sell alcohol to minors, Walmart argues, in effect, that neither it, nor presumably any other retailer that makes a similar command, can be responsible for underage alcohol sales because the selling employee always acts against explicit instructions.

¶29 Walmart's view, while convenient for retailers, does not reflect the more than one-hundred-year history of the law of respondeat superior in the State of Oklahoma. As early as 1911, the Oklahoma Supreme Court approved the rule that a principal is generally held liable to third persons in a civil suit for an employee's tortious acts committed in the course of his employment "even if he forbade or disapproved of them." *Chicago, R.I. & P. Ry. Co. v. Holliday*, 1911 OK 367, ¶ 24, 120 P. 927, 932. In 1932, the Oklahoma Supreme Court held:

> In general terms it may be said that an act is within the 'course of employment' if (1) it be something fairly and naturally incident to the business, and if (2) it be done while the servant was engaged upon the master's business and be done, although mistakenly or ill advisedly, with a view to further the master's interest, or from some impulse of emotion which naturally grew out of or was incident to the attempt to perform the master's business, and did not arise wholly from some external, independent, and personal motive on the part of the servant to do the act upon his own account.

Ada-Konawa Bridge Co. v. Cargo, 1932 OK 790, ¶ 33, 21 P.2d 1, 2 (finding a toll bridge employee was acting within the scope of employment when he shot a party

attempting to cross without paying). In 1983, *Rodebush* again summarized the general rule that an act is within the scope of employment when it is "fairly and naturally incident to the business" and is done "while the servant was engaged upon the master's business and be done, although mistakenly or ill advisedly, with a view to further the master's interest, or from some impulse of emotion which naturally grew out of or was incident to the attempt to perform the master's business." *Rodebush,* 1993 OK 160, ¶ 12.

¶30 It was within this long-established framework that *N.H.* concluded that "[n]o reasonable person would conclude that [the minister's] sexual misconduct was within the scope of employment or in furtherance of the national organization's business" because "Brigden acted for his own personal gratification rather than for any religious purpose." *N.H.*, ¶¶ 16, 17. This echoes the rule of *Ada-Konawa Bridge Co.* that acts which "arise wholly from some external, independent, and personal motive on the part of the servant to do the act upon his own account" are not within the scope of employment. *Id.* ¶ 33.[5] We find no indication that Walmart's cashier sold Gilliland beer for any personal

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[5] *Baker v. Saint Francis Hosp.*, 2005 OK 36, ¶ 13, 126 P.3d 602, 606, collects the following cases that found acts were not within the scope of employment based on this rule: *Hill v. McQueen*, 1951 OK 47, 230 P.2d 483 (the manager of a seed company assaulted a former independent sales contractor after the two got into an argument over a disputed debt); *Oklahoma Ry. Co. v. Sandford,* 1953 OK 394, 258 P.2d 604 (bus driver left company bus parked and assaulted the driver of an automobile and held him for arrest after the bus driver concluded he was drunk); *Tulsa General Drivers, Warehousemen, and Helpers Union, Local No. 523 v. Conley,* 1955 OK 277, 288 P.2d 750 (the agent of a union was picketing a business but left to follow the plaintiff four-and-one-half blocks to beat him with a board studded with nails because he had crossed the picket line); *Allison v. Gilmore, Gardner & Kirk, Inc.,* 1960 OK 48, 350 P.2d 287 (a gasoline truck driver was employed by the defendant to drive a truck and deliver gasoline, and while fulfilling those duties, assaulted the plaintiff who was climbing on the gasoline truck). We do not find these cases analogous to the case under review.

motive, or in any context outside that of her job checking out Walmart's customers.

¶31 Alternately, Walmart argues that it is never part of Walmart's "business" to sell beer to minors and hence not within the cashier's scope of employment to do so. This narrow definition of an employer's "business" is equally incompatible with the principles we have outlined above. The risk of underage sales is clearly incident to a business that sells alcohol.[6] We find no error in the decision that Walmart's cashier was within her scope of employment.

(4) The Allocation of Liability

¶32 Walmart also argues that the evidence does not support the jury's allocation of fault between the three defendants. Walmart's view of the evidence, however, is based largely on the two incorrect theories we have previously identified. The first is that Gilliland's testimony that he drank only eight Walmart beers on the afternoon of the accident was "undisputed" and a jury was required to accept this as true. We have addressed this fallacy in Section III-A-1 of this opinion.

¶33 The second is an argument that, because Han Huong suspected that Gilliland might be drunk, the management and staff at Shiki had an additional duty to restrain Gilliland or otherwise prevent him from driving. The testimony at trial shows that Han Huong, the only person at Shiki who suspected that that

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[6] A trucking company may as well argue that it is in the business of "moving freight," not the business of being involved in "vehicle accidents," and a supermarket may argue that it is the business of selling groceries, not in the business of hosting slippery floors. Such occurrences are *clearly incident* to these businesses, however.

Gilliland might be drunk, both inquired if Gilliland was served alcohol at Shiki and was told he was not and asked Gilliland if he was driving. Gilliland lied to Huong, and said he was not driving. Walmart cites no common or statutory law placing a duty on Shiki to restrain, forcibly or otherwise, a suspected drunk patron from driving. Persuasive cases indicate no duty here, and we decline to create such a rule.[7]

¶34 In reviewing a judgment on a jury verdict, the judgment will be affirmed if there is any competent evidence to support the verdict. *Grumman Credit Corp. v. Rivair Flying Service, Inc.*, 1992 OK 133, ¶10, 845 P.2d 182. A judgment on a verdict cannot be disturbed merely because this court may have reached a different decision when faced with the same evidence. *Sides v. John Cordes, Inc.*, 1999 OK 36, ¶ 17, 981 P.2d 301, 307-08. The evidence here was sufficient to allow the jury to find that a major cause of the accident was the beer Gilliland purchased from Walmart. The specific percentage of liability was a question for the jury. We will not disturb its finding.[8]

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[7] *See, e.g., Snow v. TravelCenters of America LLC*, 2023 OK CIV APP 8, ¶ 44, 527 P.3d 741, 754 (holding that a gas station "did not have a duty to refuse to sell motor fuel to [a noticeably intoxicated customer] in an attempt to prevent the harm that might be caused by his illegal driving"). Notably, one consequence of such a rule would be that a bar which behaves lawfully in refusing service to a customer who arrives already intoxicated might still be liable for allowing the customer to leave.

[8] The plaintiff argues in its response brief that the seventy percent/ten percent distribution of liability between Walmart and Gilliland is encouraged by law. It cites *Mansfield v. Circle K. Corp.*, 1994 OK 80, ¶ 17, 877 P.2d 1130, 1136, for a principle that Oklahoma law holds the seller more responsible than the minor because the statutes forbidding alcohol sales to minors are intended to protect the minor. We reject this theory. *Mansfield* examined the question of whether a minor may hold a seller liable for the minor's own injuries caused by drinking alcohol. It did so against the background of established law that an adult has no cause of action against the seller in this situation. The *Mansfield* Court concluded that, because of the protective function of the statute, a seller has a duty to a

(5) The Admissibility of the Testimony of Toxicologist Joseph McCabe

¶35 Next, Walmart argues that the plaintiff's expert's opinion as to the quantity of Walmart beer consumed by Gilliland should have been excluded. As this allegation of error involves Walmart's "undisputed evidence" theory, as discussed above, we will recap it briefly here. Gilliland testified to three material facts: (1) he drank eight Walmart beers in the afternoon before going to Shiki; (2) he drank two to four beers at Shiki; and (3) he drank no alcohol from any other source that day. No witness observed the amount of alcohol Gilliland consumed in the afternoon and there was no testimony regarding the whereabouts of any beer that, had he only consumed eight Walmart beers, would have remained. Walmart has previously argued that there is therefore no evidence disputing Gilliland's testimony that he drank only eight beers in the afternoon, and hence McCabe could not make an analysis based on any other scenario.

¶36 As we previously noted, the totality of Gilliland's testimony was in great tension with the circumstantial evidence. The evidence was that he had a BAC of 0.149 g/dL one hour after the accident. Credible and accepted scientific calculations established at trial that this would equate to a BAC in the region of 0.200 g/dL or above at the time he left Shiki, unless alcohol was consumed after that time, which Gilliland denied. This is impossible if Gilliland's testimony was entirely truthful. At least one of the three crucial facts he testified to must be

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minor that it does not have to an adult patron. We find, however, no indication whatsoever that *Mansfield* commented on the situation of *liability to a third party* where the seller and the minor are successive tortfeasors. We further find no other precedent for such an interpretation.

false according to the scientific evidence. The central task of the jury was to judge the credibility of his testimony against this forensic evidence.

¶37 The fact that Gilliland's testimony was contradicted does not, however, automatically render McCabe's opinion that Gilliland must have consumed approximately twenty-six Walmart beers before going to Shiki competent. Although the BAC result requires a conclusion that Gilliland drank considerably more that day than he testified to, it does not, and cannot, indicate *when or where* he consumed the additional alcohol. Even if the possibility of alcohol from some other source is discounted, the BAC result cannot show whether the additional alcohol was consumed *before or after* Gilliland went to Shiki.

¶38 Hence, McCabe testified that his final conclusion relied on the testimony that Gilliland drank only two to four beers at Shiki and started from that assumption. He testified that, under that scenario, Gilliland must have drunk in the neighborhood of twenty-three to twenty-six beers before he arrived at Shiki in order to reach a BAC in excess of 0.20 g/dL around the time he left the restaurant.

¶39 Although the "twenty-six beers" conclusion is scientifically acceptable assuming Gilliland drank only two to four beers at Shiki, McCabe stated no scientific reason to find that Gilliland's testimony of his consumption at Shiki was true and, in fact, stated that he had not made a determination as to witness credibility. As such McCabe's opinion flowed from *an assumption*—the assumption that Gilliland drank only two to four beers at Shiki.

¶40 Expert testimony based on an assumption is not inherently incompetent or inadmissible unless it is based on assumptions that are "so unrealistic and contradictory as to suggest bad faith" or "a purely subjective opinion based only on the *ipse dixit* of the expert." *Boyle v. ASAP Energy, Inc.*, 2017 OK 82, ¶ 38, 408 P.3d 183, 196 (footnotes and internal quotations omitted). In this case, there was testimony from Gilliland, Schaff, and the Shiki staff supporting the assumption that he drank no more than two to four beers there.

¶41 Although an expert may make assumptions based on facts in evidence, the expert may not assert those assumptions as uncontroverted facts or as expert opinions to the jury. *Rowe v. DPI Specialty Foods, Inc.*, 727 Fed. Appx. 488, 501, n.11 (10th Cir. 2018). We find no indication that Mr. McCabe did so, however. He stated that he had begun his analysis from an assumption that Gilliland drank two to four beers at Shiki, but he had (properly) not attempted to decide the credibility of the testimony supporting this assumption. If Walmart had concerns about the correctness of Mr. McCabe's assumption, or wished to examine alternate scenarios, it could easily have expressed those doubts to the jury through cross-examination and closing argument, or an expert of their own. While the credibility of the assumption McCabe relied on goes to the weight the jury should have given his opinions, it does not render them inadmissible.

(6) Prejudicial Statements During Closing

¶42 Walmart also complains of several improper and prejudicial statements plaintiff's counsel made during closing argument. Examining the closings, it is evident that counsel on multiple sides may have both misrepresented the law,

and at times encouraged the jury to decide on grounds not supported by, or contrary to, the law and instructions.[9] Plaintiff's counsel told the jury that that finding Walmart not liable would "nullify the law." Tr. Vol. IV, pg. 952. He later clearly implied to the jury that Gilliland should not be held to the same standard of conduct as a corporation, and that a business should be held to a higher standard "if that company is the largest retail store on planet earth." *Id.* at 953. This was contrary to the explicit instruction given to the jury that corporations are entitled to the same impartial consideration as individuals.

¶43 Walmart did object to these two statements. After the objection to the "nullify the law" statement the court stated, "I'll just remind the jury that closing arguments are—statements are arguments, and not the law" which counsel took as an invitation to repeat the same "nullify" comment to the jury, with emphasis. *Id.* at 953. After plaintiff's counsel requested the jury to hold the "largest retail store on planet earth" to a higher standard than an individual, the court responded only by stating: "Well, I've given the jury their instructions and they will follow them." *Id.*

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[9] For example, Gilliland's counsel argued that Gilliland should be held less liable than Walmart because he had already effectively "paid a price" and because Twyman's father has accepted Gilliland's apology. Tr. Vol. IV, pgs. 907-910. The plaintiff presented a similar argument that Walmart should be assigned liability because Gilliland has "already stepped up" and "paid with years of his life in a very unpleasant place"—*i.e., went to jail for manslaughter. Id.* at 950. We know of know no principle that allows a jury to assign less civil responsibility to a defendant on the grounds that the state has already imposed a criminal penalty. Indeed, this would seem to be the epitome of a verdict "motivated by sympathy" that jury instruction number one warned against. In a comparative liability regime, where every percentage of liability not assigned to Gilliland goes to another defendant, this appears prejudicial. Error was not preserved on this question, however.

¶44 "In a jury trial, argument of counsel should be limited to those questions submitted to the jury and should not extend to questions of law determinable by the court." *Grand River Dam Authority v. Grand-Hydro*, 1947 OK 167, ¶ 0, 201 P.2d 225 (syllabus of the Court). Here, the plaintiff raised one improper theory of law—that the plaintiff was entitled to a verdict against Walmart because to find otherwise would nullify the law—and explicitly contradicted a jury instruction by asking that a corporate defendant be held to a higher standard than an individual. Ordinarily an "admonition to the jury to disregard an improper argument cures any prejudice which might be created thereby since it cannot be presumed as a matter of law that the jury will fail to heed the admonition given by the court." *Middlebrook v. Imler, Tenny & Kugler M.D.'s, Inc.*, 1985 OK 66, ¶ 29, 713 P.2d 572, 583. While the court's admonition here could have been stronger, we find it sufficient under the circumstances.

¶45 "Conduct of counsel ordinarily is not grounds for reversal, unless such conduct substantially influences the verdict or denies the defendant a fair trial." *Fields v. Volkswagen of America*, 1976 OK 106, ¶ 54, 555 P.2d 48, 61. Attorneys have wide latitude in opening and closing statements, subject to the trial court's control, and limitation of the scope of the arguments is within the trial court's discretion. *Lerma v. Wal-Mart Stores, Inc.*, 2006 OK 84, ¶ 20, 148 P.3d 880, 885. There must be a showing that counsel's conduct substantially influenced the verdict or denied the defendant a fair trial, or both. *Id.*

¶46 Although we do find that counsel likely misstated the law and contradicted at least one of the court's instructions during closing, the "trial court is in a

better position to determine the prejudicial effect of remarks made at trial than is this Court." *Id.* ¶ 27, 886. Further, "[i]n order for alleged misconduct of counsel in argument to the jury to effect a reversal of a judgment it must appear that substantial prejudice resulted therefrom and that the jury was influenced thereby to the material detriment of the party complaining." *Id.* Although these remarks were prejudicial, we do no find they rise to the level of prejudice that would require us to overturn a jury's verdict.

(7) The Matter of Juror Smith

¶47 Walmart argues that the court should have removed a prospective juror, Ms. Smith, for cause, but instead forced Walmart to use a peremptory challenge to remove Smith, thereby requiring Walmart to leave another juror on the panel that it would otherwise have removed. In a 9-3 verdict, there is inherently a greater chance that the selection of a single juror could have changed the verdict.[10]

¶48 Juror Smith's history in *voir dire* is substantial and somewhat confusing. Smith opined: "I think we all make our own decisions, so you're the one to decide if you want to buy [alcohol] or not" and "I do believe it's more the drinker's fault because they know what they're doing and what harm they could cause." Tr. Vol. I, pg. 125. When asked if she could put her personal beliefs aside and follow the

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[10] We are not unmindful, however, of the rule expressed in *Parrish v. Lilly*, 1993 OK 80, 883 P.2d 158, that "[e]ach and every person who sits on a jury, *regardless of the number of jurors required to render a verdict,* must satisfy the constitutional and statutory requirements of impartiality. Subjecting a party to anything less than twelve impartial jurors, where twelve jurors are guaranteed, will not survive judicial scrutiny." *Id.* ¶ 20, 161 (emphasis supplied).

law the judge provided, she said, "I don't know, because my brother is an alcoholic, so it's kind of a touchy subject. He goes—does well and then he has alcohol in his system, but he is still choosing what he does." *Id.* at 127.

¶49 When asked the same question, she responded, "Well, I'm just speaking about my opinion" and that her opinion was so strong because "my brother's an alcoholic, that I'd still lean towards, you know, it's not okay. You choose what you did." *Id.* at 128. When again pressed whether she could follow the instructions she replied, "I don't know because if it was my brother in the same place it would be different, you know." *Id.* at 129. When pressed again whether she could follow the instructions, she responded "Yeah, maybe." *Id.* at 130. However, shortly after this she was asked, along with all the prospective jurors, whether she had a "preconceived notion" that only the drunk driver could be at fault or if she would be able "to listen to all the evidence and follow the instructions as the Judge gives you," and she responded in the affirmative. *Id.* at 135.

¶50 She later admitted to leaning "a little bit towards the responsibility lying solely with the person consuming the alcohol." *Id.* at 146. When asked again if she could set aside her personal opinions on where the responsibility lies, she answered, "I can try to, but I can't say 100 percent yes or no." *Id.* at 147. She testified that there was a slightly better than 50 percent chance of her following the law over her own views. *Id.* at 147-48.

¶51 At this point, Gilliland's counsel asked the court to remove Smith for cause. *Id.* at 149. The court refused. Later, after Smith testified that she couldn't

give any of the three defendants a "zero on liability" although she "might change her mind when she hears the evidence," *id.* at 170-71, Walmart moved the court to remove Juror Smith for cause. *Id.* at 172. The Court again refused, summarizing that "she's been all over the place—her answers are so inconsistent." *Id.* at 173.

¶52 It is generally recognized that "jurors must be impartial, and bias or prejudice in a case disqualifies one as a juror thereon and provides cause for a challenge." *Parrish v. Lilly,* 1993 OK 80, 883 P.2d 158, 160 (*citing Burke v. McKenzie,* 1957 OK 155, 313 P.2d 1090, 1093). "In the case of bias, prejudice is presumed, and the impact of the bias on the verdict need not be proven." *Fields v. Saunders,* 2012 OK 17, ¶ 13, 278 P.3d 577, 581–82 (citing *Parrish* at ¶ 16). "Such bias presents a fundamental constitutional issue involving violation of the absolute right to a fair trial and an impartial jury. Such an issue is reviewable *de novo.*" *Id.*

¶53 All jurors, however, have some inherent preconceptions or biases. The rule of these cases—that if bias is shown, prejudice is presumed—should therefore be interpreted with proper reference to the facts in those cases. The question is not whether a juror has some inherent preconceptions or biases, as this appears almost inevitable. It is whether those biases render the juror incapable of deciding based on the evidence presented.

¶54 Juror Smith is not closely analogous to the jurors in either *Parish* or *Fields.* In *Parish,* a juror was of the opinion that a failure to diagnose lung cancer in a patient known to be a long-term heavy smoker inherently constituted

malpractice. The juror in *Fields* stated that "the plaintiffs would have never won the case with him (the juror) serving in the case." *Id.* ¶ 3. The willful inability of each juror to decide based on the evidence was clear.

¶55 Here, Ms. Smith answered somewhat erratically, insisting that she had her own opinions on the subject matter of the case (which the trial court summarized for the panel prior to the *voir dire*) and the responsible parties (some of which were quite *favorable* to Walmart),[11] but eventually conceded that those initial opinions could be changed by the evidence. We are not of the opinion that Ms. Smith's answers demonstrated the degree of fundamental bias that would show the prejudice present in *Fields* and *Parish.* We find no error by the court here.

(8) The City of Yukon as a Nonparty Tortfeasor

¶56 This case originally had a fourth defendant—the City of Yukon—which was sued for the alleged negligence of its officer in allowing the underage Gilliland to drive away from a traffic stop with a BAC approximately twice the legal limit for even an of-age driver, twenty minutes before the accident that killed Twyman. The basis of the alleged liability was the officer's failure to detain Gilliland and remove him from the road.[12] The City obtained summary judgment based on sovereign immunity pursuant to 51 O.S. § 155 of the Governmental Tort Claims

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[11] Indeed, Ms. Smith's most strongly held opinion appeared to be that Gilliland, rather than Walmart, should bear the primary responsibility for the accident.

[12] The plaintiff's amended petition alleges: "Although Gilliland was visibly and noticeably intoxicated and underage, the City of Yukon police officer negligently failed to remove Gilliland from his vehicle and negligently permitted Gilliland to continue to operate his motor vehicle on the public roads." R. at 9. Walmart accepts this characterization in its briefing. *See Brief-in-Chief,* 27 ("Despite his training and opportunity, Captain Robinson *failed to stop* Tyler Gilliland from driving away ....") (emphasis added).

Act (GTCA).[13] That decision was not appealed. However, Walmart asked to include the City as a nonparty tortfeasor on the verdict form for the purpose of distributing liability between the remaining parties, which was refused over Walmart's objection. The question here is whether this was error.

¶57 Generally, a defendant is entitled, assuming the appropriate evidentiary showing, to include nonparty tortfeasors on the verdict form. *Paul v. N.L. Industries, Inc.*, 1980 OK 127, ¶ 5, 624 P.2d 68, 70 ("[T]ortfeasors not parties to the lawsuit should be considered by the trial jury in order to properly apportion the negligence of those tortfeasors who are parties."). However, the party attempting to add them must show that they are capable of meeting the definition of a tortfeasor. In this case, even taking the facts in the light most favorable to the defendants, we find that the City of Yukon could not meet this definition because its officer had no general duty to arrest Gilliland under the circumstances.

¶58 We find the Supreme Court's case of *Morales v. City of Oklahoma City ex rel. Oklahoma City Police Dep't*, 2010 OK 9, 230 P.3d 869, dictates a favorable result for the plaintiff on this issue. In that case, which concerned an officer's liability for injuries that a plaintiff incurred during the course of an arrest, the

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[13] The City argued the following exemptions applied: § 155(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 ...."), § 155(5) ("Performance of or the failure to exercise or perform any act or service which is in the discretion of the state or political subdivision or its employees ...."), and §155(6) ("[T]he failure to provide, or the method of providing, police, law enforcement or fire protection ...."). In granting the City's motion for summary judgment, the trial court did not state which exemption or exemptions it thought applicable.

Court reiterated its previously announced rule that there is no blanket immunity for police officers for injuries that occur to others during the course of an arrest. *Id.* ¶ 11, 875-76 (citing *Tuffy's Inc v. City of Oklahoma City*, 2009 OK 4, 212 P.3d 1158). However, the Court drew a line protecting the officer from any liability stemming from the decision whether or not to make the arrest in the first instance. The Court—concerning § 155(4) of the GTCA, which exempts the state and its political subdivisions from "failure to adopt or enforce a law"—said:

> 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. 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.

Id. ¶ 12, 876 (emphasis modified). Here, we find that the officer's decision not to arrest Gilliland was an exercise of discretion protected by this exemption.

¶59 While *Morales* definitively answers the question of immunity under the GTCA, the question of whether an immune but otherwise negligent party could be listed on the verdict form is distinct; that is, one might have immunity under the GTCA but still have breached a duty under traditional tort-law concepts. While we concede this is possible in some cases, where the immunity is provided because the state actor had the *discretion* to act or not, we hold that there can be no duty to act. If the decision to arrest or engage in other law enforcement activities is discretionary in the first instance, it must follow there can be no duty

to make any particular choice that would support tort liability. The concepts of duty and discretion are fundamentally at odds in this respect.[14]

¶60 However, even setting aside *Morales*, we would hold that the officer here could not be held liable for his failure to act under Oklahoma tort law. It would stretch the common law of torts to its breaking point to place a duty to act on the officer here. This case falls squarely within the general rule that, "[a]t common law, a person had no duty to prevent a third person from causing physical injury to another." *Wofford v. Eastern State Hosp.*, 1990 OK 77, ¶ 9, 795 P.2d 516, 518. Although there are exceptions to this rule, including *Wofford* itself, the officer's failure to arrest Gilliland fits no such exception.

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[14] While we in no way rely on this source, we note that the *Restatement (Third) of Torts: Apportionment Liab.* § B19 (2000) directly addresses the difficult line-drawing problems and policy considerations that are unavoidable in any system of comparative negligence that allows immune non-parties to share in ultimate liability. As it relates to this case, for example, comment *e* to § B19 states:

> [I]n some cases immunities may be an alternative way of stating that the person has no legal duty or has not breached any duty that exists. Thus, for example, a municipality may be "immune" from suit for failing to provide police protection to an individual who was assaulted. This "immunity" may obscure that a municipality has no duty of care in tort law to the general public to prevent assaults and/or that there was no reasonable means of precaution by which to prevent any such assault, such that any duty that might have existed was not breached as a matter of law. Identifying those immune persons who are truly immune despite tortious conduct that would be actionable and those whose immunity is an alternative way of stating that there is no duty or no breach of duty may be uncertain and difficult. Courts must, nevertheless, carefully analyze these issues in determining whether an immune party may be assigned a percentage of comparative responsibility.

Id. cmt. e. Here we hold, in effect, that the City's immunity is a "no duty" type of immunity, and thus, the City could not share in the liability. A simpler, perhaps better rule would be to declare that any party immune under the GTCA cannot share in liability, *full stop.* However, we recognize that any such rule must originate a higher lawmaking body than this one. For a thoughtful analysis of these issues, *see generally,* Jonathan Cardi, *Apportioning Responsibility to Immune Nonparties: An Argument Based on Comparative Responsibility and the Proposed Restatement (Third) of Torts,* 82 Iowa L. Rev. 1293 (1997).

¶61 While *Wofford* recognized potential tort liability for the release of a dangerous mental patient, it was clear in *Wofford* that the hospital had taken charge of the patient. In this case, while the officer certainly had the *option* to arrest Gilliland—the malfunctioning headlight alone offered probable cause to arrest[15]—the officer, for whatever reason, decided not to. We cannot agree with any implication that Gilliland was ever arrested or in custody here.[16] The officer in this case engaged in a traffic stop, nothing more and nothing less. To analogize this case to *Wofford*, where the patient "was institutionalized as a 'Person requiring treatment'" under state law, *Wofford*, 1990 OK 77, ¶ 21, is untenable.[17]

¶62 The dissent also cites to high-speed-chase cases such as *State ex rel. Oklahoma Dep't of Pub. Safety v. Gurich*, 2010 OK 56, 238 P.3d 1, *Ray v. Broken Arrow Police Dep't*, 2010 OK 57, 238 P.3d 931, and *Smith v. City of Stillwater*, 2014 OK 42, 328 P.3d 1192, for support of its position, but each is readily

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[15] *See* 47 O.S. § 12-101 and § 12-203.1 (making it a misdemeanor to drive a car without at least two functioning headlights); 22 O.S. § 196 (permitting arrest for any "public offense, committed or attempted in an officer's presence"); 21 O.S. § 3 (defining "public offense" to include misdemeanors).

[16] While we acknowledge Gilliland was not free to leave the scene until the officer completed his investigation, we reject the notion that Gilliland was ever "under arrest." "Arrest" is a defined term under Oklahoma law, and the officer's investigatory stop in this case is miles from that definition. *See* 22 O.S. § 186 (defining "arrest" as "the taking of a person into custody, that he may be held to answer for a public offense.").

[17] Likewise, any plea to the *Restatement (Second) of Torts* § 319—which states that "[o]ne who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm"—is unavailing. In our view, the officer did not "take[] charge" of Gilliland within the *Restatement's* meaning. *See Crider v. United States*, 885 F.2d 294, 300 (5th Cir. 1989) (finding this § 319 "inapplicable" because "[t]he entire basis of [the plaintiff's] lawsuit is his claim that the [defendants] failed to 'take charge' of [the intoxicated person] by failing to arrest him").

distinguishable from this case.[18] In this case, any harm alleged to have been caused by the officer was entirely due to the officer's failure to act. However, each of the cases cited above involves very clear action taken by the police and harm that allegedly flowed directly from that action. *See Gurich*, ¶ 4 (describing harm that occurred after an officer "activated his lights and siren and pursued the fleeing driver for several miles at high rates of speed in moderate to heavy traffic through mixed residential and business areas of Oklahoma City"); *Ray*, ¶ 3 (describing harm that took place after the police "recognized the vehicle as being stolen, performed a U-turn and began pursuit"); *Smith*, ¶ 1 (describing harm that occurred "[i]n the course of the pursuit"). These cases, because they involve harm that clearly flowed from action as opposed to inaction, simply have no relevance to this case.

¶63 We conclude by noting that our holding aligns with many other states and jurisdictions that have addressed this particular issue.[19] We adopt such a view

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[18] We note that Walmart does not cite to any of these cases in its briefing. This line of attack on the trial court's judgment is entirely of the dissent's making.

[19] *See e.g., Crider*, 885 F.2d at 298 (finding, under Texas law, that park rangers owed no duty to arrest a drunk driver who later injured plaintiff in a car accident); *Landis v. Rockdale County*, 212 Ga.App. 700, 445 S.E.2d 264, 265–68 (1994) (holding that the county sheriff and deputy sheriff had no duty to arrest a drunk driver whom they had stopped shortly before he crashed into plaintiff's decedent's car); *Markis v. City of Grosse Pointe Park*, 180 Mich. App. 545, 559, 448 N.W.2d 352, 359 (1989) (holding that a police officer's duty to restrain intoxicated motorists is owed to the public generally and does not create liability for an individual's injury arising from its breach); *Shore v. Town of Stonington*, 187 Conn. 147, 153, 444 A.2d 1379, 1382 (1982) (finding a duty to arrest drunk driver only where it would be apparent to the officer that his failure to act would be likely to subject an identifiable person to imminent harm); *Lehto v. City of Oxnard*, 171 Cal. App. 3d 285, 291, 217 Cal. Rptr. 450, 453 (Ct. App. 1985) (holding that the fact that harm to a plaintiff as a member of the public might have been reasonably foreseeable as result of failing to arrest a drunk driver did not impose a duty on police); and, *Fusilier v. Russell*, 345 So. 2d 543, 546 (La. Ct. App. 1977) (holding that a police officer's duty to arrest drunk driver is owed to the

here and hold that a police officer's decision not to arrest is within the officer's discretion. Because the officer had no duty arrest Gilliland, the trial court did not err in refusing to list the City of Yukon on the verdict form.

B.

¶64 As previously discussed, the jury awarded actual damages of $6,200,000 and assigned ten percent liability to Gilliland ($620,000), twenty percent liability to Shiki ($1,240,000), and seventy percent liability to Walmart ($4,340,000). The case then proceeded to the punitive damages phase. The plaintiff did not seek punitive damages against Gilliland, but only against Shiki and Walmart. However, Shiki settled while the jury was deliberating in stage one. Thus, the amount of Walmart's liability for punitive damages was the only question sent to the jury during phase two.

¶65 After deliberations in stage two, the jury found Walmart liable for $5,700,000 in punitive damages pursuant to 23 O.S.2021 § 9.1. After Walmart filed its motion for JNOV,[20] the trial court reduced Walmart's punitive damages

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general public and not to individuals). *But see, e.g., Irwin v. Town of Ware*, 467 N.E.2d 1292, 1304 (Mass. 1984) (imposing tort liability against a police officer for "negligently fail[ing] to remove an intoxicated motorist from the highway"). *See generally*, 48 A.L.R.4th 320 (originally published in 1986).

[20] The plaintiff contends that the trial court had no power to make this reduction because Walmart did not object to either the jury instructions related to the punitive damages award or the "defective form" of the verdict at the time it was announced and accepted by the trial court. The plaintiff cites to *State ex rel. Dept. of Transp. v. Sherrill*, 2012 OK CIV APP 43, ¶ 12, 276 P.3d 1060, 1062, which states that "[w]here a party fails to object to the form of the verdict before the jury is discharged, such failure constitutes a waiver of his objections." A verdict that is "defective in form only, *not affecting the rights or merits of the parties*, may be corrected by the court with the assent of the jury before they are discharged." *Bullard v. Grisham Constr. Co.*, 1983 OK 21, ¶ 10, 660 P.2d 1045, 1048. However, a verdict awarding damages plainly in excess of those allowed by statute, as Walmart argued in its JNOV, is not merely "defective in form." It not only "affects the rights

award to $4,340,000, which, as the trial court found, was Walmart's "proportionate share of actual damages awarded by the jury." The relevant provision of Section 9.1 provides that a jury may award "Category I" punitive damages "in an amount not to exceed . . . the amount of the actual damages awarded." 23 O.S.2021 § 9.1(B)(2)(b). The plaintiff has appealed the trial court's reduction, arguing that the trial court misinterpreted Section 9.1 because the phrase "the amount of the actual damages awarded" refers to all compensatory damages awarded.

¶66 The question of what is meant by the phrase "the amount of the actual damages awarded" involves a matter of statutory interpretation. "The cardinal rule of statutory interpretation is to ascertain and give effect to legislative intent and purpose as expressed by the statutory language." *Odom v. Penske Truck Leasing Co.*, 2018 OK 23, ¶ 17, 415 P.3d 521, 528. "It is presumed that the Legislature has expressed its intent in a statute's language and that it intended what it so expressed." *Id.* Ultimately, "legislative intent will be ascertained from the whole act in light of its general purpose and objective considering relevant provisions together to give full force and effect to each." *Id.* ¶ 18, 415 P.3d at 528. "Only where legislative intent cannot be ascertained from the language of a statute, as in cases of ambiguity, are rules of statutory interpretation employed." *Id.*

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of the parties," but raises a question of fundamental error. Thus, we confirm the trial court's ruling that the matter was properly addressed by post-judgment motion.

¶67 Keeping these principles in mind, we must determine whether the phrase "the amount of the actual damages awarded" refers to the amount of actual damages awarded in total or does it refer to the amount of actual damages assessed against a particular defendant. Although there is no Oklahoma appellate case directly on point, the Oklahoma Supreme Court has considered a similar factual scenario as the one currently before us in its interpretation and analysis of the previous version of Section 9.1, 23 O.S.1991 § 9, and the uniform contribution statute, 12 O.S.1991 § 832. Despite the similar facts, we find that this decision falls short of providing us an answer to the precise issue before us.

¶68 In *Nichols v. Mid-Continent Pipe Line Co.*, 1996 OK 118, 933 P.2d 272, the plaintiffs brought suit against three defendants—Barrett, Exxon, and Mid-Continent—for negligence and nuisance, which arose from injuries to plaintiffs' cattle. *Id.* ¶¶ 4-5, 933 P.2d at 275. Barrett settled with the plaintiffs for $100,000 and was dismissed from the action before trial. *Id.* ¶ 4, 933 P.2d at 275. Even though he was dismissed, his fault as a non-party on the negligence claim was submitted to the jury. *Id.* Barrett's liability on the nuisance claim was not submitted to the jury. *Id.*

¶69 As to the negligence claim, the jury assessed $100,000 in damages and apportioned liability as follows: (1) ten percent liability to the plaintiffs for contributory negligence ($10,000); thirty-five percent liability to Exxon ($35,000); and fifty-five percent liability to Mid-Continent ($55,000); and zero liability to Barrett. *Nichols*, 1996 OK 118, ¶ 5, 933 P.2d at 275. The jury also found Mid-Continent solely liable on the nuisance claim for $150,000 in

damages and assessed a punitive damages award against Mid-Continent for $250,000. *Id.*

¶70 In accordance with 12 O.S.1991 § 832, the trial court credited Exxon and Mid-Continent each with $50,000 each from the Barrett settlement proceeds. *Id.* ¶ 6, 933 P.2d at 275. This reduced the negligence judgment against Mid-Continent to $5,000 and the judgment against Exxon to -0-. *Id.* n.5, 933 P.2d at 275 n.5. The trial court also reduced the punitive damages award to $155,000—the amount of actual damages awarded against Mid-Continent after the Barrett settlement credit ($5,000 for negligence and $150,000 for nuisance). *Id.* ¶ 6, 933 P.2d at 275. Mid-Continent, Exxon, and the plaintiffs all appealed, with the plaintiffs seeking relief from the trial court's application of the settlement proceeds. *Id.* ¶ 6, 933 P.2d at 275-76. After this Court reversed the trial court's use of the Barrett settlement proceeds, Mid-Continent sought certiorari. *Nichols*, 1996 OK 118, ¶¶ 6-7, 933 P.2d at 275-76.

¶71 Upon review, the Oklahoma Supreme Court ruled that it was an error for the trial court to allow either Exxon or Mid-Continent to credit the Barrett proceeds to the negligence-related damages because the jury had exonerated Barrett for any negligence-based liability. *Id.* ¶ 17, 933 P.2d at 279. This was because, as the Supreme Court noted, "[u]nder the provisions of [Section] 832H[,] a claim to settlement proceeds' credit *must be rested on the existence of other tortfeasors who are liable for the same injury as the settling party.*" *Id.* The Supreme Court went on to note that Mid-Continent also did not satisfy the statutory requirements of Section 832H for purposes of the nuisance claim. *Id.*,

¶¶ 19-20, 933 P.2d at 280. In *Nichols*, Barrett's liability for nuisance was not submitted to the jury and Mid-Continent did not properly preserve the issue with the trial court. *Id.* ¶¶ 19-20, 933 P.2d at 280. Therefore, because "the Barrett settlement proceeds [were] *not available to reduce* the compensatory damages of $250,000, the plaintiffs [were] entitled to the $250,000 award in punitive damages." *Nichols*, 1996 OK 118, ¶ 22, 933 P.2d at 280-81.

¶72 While the *Nichols* decision is factually similar to this case, it does not stand for the proposition that the phrase "the amount of the actual damages awarded" means the total amount of damages assessed against all parties. That was not the issue before the Oklahoma Supreme Court and it did not make that express holding. As such, we cannot infer any meaning of the phrase "the amount of the actual damages awarded" from the *Nichols* decision.[21] Further, in *Nichols*, the Supreme Court was looking to an entirely different punitive damages statute, 23 O.S.1991 § 9. Even though Section 9 and Section 9.1 are similar, Section 9.1 contains different language and a structure that must be taken into consideration. In considering the express language of Section 9.1 and its purpose, we determine that the phrase "the amount of the actual damages

[21] This is why we cannot agree with Judge Blackwell's argument in his dissent, *infra*, that we "minimize [] the significance of" *Nichols*. Although the Supreme Court made a finding that a punitive damages award of $250,000 could be assessed against Mid-Continent, which was the entire amount of actual damages assessed against all parties, that finding was not based upon an express finding that the phrase "the amount of the actual damages awarded" does in fact mean the entire amount of damages assessed against all parties. That is an assumption we are not willing to make.

awarded" refers to the damages assessed against a particular defendant whose conduct is being evaluated for purposes of punitive damages.[22]

¶73 Section 9.1 expressly states that the purpose of awarding punitive damages is "for the sake of example and by way of punishing the defendant." 23 O.S.2021 § 9.1(A). The Oklahoma Supreme Court has recognized this purpose, noting "that they are allowed as punishment for the benefit of society as a restraint upon the transgressor and a warning and example serving as a deterrent to such conduct in the defendant and others similarly situated." *LeFlore v. Reflections of Tulsa, Inc.*, 1985 OK 72, ¶ 40, 708 P.2d 1068, 1077 (discussing previously repealed punitive damages statute, 23 O.S.1981 § 9). This purpose is expressly carried out in the language of Section 9.1.

¶74 Throughout Section 9.1, the phrase "the defendant" is used. For instance, the factors a jury is instructed to consider indicate that it is the conduct of a particular defendant that is evaluated, as the phrases "the defendant" and "a defendant" are used. Section 9.1(A) sets forth the factors as follows:

> 1. The seriousness of the hazard to the public arising from ***the defendant's*** misconduct;
> 2. The profitability of the misconduct to ***the defendant***;
> 3. The duration of the misconduct and any concealment of it;

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[22] Judge Blackwell's dissent argues that our interpretation of Section 9.1 adds language to the statute in resolving this appeal: i.e., "the amount of the actual damages awarded" means those "*as assessed against that particular defendant.*" Judge Blackwell's dissent, p. 6 (emphasis in original). At the same time, Judge Blackwell's dissent adds its own language to the statute to achieve its result: "In my view, the unambiguous language of [Section] 9.1 refers to *all* of the compensatory damages a jury awards a plaintiff." *Id.* (emphasis in original). Neither the word "all" nor the phrase "as assessed against that particular defendant" appear in the text of Section 9.1. Therefore, because the text of the statute – "the amount of the actual damages awarded" – requires the addition of some language to decide this appeal, we look to the Legislature's intent to resolve the ambiguity in the statutory text.

> 4. The degree of ***the defendant's*** awareness of the hazard and of its excessiveness;
> 5. The attitude and conduct of ***the defendant*** upon discovery of the misconduct or hazard;
> 6. In the case of ***a defendant*** which is a corporation or other entity, the number and level of employees involved in causing or concealing the misconduct; and
> 7. The financial condition of ***the defendant***.

23 O.S.2021 § 9.1(A) (emphasis added). The plaintiff has also recognized this phrasing, noting that the "factors do not describe or consider the actions or conduct of others at all." The plaintiff contends, however, that even though these factors indicate that a jury is to consider the conduct of a defendant, the punitive damages cap should not be awarded based upon the amount of damages awarded against that particular defendant. According to the plaintiff, this is because the amount of actual damages is not listed as a factor, but merely a cap on damages. We disagree with the plaintiff's arguments.

¶75 Although the amount of damages is not listed as a factor, it does not follow that a jury should then disregard that particular defendant when deciding the amount of the award. This is contrary to the language found within the statutory section that contains the punitive damages caps for each category. For example, Subsection 9.1(B) says, in part, the following regarding "Category I" punitive damages:

> B. Category I. Where the jury finds by clear and convincing evidence that:
> 1. ***The defendant*** has been guilty of reckless disregard for the rights of others; or
> 2. An insurer has recklessly disregarded its duty to deal fairly and act in good faith with its insured; the jury, in a separate proceeding conducted after the jury has made such finding and awarded actual damages, may award punitive damages in an amount not to exceed the greater of:

a. One Hundred Thousand Dollars ($100,000.00), or

b. the amount of the actual damages awarded.

23 O.S.2021 § 9.1(B) (emphasis added). Once again, the use of the phrase "the defendant" is present, indicating that a jury should still consider the conduct of that particular defendant when awarding punitive damages. Thus, the "amount of the actual damages awarded" means that amount of actual damages awarded against the particular defendant whose conduct is at issue.[23]

¶76 If "the amount of the actual damages awarded" meant the entire amount of damages awarded, a jury would in effect be increasing a punitive damages award based upon amounts of compensatory damages that were not attributed to the particular defendant whose conduct is being evaluated. In other words, a jury would be punishing a particular defendant for the conduct of others, which is contrary to the underlying purpose of punitive damages. Further, in a case

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[23] Judge Blackwell's dissent begins with a citation to a case from the Oklahoma Supreme Court, *Graham v. Keuchel*, 1993 OK 6, 847 P.2d 342, to argue that we do not explain why a plaintiff's percentage of contributory negligence does not reduce a punitive damages award. The quote taken from *Graham* is a citation to the punitive damages statute that was in effect in 1981. It was not until 1986 that Section 9 was amended to include language regarding the "actual damages." *Id.* ¶ 53, 847 P.2d at 363; *see also Buzzard v. Farmers Ins. Co.*, 1991 OK 127, n.2, 824 P.2d 1105, n.2. In *Buzzard*, the Oklahoma Supreme Court seemingly acknowledged that a punitive damages statute that provides a limitation of "the amount of actual damages" does require consideration of the particular compensatory damages ratios by citing to this change in a footnote after saying the following: "Because such damages are awarded to punish the wrongdoer for the wrong committed upon society, Oklahoma does not require the amount of punitive damages to be in a particular ratio to the amount of actual damages." *Buzzard*, 1991 OK 127, ¶ 48, 824 P.2d at 1115. As such, the amount of a plaintiff's contributory negligence certainly comes into play, as any amount of "actual damages awarded" to a particular defendant would not include amounts attributed to the contributorily negligent plaintiff. Although a contributorily negligent plaintiff was not the precise factual scenario before this Court, the same rationale discussed herein regarding joint tortfeasors applies. *See* 23 O.S.2021 § 14 ("Where such contributory negligence is shown on the part of the person injured, damaged or killed, the amount of the recovery shall be diminished in proportion to such person's contributory negligence.").

such as this involving joint tortfeasors, assessing an award of punitive damages against a particular defendant is consistent with Oklahoma's law that liability for damages caused by joint tortfeasors is several. 23 O.S.2021 § 15(A) ("In any civil action based on fault and not arising out of contract, the liability for damages caused by two or more persons shall be several only and a joint tortfeasor shall be liable only for the amount of damages allocated to that tortfeasor.").[24]

¶77 Our finding today is consistent with other jurisdictions who have recognized that assessing punitive damages based upon a particular defendant's culpability is consistent with the underlying purpose of a punitive damages award. *E.g.*, *Remeikis v. Boss & Phelps, Inc.*, 419 A.2d 986, 992 (D.C. 1980) (punitive damages must be related to degree of culpability and defendants' ability to pay); *York v. InTrust Bank, N.A.*, 962 P.2d 405, 433 (Kan. 1998) (holding that the amount of a punitive damages award "is to be calculated with the individual defendant's financial status and conduct in mind"); *Fisher v. McCrary Crescent City, LLC*, 972 A.2d 954, 988 (Md. Ct. Spec. App. 2009) (holding that "it is appropriate that trial courts apportion punitive damages in accordance with the

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[24] The dissent takes issue with our discussion of Section 15. We cannot agree with the dissent's position. Under the dissent's analysis, "the amount of the actual damages awarded" cap includes the total amount of actual damages assessed in the litigation. Thus, it would include amounts that were assessed not only against one tortfeasor, but against all tortfeasors. With the enactment of Section 15, the Legislature made liability among tortfeasors several and a tortfeasor is only responsible for an amount of damages that is proportionate to one's degree of fault. Under the dissent's reasoning, the punitive damages cap would include an amount of damages attributed to another tortfeasor's degree of fault. Although the purpose of punitive damages is to punish a defendant, the dissent's interpretation, in our view, punishes a defendant for the conduct of another.

defendants' degree of culpability and ability to pay"); *Huckeby v. Spangler*, 563 S.W.2d 555, 560 (Tenn. 1978) ("apportionment of punitive damages represents the better view of the subject"); *Diversified Holdings, L.C. v. Turner*, 2002 UT 129, 63 P.3d 686, 698 ("When multiple defendants are not jointly and severally liable, as they are not for negligence damages, one defendant's liability should not be a predicate for increasing punitive damages assessed against another.").

¶78 If the Legislature intended for the conduct of multiple defendants to be evaluated, it could have departed from the singular phrasing and used a phrase such as "the defendant[s]" or "all defendants."[25] However, it did not, and we will not write such language into the statute. Accordingly, when awarding punitive damages under Section 9.1, they must be separately assessed against a particular defendant so as to not exceed the amount of actual damages awarded against that defendant. We believe this interpretation is consistent with and gives effect to the legislative intent and purpose of Section 9.1. Thus, we affirm the trial court's reduction of the amount of punitive damages the jury assessed against Walmart.

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[25] As Judge Blackwell's dissent points out, under Oklahoma law, "[w]ords used in the singular number include the plural, and the plural the singular, except where a contrary intention plainly appears." 25 O.S.2021 § 25. We, however, believe a contrary intention appears within Section 9.1 because of the factors listed for the jury's consideration. A jury is required to make certain findings by, for example, "clear and convincing evidence." This requires a jury to evaluate the conduct of a particular defendant, not the collective conduct of all defendants.

IV.

¶79 After a thorough review of the record, we find no error in either the trial court's judgment, entered upon the jury's verdict on August 11, 2021, or in its post-judgment reduction of punitive damages.

¶80 **AFFIRMED.**

HUBER, J., concurs; FISCHER, J., dissents and concurs specially in Part III-B; and BLACKWELL, P.J., concurs except as to Part III-B, to which he dissents.

FISCHER, J., dissenting:

¶1 In my view, the district court erred in not instructing the jury to consider any negligence on the part of the City of Yukon and its officer who stopped and then released Tyler Gilliland before the accident that killed Joseph Twyman. Even though the City was no longer a party to this action, the failure to instruct the jury to consider the City's potential negligence and the refusal of Wal-Mart's request to include the City on the verdict form, was fundamental error and requires reversal of the judgment in favor of the Plaintiff. *See Sellars v. McCullough*, 1989 OK 155, ¶ 9, 784 P.2d 1060, 1063 (stating that the provisions of 12 O.S.2021 §§ 577 through 577.2 "place an affirmative duty upon the court to give instructions which accurately reflect the law regarding the issues presented"). I would remand for a new trial with instructions to direct the jury to consider any negligence on the part of the City when apportioning the amount of negligence attributable to all tortfeasors responsible for Twyman's death, and,

therefore, dissent to the Majority's affirmance of the judgment in favor of the plaintiff.

I. Absent Tortfeasor Law

¶2 **The dispositive issue is not whether the City can be held liable for a percentage of the negligence that caused Twyman's death**. That issue was resolved in the City's favor when the district court granted the City's motion for summary judgment. The issue is whether, if negligent but immune from liability because of the protection afforded by the Governmental Tort Claims Act, (51 O.S.2021 §§ 151 through 172), the City's negligence should have been considered by the jury when it determined the percentage of Wal-Mart's negligence compared with the percentage of negligence of the other defendants. It is "'accepted practice to include all tortfeasors in the apportionment question,' including . . . persons alleged to be **negligent but not liable** for damages, such as the third party in Workers' Compensation cases." *Paul v. N.L. Indus. Inc.*, 1980 OK 127, ¶ 10, 624 P.2d 68, 69 (quoting Heft and Heft, "Comparative Negligence Manual," § 4.220)(emphasis added).

¶3 Settled law for over forty years establishes that "the negligence of tortfeasors not parties to the lawsuit should be considered by the trial jury in order to properly apportion the negligence of those tortfeasors who are parties."

Id. ¶ 5, 624 P.2d at 69. *See Bode v. Clark Equip. Co.*, 1986 OK 21, ¶ 12, 719 P.2d 824, 827.[1] On this point, the Majority and I agree.

II. The Majority's "No Duty" Rule

¶4 However, the Majority concludes the district court did not err in precluding the jury from considering the City's negligence "because its officer had no general duty to arrest Gilliland under the circumstances." (Majority Opinion, ¶ 57, p. 25). First, that is not the issue; the issue is whether the officer had a duty to protect Twyman from harm Gilliland might cause if permitted to drive while intoxicated. Second, that is not the basis on which the City argued its motion for summary judgment, or, more importantly, the basis on which the district court ruled. The City, in effect, conceded its officer's duty and negligence in the discharge of that duty when it argued that it was immune from liability for the decision to release Gilliland. The City relied on three exceptions to the waiver of sovereign immunity in section 155 of the Governmental Tort Claims Act. The

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[1] *See also* Oklahoma Uniform Jury Instructions (OUJI) — Civil No. 9.21, which provides, in part:

> [Defendant] contends that the negligence of [name], who is not a party to this lawsuit but about whom you have heard testimony in this trial, was the direct cause of the occurrence, or at least had some causal connection with it.
> Under the law you are to compare the percentage (0%-100%) of negligence of [Plaintiff], if any, with the percentage (0%-100%) of negligence of [Defendant], if any, and the percentage (0%-100%) of negligence of [name of the non-party], if any.

"Whenever [OUJI] contains an instruction applicable in a civil case . . . the OUJI instructions shall be used unless the court determines that it does not accurately state the law." 12 O.S.2021 § 577.2. "[I]f the OUJI contains a pertinent applicable instruction, the trial court 'shall' use the instruction unless the trial court determines that the instruction does not accurately state the applicable law." *Thomas v. Gilliam*, 1989 OK 59, ¶ 9, 774 P.2d 462, 465 (footnote omitted). The law on this issue is accurately stated in OUJI No. 9.21.

district court agreed finding: "Yukon's motion based on its claim that its officer's alleged negligent acts were 'exempt' from tort liability under 51 O.S. § 155 is sustained." *See* Order granting the City's Motion for Summary Judgment (Feb. 27, 2017), ROA, Vol. I at p. 172. The plaintiff did not appeal that ruling or challenge its finality in this appeal.[2]

¶5 Although the Majority agrees with the district court, "we find that the officer's decision not to arrest Gilliland was an exercise of discretion protected by this [51 O.S. § 155(4)] exemption" (Majority Opinion, ¶ 58, p. 26), that is not why the Majority affirms the district court's judgment. The Majority holds: "where the immunity is provided because the state actor had the *discretion* to act or not, we hold that there can be no duty to act." (emphasis in original) (Majority Opinion, ¶ 59, p. 26). "If the defendant does not have a duty to protect the plaintiff from injury, there can be no set of facts available to create liability for negligence as a matter of law." *MeGee v. El Patio*, 2023 OK 14, ¶ 13, 524 P.3d 1283, 1287. The Majority holds this officer is not negligent because there was no duty he could have breached to provide the basis for a tort action. According to the Majority, "this case falls squarely within the general rule that, '[a]t common law, a person had no duty to prevent a third person from causing physical injury

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[2] *See Andrew v. Depani-Sparkes*, 2017 OK 42, ¶ 11, 396 P.3d 210, 215 (partial summary judgment in favor of one of several defendants in plaintiff's cause of action is not appealable until final judgment is entered). *See also Depuy v. Hoeme*, 1989 OK 42, ¶ 10, n. 23, 775 P.2d 1339, 1343 ("after the expiration of appeal time when no appeal has been taken, a judgment acquires the degree of finality requisite for the application of [the claim preclusion] doctrine.").

to another.'" (Majority Opinion, ¶ 60, p. 27) (quoting *Wofford v. Eastern State Hosp.*, 1990 OK 77, ¶ 9, 795 P.2d 516, 518).

¶6 To hold otherwise would concede Wal-Mart's argument, that is, although the City is immune from liability for its officer's negligence, that negligence should have been considered by the jury. Only by holding that the officer had no duty to Twyman, and therefore could not have been negligent in the first place, can the Majority affirm the decision to exclude the City from the verdict form. *Paul v. N.L. Indus. Inc.*, 1980 OK 127, ¶ 5, 624 P.2d 68, 69 ("the negligence of tortfeasors not parties to the lawsuit should be considered by the trial jury").

¶7 Although it does not do so expressly, the Majority affirms the result reached by the district court but based on a different legal theory. "We adopt [the view of 'many other states'] and hold that a police officer's decision not to arrest is within the officer's discretion, and the officer is thereby under no duty for which he can be held liable in tort." (Majority Opinion, ¶ 63, p. 29-30). It is permitted to do so. *McMinn v. City of Okla. City*, 1997 OK 154, ¶ 11, 952 P.2d 517, 521. However, the Majority's "no duty" rule is inconsistent with controlling precedent and disregards undisputed evidence in this record.

A. The Officer's Testimony

¶8 The officer who stopped Gilliland testified that he had been on the Yukon police force for approximately 16 years. During that time, he had received extensive training in detecting intoxicated drivers and was a "drug recognition expert." The officer was working the night of the accident that killed Twyman. He testified that his law enforcement duties that night included "initiat[ing]

traffic stops if I saw a traffic violation." He stopped Gilliland at approximately 11:08 p.m. because his pickup had only one working headlight and because he was speeding (6-10 miles over the 30-mile per hour speed limit, confirmed by his radar). The officer issued Gilliland a warning for his defective headlight and speeding. He issued Gilliland a citation because he was unable to show proof of statutorily mandated insurance coverage for his vehicle. No party argues that the officer did not have probable cause to stop Gilliland or that Gilliland was not guilty of the infractions for which he was issued the warnings and citation.

¶9 The officer also testified that the stop lasted approximately 12 minutes. During his encounter with Gilliland, the officer testified that he was trained to and "absolutely" did look for signs of slurred speech, bloodshot eyes and the smell of alcohol to determine if Gilliland was intoxicated. The officer maintained that he allowed Gilliland to exit his vehicle and walk around to the passenger side to try and find his proof of insurance. The officer observed Gilliland during this time to see if he stumbled or had an altered gait. The officer testified he did not detect any signs that indicated to him that Gilliland was intoxicated.

¶10 Finally, the officer testified unequivocally that while engaged in his law enforcement duties he would have subjected Gilliland to a field sobriety test if he had observed any behavior that indicated Gilliland might be intoxicated. And if the officer determined that Gilliland was intoxicated, he would not have let Gilliland back on the road. However, the officer testified that he did not think that Gilliland was intoxicated and, therefore, he did not have reasonable grounds

to detain Gilliland further.[3] For that reason, he permitted Gilliland to drive his vehicle from the scene at approximately 11:20 p.m. Twenty minutes later, Twyman was dead.

¶11 The complex and competing demands on law enforcement officers require deference to the officer's decision to enforce or not enforce the law in any particular situation. *Morales v. City of Okla. City ex rel. Okla. City Police Dep't*, 2010 OK 9, ¶ 12, 230 P.3d 869, 876. In terms of general tort law, if a law enforcement officer, who has probable cause to do so, decides not to stop the driver of a motor vehicle who later harms another, the officer "made [the victim's] situation no worse, and has merely failed to benefit [the victim] by interfering in his affairs." William L. Prosser, Handbook of the Law of Torts 339 (West Publ'g Co., 4th ed. 1964). "The duties of one who merely omits to act are more restricted, and in general are confined to situations where there is a special relation between the actor and the other which gives rise to the duty." Restatement (Second) of Torts § 302 cmt. a (Am. Law Inst. 1965).

¶12 However, once the officer has made the discretionary decision to enforce the law by initiating a traffic stop, a relationship with the driver and others on the road has been established. It is the officer's decision to arrest or release the driver which is judged by "the standard of care which the [officer] . . . owes to

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[3] At that time, based on an expert witness's scientific estimate, Gilliland had a blood alcohol content of between .20 and .18 – well above the limit to legally operate a motor vehicle. Gilliland, under the age of twenty-one, was not permitted to operate a motor vehicle under the influence of any amount of alcohol. A different City officer, who had been at the accident scene and questioned Gilliland at the hospital, testified that Gilliland was "obviously out of it . . . you could smell the alcohol coming off of him . . . he had bloodshot eyes and slurred speech . . . all the signs." (Officer Robinson, Transcript Vol. I at 277).

the public . . . ." *State ex rel. Okla. Dep't of Pub. Safety v. Gurich*, 2010 OK 56, ¶ 20, 238 P.3d 1, 6 (law enforcement officers owe duty to public when deciding to begin or discontinue pursuit of a fleeing driver governed by reckless disregard standard of care).[4] *Accord Ray v. Broken Arrow Police Dep't*, 2010 OK 57, ¶ 8, 238 P.3d 931, 933 ("the exemptions from liability which are enumerated in the [Tort Claims Act] do not abridge or enlarge tort law" with respect to the duty of care regarding an officer's pursuit of a fleeing driver).

¶13 Here, the officer's testimony that he had a duty to prevent intoxicated motorists, like Gilliland, from driving is not contradicted in the record. However, the officer's belief that he had such a duty is not dispositive of the issue. "Whether a duty exists is a question of law; whether it has been breached is a question of fact." *Wofford v. Eastern State Hosp.*, 1990 OK 77, ¶ 22, 795 P.2d 516, 521 (citations omitted). Nonetheless, the officer's belief that he had a duty to prevent Gilliland from driving if he was intoxicated is confirmed by controlling case law.

B. Oklahoma Tort Law

¶14 The Majority's "no duty" rule cannot be reconciled with Oklahoma tort law. "Oklahoma courts have recognized that the existence of a duty depends on the relationship between the parties and the general risks involved . . . ." *Id.* ¶ 10,

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[4] For purposes of this appeal, it is not necessary to determine the appropriate standard of care, i.e., ordinary negligence versus the statutorily mandated "reckless disregard" standard adopted in *Gurich* for drivers of emergency vehicles. That is not an issue resolved by the district court or raised in this appeal. On remand the district court can resolve the appropriate standard of care by which the jury should evaluate the City's negligence. *See Gurich*, 2010 OK 56, ¶ 25, 238 P.3d at 7 (finding that the "reckless disregard" standard of care is mandated by 47 O.S.2021 § 11-106(E)).

795 P.2d at 519 (citation omitted). "In tort jurisprudence . . . negligence 'is . . . a term of relation' where the existence of a legal duty must be owed by the defendant to the particular plaintiff bringing the action . . . ." *Hensley v. State Farm Fire and Cas. Co.*, 2017 OK 57, ¶ 16, 398 P.3d 11, 17 (quoting *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 101 (N.Y. 1928)). The issue here is whether the officer owed a duty to Twyman to protect him from harm caused by an intoxicated Gilliland because of the relationship established when the officer decided to stop Gilliland.

¶15 The Majority's "no duty" rule is derived from the old common law and was recognized but limited in *Wofford*: "At common law, a person had no duty to prevent a third person from causing physical injury to another. However, a number of courts [including Oklahoma] and the Restatement (Second) of Torts § 315 (1965) have recognized an exception to this general rule." *Wofford*, 1990 OK 77, ¶ 9, 795 P.2d at 518. Restatement § 315 provides, in relevant part: "There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct." Restatement (Second) of Torts § 315 (Am. Law Inst. 1965). The Restatement (Second) of Torts §§ 319-321 describe three recognized special relationship exceptions to the general rule. The Majority recognizes these exceptions exist but concludes that none apply.

¶16 Nonetheless, the Oklahoma Supreme Court utilized one of the special relationship exceptions. *See Wofford*, 1990 OK 77, ¶ 17, 795 P.2d at 520 (holding

that "a psychiatrist has a duty to exercise reasonable professional care in the discharge of a mental patient . . . [and that] duty extends to such persons as are foreseeably endangered by the patient's release"). That special relationship is stated in the Restatement § 319: "Duty of Those in Charge of Person Having Dangerous Propensities: One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." Restatement (Second) of Torts § 319 (Am. Law Inst. 1965).

¶17 Even prior to *Wofford*, Oklahoma law recognized that: "Whenever a person is placed in such a position with regard to another that it is obvious that if he did not use due care in his own conduct he will cause injury to the other, the duty at once arises to exercise care commensurate with the situation in order to avoid such injury." *Union Bank of Tucson, Arizona v. Griffin*, 1989 OK 47, ¶ 13, 771 P.2d 219, 222 (tag agent potentially liable to third-party for negligently issuing automobile title to vehicle owner without including third-party's lien). *See Bradford Secs. Processing Servs., Inc. v. Plaza Bank & Trust*, 1982 OK 96, ¶ 10, 653 P.2d 188, 191 (lawyer potentially liable to class of subsequent bond purchasers for negligence in drafting opinion for client's use in selling bonds); *Keel v. Titan Constr. Corp.*, 1981 OK 148, ¶ 14, 639 P.2d 1228, 1232 (architect potentially liable to subsequent purchaser of home for negligent performance of contract with home builder to design house). After he stopped Gilliland, the

officer, at that time, "was the only person in a position to prevent" the harm to Twyman. *Union Bank*, 1989 OK 47, ¶ 13, 771 P.2d at 222.

¶18 Rather than follow these precedents, the Majority attempts to distinguish *Wofford* and existing Supreme Court police pursuit cases to support its conclusion that this officer owed no duty to Twyman. If the Majority's point is that the Supreme Court has not decided that issue in a case involving these exact facts, I agree. However, the Supreme Court has decided the issue on both sides of these facts – the duty attaches before an arrest can be made and after an arrest has been made.

¶19 First, in the police pursuit cases the Supreme Court has found that a duty to the public exists before an arrest can be made. *See Smith v. City of Stillwater*, 2014 OK 42, ¶ 37, 328 P.3d 1192, 1204 (holding that the Tort Claims Act does "not immunize the State or its political subdivisions for the actions taken by their law enforcement officers engaged in police pursuits").

¶20 Second, *Morales* and the cases it followed clearly find that the officer's duty exists once the decision to arrest is made. "Once an officer makes the decision to enforce a law by making an arrest, he or she must do so in a lawful manner." *Morales v. City of Okla. City ex rel. Okla. City Police Dep't*, 2010 OK 9, ¶ 12, 230 P.3d 869, 876 (assuming a duty because the City did not dispute that "a police officer owes a negligence-based duty of care to an arrestee").

¶21 Although *Morales* did not resolve the extent of an officer's duty to third parties, that issue was resolved in *Gurich* when the Supreme Court held that the risk of injury to the public was sufficiently foreseeable from the negligent pursuit

of a fleeing criminal to impose a duty on the officer when deciding "to commence or continue a police pursuit." *State ex rel. Okla. Dep't of Pub. Safety v. Gurich*, 2010 OK 56, ¶ 26, 238 P.3d 1, 7. *See also Smith v. City of Stillwater*, 2014 OK 42, ¶ 37, 328 P.3d 1192, 1204 (reaffirming the holding in *Gurich*, but declining to extend the duty to the fleeing suspect). On the other end of the custodial spectrum, *Nguyen v. State*, 1990 OK 21, 788 P.2d 962, and *Wofford v. Eastern State Hospital*, 1990 OK 77, 795 P.2d 962, stand for the proposition that the risk of injury to the public is sufficiently foreseeable to impose potential tort liability for the negligent release of one who has been arrested and incarcerated.[5]

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[5] The Majority's argument that these cases can be distinguished because of "very clear action taken" does not reconcile the failure to take action on which a duty was imposed in *National Trailer Convoy, Inc. v. Saul*, 1962 OK 181, 375 P.2d 922. In that case, the Supreme Court affirmed a judgment against the Oklahoma Turnpike Authority in favor of the victim of an automobile accident on the Will Rogers Turnpike caused by an intoxicated truck driver allowed access to the Turnpike by the gate attendant, who testified that he had conversations with the truck driver during which the driver "slurred his words" and stated that "he had been out on [a drunk] or was out on one." *Id.* ¶ 14, 375 P.2d at 930. The gate attendant testified, "without contradiction," that it was the duty of tollgate attendants who have reason to believe a driver is intoxicated, "to try to prevent him from driving through his gate onto the turnpike, and, failing in this, to notify the highway patrol. . . ." *Id.* ¶ 0 (Syllabus 2, 3). The gate attendant's "inaction" was sufficient to find a breach of duty consistent with the duty to the public resulting from the relationship established with the driver and some ability to control the driver's access to the turnpike. That "control" distinguishes *National Trailer* from *Snow v. Travelcenters of America*, 2023 OK CIV APP 8, 527 P.3d 741 (convenience store employees lacked sufficient control over intoxicated driver purchasing motor fuel to impose tort liability). *National Trailer* was decided before Oklahoma's sovereign immunity was abrogated by *Vanderpool v. State*, 1983 OK 82, 672 P.2d 1153, and before the GTCA was adopted in 1978. Further, the Majority misrepresents the Plaintiff's claim in its effort to distinguish the police pursuit cases. It was not "the officer's failure to act" (Majority Opinion, ¶ 62, p. 29) that the Plaintiff alleged was negligent, but having "acted" to stop Gilliland, it was the officer's decision to let him go that is the foundation of the Plaintiff's claim: the "police officer negligently failed to remove Gilliland from his vehicle and negligently permitted Gilliland to continue to operate his motor vehicle on the public roads." ROA p. 9. The Majority's analysis also disregards the fact that the holdings in the police pursuit cases impose a duty to the public on the officer's "decision to terminate a pursuit," i.e., take no further action, as well as on the decision to take action by commencing the pursuit. *State ex rel. Okla. Dep't of Pub. Safety v. Gurich*, 2010 OK 56, ¶ 27, 238 P.3d at 8.

¶22 Gilliland falls somewhere between the arrestee in *Morales* and the confined mental patient in *Nguyen* and the suspect being pursued in *Gurich* in an effort to make an arrest. I find no difference between the officer's duty to the public after initiating the pursuit of a suspect the officer is trying to arrest and the duty the officer owes to the public while pursuing a suspect who does not flee but submits to the officer's command to stop. And, the Majority has cited no authority for the proposition that the officer's duty while pursuing a suspect once the decision to enforce the law is made is somehow suspended after the suspect is stopped and during the time the officer is making the decision whether to arrest the suspect.[6]

¶23 The Majority, however, argues that the officer's duty to the public depends on whether an arrest is made and that this officer owed no duty to Twyman because Gilliland was not under arrest while he was stopped.[7] Whether Gilliland

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[6] For example, the Majority's rule would impose no duty, and therefore no potential finding of negligence for the harm to a kidnap victim, on an officer who, after receiving an Amber Alert concerning the abduction of a young female wearing a red sweatshirt, stopped a vehicle matching the description of the vehicle involved in the abduction observed a passenger in the back seat of the vehicle wearing a red sweatshirt but did not investigate further before deciding, "for whatever reason," to release and not arrest the driver. (Majority Opinion, ¶ 61, p. 28).

[7] The United States Supreme Court disagrees. "The common law distinguished the application of force from a show of authority, such as an order for a suspect to halt. The latter does not become an arrest unless and until the arrestee complies with the demand." *Torres v. Madrid*, 592 U.S. 306, 311, 141 S.Ct. 989 (2007). "An arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority." *California v. Hodari D.*, 499 U.S. 621, 626, 111 S.Ct. 1547 (1991) (emphasis in original). The United States Court of Appeals for the Tenth Circuit would categorize the officer's encounter with Gilliland as an investigative detention. "[I]nvestigative detentions . . . are Fourth Amendment seizures of limited scope and duration and must be supported by a reasonable suspicion of criminal activity." *United States v. Samilton*, 56 F.4th 820, 826 (10th Cir. 2022). An investigative detention "includes detention of individuals in vehicles." *Id.* The Oklahoma Court of Criminal Appeals holds this view. "Thus, while '[a] traffic stop is a seizure within

was under "arrest," as that term is used in *Morales*, Gilliland could not ignore the officer's command to pull over once the officer decided to initiate the traffic stop. *See, e.g.*, 21 O.S.2021 § 540A (making it unlawful for the "operator of a motor vehicle who has received a visual and audible signal, a red light and a siren from a peace officer . . . directing the operator to bring the vehicle to a stop" to attempt to elude the police officer). Gilliland may not have been confined like the mental patient in *Wofford* when the decision to release was made. Nonetheless, the Majority and I agree, Gilliland could not lawfully leave the scene until the officer decided to let him go.

¶24 The Supreme Court may, at some point, determine that a law enforcement officer's duty to third persons foreseeably harmed by a suspect in the "charge of" the officer as the result of a traffic stop depends on the extent of the custodial restraint ultimately exercised by the officer. The Restatement (Second) of Torts does not.[8] Until then, in my view, the holdings in *Nguyen*, *Wofford*, *Morales*,

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the meaning of the Fourth Amendment, . . . a routine traffic stop is more analogous to an investigative detention than a custodial arrest.'" *State v. Nelson*, 2015 OK CR 10, ¶ 29, 356 P.3d 1113, 1122 (quoting *Graves v. Thomas*, 450 F.3d 1215, 1223-24 (10th Cir. 2006)) (stating routine traffic stop is not equivalent to an arrest).

[8] *See, e.g., Irwin v. Town of Ware*, 467 N.E.2d 1292, 1299, 392 (Mass. 1984) (duty of officer to remove intoxicated driver is based on "special relationship" and is not immune discretionary act); *Ransom v. City of Garden City*, 743 P.2d 70, 76 (Idaho 1987) (officer's decision to leave vehicle keys with intoxicated passenger after arresting intoxicated driver was not exempt discretionary function – material facts as to whether officer breached duty of care to third parties injured by passenger precluded summary judgment); *Irene v. Seneca Ins. Co. Inc.*, 337 P.3d 483 (Wyo. 2014) (plaintiff injured by intoxicated driver stated negligence claim pursuant to Restatement (Second) Torts § 319 against bail bondsman who undertook custody of driver by posting his bond, then failed to exercise reasonable control in allowing driver to return to bar where he had been drinking before the arrest). *Cf.*, *Wongittilin v. State*, 36 P.3d 678, 683 (Alaska 2001) (affirming summary judgment for officer who questioned driver with outstanding warrant but decided not to execute the warrant for logistical reasons because officer never "took charge" of driver pursuant to Restatement (Second) Torts of § 319).

Gurich and *City of Stillwater* impose a duty on the officer who stopped Gilliland to exercise the required care when he allowed Gilliland to leave. Whether the officer met that standard of care should have been decided by the jury.

III. The Majority's Reliance on the Law of other States

¶25 Finally, the Majority cites cases from six jurisdictions which it decides to follow in adopting its "no duty" rule. (Majority Opinion, ¶ 65, p. 30, n. 20). These jurisdictions have adopted the "public duty rule" which provides that "local governmental entities owe no duty to individual members of the general public to provide adequate government services, such as police and fire protection." *Coleman v. E. Joliet Fire Prot. Dist.*, 46 N.E.3d 741, 750 (Ill. 2016) (abrogating prior Illinois decisions that had adopted the public duty rule). In my view, and in the view of a majority of jurisdictions, "the underlying purposes of the public duty rule are better served by application of conventional tort principles and the immunity protection afforded by statutes than by a rule that precludes a finding of a duty on the basis of the defendant's status as a public entity." *Id.*, 46 N.E.3d at 757-58.[9]

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[9] According to American Law Reports articles originally published in the 1980s, a significant number of jurisdictions had adopted the public duty rule at one time. *See* James L. Isham, Annotation, *Failure to restrain drunk driver as ground of liability of state or local government unit or officer*, 48 A.L.R.4th 320 (1986), and John H. Derrick, Annotation, *Modern status of rule excusing governmental unit from tort liability on theory that only general, not particular, duty was owed under circumstances*, 38 ALR4th 1194 (1985). To date, only four jurisdictions appear to still follow that rule. *See Lewis v. City of St. Petersburg*, 98 F. Supp.2d 1344 (M.D. Fla. 2000); Ky. Rev. Stat. Ann. § 49.070(13) (2021); N.D. Cent. Code Ann. § 32-12.2-02(3) (2022); and Ohio Rev. Code Ann. § 2743.02 (2021). A fifth jurisdiction, Texas, may also follow the rule if the United States Court of Appeals for the Fifth Circuit has correctly projected what the Texas Supreme Court would do based on two intermediate appellate court decisions. *See Crider v. U.S.*, 885 F.2d 294 (5th Cir. 1989). The Texas Supreme Court has not yet addressed the issue. However, even in those jurisdictions the

¶26 To the extent it was ever followed in Oklahoma, the common law "public duty rule" has been abrogated by statute, if not by *Nguyen* and *Wofford*. *See* 51 O.S.2021 § 152.1(B)("The state, only to the extent and in the manner provided in this act, waives its immunity and that of its political subdivisions."). *Cf.*, *Southers v. City of Farmington*, 263 S.W.3d 603, 613 (Mo. 2008) ("In deference to the statutory waiver of sovereign immunity . . . this Court is no longer willing to apply the -judicially-created protections of the public duty doctrine in a way that would insulate government entities from tort liability where the legislature has expressly abolished such immunity."). In this regard, Oklahoma follows the majority rule rather than the rule followed in the six jurisdictions adopted in the Majority Opinion.

¶27 My disagreement with the Majority is not about where to "draw the line" between discretionary "negligent acts" for which the State has not waived its immunity from liability and ministerial "negligent acts" for which the State has

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survival of the public duty rule is questionable. For example, Florida and Ohio have adopted a tort claims act similar to Oklahoma's wherein the state legislature has waived sovereign immunity "where a private person would be liable," subject to certain exceptions. A total of twenty states have enacted similar legislation. Another sixteen states, including Texas, have waived sovereign immunity for negligent "ministerial acts" of state employees. In the remainder of the states, sovereign immunity is either waived for certain classes of torts or sovereign immunity is preserved and tort claims are referred to an administrative board or commission for resolution. *See* Matthiesen, Wickert & Lehrer, S.C., STATE SOVEREIGN IMMUNITY AND TORT LIABILITY IN ALL 50 STATES, https://www.mwl-law.com/wp-content/uploads/2018/02/STATE-SOVEREIGN-IMMUNITY-AND-TORT-LIABILITY-CHART-00219770x9EBBF.pdf (last updated Jan. 13, 2022). A couple of states, through legislation, have preserved state immunity for harm resulting from failure to enforce the law. *See, e.g.*, Kan. Stat. Ann. §§ 75-6101 to 75-6120 (1979). Arizona has codified an exception to its waiver of sovereign immunity protecting the failure to arrest or restrain an intoxicated person. Ariz. Rev. Stat. Ann. § 12-820.01 (1984). And a couple, like Florida, appear to have preserved the public duty rule through a statutory or judicially-created exception to the waiver of sovereign immunity. However, the vast majority of jurisdictions, like Oklahoma, limit the state's immunity to discretionary acts, waiving immunity for ministerial acts.

waived its sovereign immunity. **That distinction is irrelevant for purposes of this appeal.** Any "negligent act" by the City's officer, whether considered discretionary or ministerial and for which the government is ultimately liable or not, should have been considered by the jury. *Paul v. N.L. Indus. Inc.*, 1980 OK 127, ¶ 5, 624 P.2d 68, 69.

¶28 In its motion for summary judgment, the City did not contest whether its officer's decision to release Gilliland was negligent. Instead, the City's argument assumed that its officer's decision was negligent but argued it could not be held liable because of the immunity granted by the Governmental Tort Claims Act.[10] Consequently, no finder of fact has reviewed the officer's decision to determine whether, in fact, that decision satisfied or breached the applicable standard of care.

¶29 Whether this officer knew or should have known that Gilliland was intoxicated and dangerous to others on the road if permitted to continue driving is for the trier of fact to decide. Likewise, to satisfy Oklahoma absent tortfeasor law, a finder of fact must determine whether the officer's decision to let Gilliland go met or breached the standard of care. The officer may have made that decision because other, more pressing law enforcement matters required his

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[10] A finding that a governmental entity is immune from liability is not required in the absence of a finding that "a private person or entity, would be liable for money damages under the laws of this state" because of its negligence. 51 O.S.2021 § 153(A). *Cf., Kamphaus v. Town of Granite*, 2022 OK 46, ¶ 20, 510 P.3d 181, 187 ("Whether Town was exempt from liability under § 155(13) of the GTCA is not determinative of whether Town had a duty to inspect the headstone.").

immediate attention,[11] or for any number of other valid reasons.[12] Wal-Mart argues that this jury should have been permitted to make that determination and consider whether the officer's decision to release Gilliland breached his duty to Twyman and, if so, the extent to which that breach of duty contributed to the plaintiff's loss when compared to the negligence of the other defendants. I agree.

FISCHER, J., concurring specially in Part III-B:

¶1 I concur in affirming the district court's reduction of the punitive damages award for the reasons stated in Part III-B of the opinion. I do not think my concurring vote is required because my Dissent would fully resolve this case requiring remand for a new trial. Whether punitive damages would be awarded after the new trial is a hypothetical question. Having reached that conclusion, resolution of the punitive damage issue was unnecessary and there was "nothing [more] to determine, nothing to decide." *In re Application of the Okla. Turnpike Auth.*, 2023 OK 84, ¶ 9, 535 P.3d 1248, 1265 (Kuehn, J., dissenting). Appellate courts, and particularly this Court, do not ordinarily provide advisory opinions. *Post Oak Oil Co. v. Stack & Barnes, P.C.*, 1996 OK 23, ¶ 16, 913 P.2d 1311, 1314.

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[11] *See, e.g., Crider v. U.S.*, 885 F.2d 294 (5th Cir. 1989)(park rangers who had stopped intoxicated motorist driving on beach with two teenage girls hanging onto the hood of his car, decided to escort the girls back to the rangers' station and obtain suitable transportation for them and instructed motorist to remain on the beach and not drive until he "sobered up").

[12] *See, e.g., Phillips v. City of Billings*, 758 P.2d 772, 775 (Mont. 1988) (finding no duty to plaintiff injured by intoxicated driver who had been stopped but released because officer believed he had no probable cause to arrest at that time: "imposition of a duty under § 319 depends on an ability to control the third person. . . absent probable cause, no duty existed" because the officers had no right to control the intoxicated motorist's actions).

¶2 Nonetheless, at the request of the Presiding Judge, I have added this vote, specially concurring in Part III-B. The result is a resolution of this case that does not have a decision in which "at least two [judges] shall concur . . . ." 20 O.S.2021 § 30.2. Recently, one member of the Supreme Court expressed the view that a decision in which two judges of the Court of Civil Appeals concurred in one part of an opinion and a different two judges concurred in a separate part was an "inappropriate" resolution of the case. "The concurrence of two judges [of the Court of Civil Appeals] shall be necessary to make a decision on the merits." *Scott v. Foster*, 2023 OK 112, ¶ 3, 538 P.3d 1180, 1190 (Gurich, J., concurring specially) (citing Okla.Sup.Ct.R. 1.174, 12 O.S., ch. 15, app. 1 (OSCN)). No other Justice formally joined Justice Gurich in this view. Likewise, no other Justice formally disagreed with the view expressed by Justice Gurich.

¶3 This matter has been addressed by the full Oklahoma Supreme Court with respect to Article VII, § 5 of the Oklahoma Constitution, governing that Court's disposition of cases. *See In re Estate of Brown v. Brown*, 2013 OK 102, n.1, 509 P.3d 66 ("Because the Oklahoma Supreme Court is composed of nine members, an opinion must receive at least five votes.") (quoting The Third Branch, http://www.oscn.net/static/osc-ojs-brochure-online.pdf, p. 9). Based on its constitutional constraints, the Oklahoma Supreme Court held: "Likewise, a majority of three panel members of the Court of Civil Appeals is required for a majority decision." *Id. See Boelman v. Contractor Servs., Inc*, 2010 OK CIV APP 81, ¶¶ 16-17, 240 P.3d 23, 27 (applying the rationale previously used by the Oklahoma Supreme Court to determine what constitutes "the concurrence of the

majority of the Justices" and holding that a "concur in result" vote and a dissent to the author's decision in a workers' compensation case did not constitute the statutorily required majority vote for decisions by a three-judge panel of that court). If the rules governing the Oklahoma Supreme Court require a majority of the same Justices to concur in every part of an opinion in order to resolve a case, this Court cannot do otherwise. "All Supreme Court Rules are applicable to cases assigned to the Court of Civil Appeals . . . ." Okla.Sup.Ct.R. 1.170, 12 O.S., ch. 15, app. 1 (OSCN).

¶4 One cannot parse the text of the Constitution or our governing statutes and discern a clear answer. And, the facts in *Estate of Brown* and *Scott v. Foster* are not identical to the facts in this matter. However, the legal principles applied in those cases appear to preclude the disposition of this case without a majority of the same Judges concurring in every part of the decision. Nonetheless, without further guidance from the Supreme Court, I cast an additional vote concurring in the disposition of the punitive damage issue in in this appeal.

BLACKWELL, P.J., dissenting in part:

¶1 The trial court erred in its interpretation of 23 O.S. § 9.1 and should not have reduced the amount of punitive damages the jury assessed against Walmart. Accordingly, I respectfully dissent from Part III-B of the Court's opinion.[1]

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[1] I note that the Court's split-majority opinion—with a set of two judges joining to affirm the jury's verdict and a different set of two judges joining to affirm the trial court's reduction of punitive damages—comes only after intense and lengthy deliberations aimed at

¶2 The question presented is what is meant by "the actual damages awarded" in § 9.1 in a multi-defendant case. Under the majority's reading, "the amount of the actual damages awarded" does not simply mean just that, but rather, it means the amount of the actual damages awarded *as assessed against that*

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reaching an opinion that the same two judges could join in full. Due to good-faith disagreements regarding the proper resolution of the two distinct orders on appeal, such an opinion could not be authored. I write briefly here to note that, in my view, this form of opinion is permissible and, while rare, is sometimes critical to the work of this Court.

Notably, one member of the Oklahoma Supreme Court has recently suggested this form of opinion is not permitted. *See Scott v. Foster*, 2023 OK 112, ¶ 1 ("COCA's plurality opinion in this case is inappropriate ....") (Gurich, J., concurring specially). I raise the issue here seeking clarity. In defense of this form of opinion, I would first note that, in my view, neither this opinion nor the opinion in *Scott* was a "plurality opinion." With only three votes available, it seems to me that this Court cannot issue a plurality opinion. *See* OPINION, Black's Law Dictionary (11th ed. 2019) (defining "plurality opinion" as "[a]n opinion lacking enough judges' votes to constitute a majority, but receiving more votes than any other opinion."). *See also Matter of Estate of Brown*, 2013 OK 102, 509 P.3d 66 (holding that COCA "[c]oncurring-in-result and concurring-in-judgment votes may not be counted as votes to form a majority opinion"). Additionally, the relevant Supreme Court Rule requires only that "[t]he concurrence of two judges shall be necessary to make a decision on the merits." Okla.Sup.Ct.R. 1.174. In *Scott*, and in this case, there were two distinct orders appealed. Here (as there), two judges agree as to the decision on the merits as to one order appealed, and two judges agree as to the decision on the merits of the second order appealed. I find nothing in Supreme Court Rule 1.174, or any other rule, statute, or constitutional provision that requires that the same two judges concur as to each separate order appealed. Nor should that be the rule. As both this case and *Scott* ably demonstrate, good-faith disagreements concerning the law may produce a different majority as to each order appealed.

Finally, I would suggest that if this form of opinion is impermissible, both the litigants and the Clerk should adhere more strictly to Supreme Court Rule 1.27, under which it seems the plaintiff in this case should have filed a new appeal, as opposed to a counter-appeal, regarding her efforts to reverse the reduction of the punitive damages award. *See* Okla.Sup.Ct.R. 1.27(a) ("If a petition in error has been timely filed to commence an appeal from an appealable decision, then a party aggrieved *by the same decision* may file a cross or counter petition in error within thirty (30) days from the date the petition in error is filed by the Appellant in the same case."). Although the plaintiff here filed her counter-petition in error from the same judgment that Walmart sought to overturn, the plaintiff also included a separate order—the order reducing the punitive damages award—which it sought to reverse. (In its briefing, the plaintiff waived all issues related to the judgment entered on the jury's verdict and only made arguments related to the order reducing punitive damages.) Had the plaintiff properly filed a separate appeal as to the punitive damages order, a new case number would have been generated. Although the cases likely would have been consolidated, on the rare occasion, such as this, that the votes of a three-judge panel of this Court produce different sets of two-judge majorities, the consolidation of the cases could perhaps be undone, and separate opinions could issue as to each appeal.

particular defendant. This interpretation necessarily requires adding language to the statute, and I would thus decline to adopt it here. *See Assessments for Tax Year 2012 of Certain Properties*, 2021 OK 7, ¶63, 481 P.3d 883, 908 ("When the language of a statute is plain and clear it will be followed by the Court, and when further inquiry is needed, this Court is 'not free to rewrite the statute.'" (quoting *Dodd v. U.S.*, 545 U.S. 353, 359, 125 S.Ct. 2478, 162 L.E.2d 343 (2005)). In my view, the unambiguous language of § 9.1 refers to *all* of the compensatory damages a jury awards a plaintiff. In this case, that was $6.2 million. Because the amount of punitive damages awarded—$5.7 million—does not exceed $6.2 million, the trial court erred in reducing the punitive damages award.

¶3 First, I note that the Oklahoma Supreme Court has held that a plaintiff's contributory negligence is not to be taken into account when determining an award of punitive damages. *Graham v. Keuchel*, 1993 OK 6, ¶ 52, 847 P.2d 342, 363 ("As for punitive damages, they present an entirely separate consideration, governed by 23 O.S.1981 § 9. *They are unrelated to a plaintiff's conduct. In sum, punitive damages' assessment remains unaffected by interposition of contributory negligence.*" (footnotes removed)). *See also Amoco Pipeline Co. v. Montgomery*, 487 F. Supp. 1268, 1273 (W.D. Okla. 1980) (holding that the parties that were awarded punitive damages were entitled to the full award "with no set off allowed" based on contributory negligence). The majority does not explain why, if a plaintiff's percentage of contributory negligence does not reduce a punitive

damages award, another defendant's percentage of comparative negligence should.[2]

¶4 Second, the majority minimizes the significance of *Nichols v. Mid-Continent Pipe Line Company*, 1996 OK 118, 933 P.2d 272. In that case the Oklahoma Supreme Court directly authorized an award of $250,000 in punitive damages against Mid-Continent even though Mid-Continent owed only $205,000 in compensatory damages under statutory language that is equivalent to the language under review here.[3] *Id.* ¶ 22. If "actual damages awarded" meant what the majority deems it must, the Supreme Court clearly erred when it held in *Nichols* that "the plaintiffs are entitled to the $250,000 award in punitive damages." *Id.*

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[2] The majority correctly notes that this citation to *Graham* references the 1981 punitive damages statute, which did not contain any reference to "actual damages awarded." However, a question in *Graham* was whether under the then-new 1986 statute, which *did* reference "actual damages awarded" (and made an award of punitive damages greater than the actual damages awarded subject to a clear-and-convincing burden of proof), the trial court was correct to use the clear-and-convincing standard when the amount of punitive damages sought was less than the actual damages. *Graham*, 1993 OK 6 at ¶¶ 53-55, 363. Thus, the *Graham* Court was well aware of the 1986 amendments to § 9 but nevertheless held that "punitive damages' assessment remains unaffected by interposition of contributory negligence." *Id.* ¶ 52 (emphasis removed). The majority does not explain how this rule of law was affected by the 1986, or subsequent amendments. In my view, it was not.

[3] The majority claims the relevant language of the current law and the prior law is meaningfully different. I cannot agree. While there are several immaterial differences, the relevant limit under each, as applied here, is "the amount of the actual damages awarded." *Compare* 23 O.S.2021 § 9.1 ("Where the jury finds by clear and convincing evidence that ... [t]he defendant has been guilty of reckless disregard for the rights of others ... the jury, in a separate proceeding conducted after the jury has made such finding and awarded actual damages, may award punitive damages ***in an amount not to exceed ... the amount of the actual damages awarded.***") *with* 23 O.S.1991 § 9 ("[W]here the defendant has been guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant, ***in an amount not exceeding the amount of actual damages awarded.***").

¶5 Third, under the plain text of § 9.1, "the amount of actual damages awarded" is not in any way tied to the defendant's comparative fault for compensatory damages. The questions juries must ask in reaching the amount of punitive damages are entirely separate from those juries must ask in determining compensatory damages. This is clear from subsection (A) of § 9.1, which lists seven such factors, each of which requires the jury to consider something *other* than the defendant's proportionate fault as to compensatory damages. This has always been the case, with or without a statutory cap on punitive damages. *See, e.g., Cates v. Darland*, 1975 OK 92, ¶ 23, 537 P.2d 336, 340 ("'[W]hile exemplary damages must bear some relation to the injuries inflicted and the cause thereof, *they do not necessarily bear any relationship to the amount of damages allowed by way of compensation.*'" (quoting *Garland Coal and Mining Co. v. Few*, 267 F.2d 785 (10th Cir 1959) (emphasis supplied)); *Moyer v. Cordell*, 1951 OK 32, ¶ 0, 228 P.2d 645, 646 ("[A]n award of nominal damages is sufficient to authorize a judgment for exemplary or punitive damages." (syllabus of the Court)); *Buzzard v. Farmers Ins. Co., Inc.*, 1991 OK 127, ¶ 48, 824 P.2d 1105, 1115 ("Because [punitive] damages are awarded to punish the wrongdoer for the wrong committed upon society, Oklahoma does not require the amount of punitive damages to be in a particular ratio to the amount of actual damages."); *Amoco Pipeline*, 487 F. Supp. at 1273 (holding that "[p]unitive damages are intended to punish the wrongdoer and bear no relationship to actual damages which compensate the damaged party for the wrong" and not allowing set-off based on the contributory negligence of the harmed party). While

it is well within the legislature's authority to place the limit the majority imposes here, it has not done so with § 9.1.

¶6 The majority opinion also suggests 23 O.S. § 15, which requires the apportionment of damages between joint tortfeasors, somehow commands the result it reaches. It does not. First, and most notably, apportionment of punitive damages is not at issue in this case as only one defendant was present at the punitive damages stage. Second, § 15 is not incompatible with § 9.1. In this case, for example, had two defendants remained at the punitive damages stages, the total cap on punitive damages would have still been $6.2 million, and the jury would have awarded the amount it thought proper (evaluating the § 9.1(A) factors, as discussed above) to each defendant. Pursuant to § 15, each defendant would be bound to pay only those punitive damages the jury assessed against it.[4] Certainly § 15, which arguably does not concern punitive damages *at all*,[5]

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[4] It appears the jury in this case understood this intuitively. Of course, it cannot be determined with any degree of certainty, but one explanation for the jury's award of $5.7 million in punitives against Walmart is that the jury intended to assess $500,000 in punitives against Shiki prior to the company's settlement. This would have left, under a proper reading of § 9.1, exactly $5.7 million to assess against Walmart.

[5] Though the question is not presented here, there is at least an argument to be made that punitive damages are not covered by § 15 at all. Arguably, punitive damages are not damages "based on fault" within the meaning of 23 O.S. § 15. *Cf. W. P. Bistro Tulsa, LLC v. Henry Real Estate, LLC*, 2022 OK CIV APP 24, ¶ 21, 514 P.3d 1091, 1100 ("Vicarious liability does not, in other words, constitute liability 'based on fault' as defined in 23 O.S. § 15."). Stated differently, the argument would be that "liability for damages *caused by* two or more persons," 23 O.S. § 15 (emphasis supplied), is not referencing punitive damages. Punitive damages are not "caused" in the same way that compensatory damages are. Rather, they "are a tool to deter the wrongdoer and are for society's benefit, not the litigating party's." *Estrada v. Port City Properties, Inc.*, 2011 OK 30, n. 21, 258 P.3d 495, 502 (2011). *See also Amoco Pipeline Co. v. Montgomery*, 487 F.Supp. 1268 (W.D. Okla. 1980) ("Punitive damages are intended to punish wrongdoer and bear no relationship to actual damages which compensate damaged party for wrong, and thus counterclaimants were entitled to award of punitive damages with no setoff allowed notwithstanding § 13 of this title [which concern's

does not require the jury make the *exact same* apportionment as to both compensatory and punitive damages.

¶7 Additionally, I do not agree that the out-of-jurisdiction cases the majority cites support its reading of § 9.1. I will briefly address each case cited.

¶8 The majority cites *Remeikis v. Boss & Phelps, Inc.*, 419 A.2d 986, 992 (D.C. 1980) for the proposition that "punitive damages must be related to degree of culpability and defendants' ability to pay." I have no objection to that statement, and it is perfectly consistent with my reading of § 9.1. A jury must under Oklahoma law assess each defendant's culpable conduct as to punitive damages under § 9.1(A), as previously discussed. Ability to pay is certainly part of that calculation. *See* 23 O.S. § 9.1(A)(7). However, the question in *Remeikis* was whether or not punitive damages could be apportioned among multiple defendants, or as in prior law (or as with compensatory damages in that jurisdiction at that time), multiple defendants were jointly and severally liable for the entirety of a punitive damages award.[6] The court found in favor of

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the plaintiff's contributory negligence]."). However, I do not rely on this argument here, and presume for purposes of this opinion that punitive damages may be apportioned among multiple tortfeasors. My quarrel with the majority is in its insistence that the cap of "actual damages awarded" was intended in any way to connect a defendant's percentage of liability of actual damages to their liability for punitive damages.

[6] The discussion cited by the majority is not a holding of the case, but a "peripheral issue[] for the trial court's guidance on remand." *Remeikis*, 419 A.2d at 992, n.* (D.C. 1980). The ultimate issue was the resolution of the plaintiff's quest for discovery related to each defendants financial status. Because "[e]vidence of a joint tort feasor's financial standing is not admissible where liability cannot be apportioned," the court first addressed the antecedent question of whether punitive damages could be apportioned. *Id.* After concluding that apportionment was available, the court concluded that "evidence of each defendant's financial standing should be admissible." *Id.* Here, all agree that evidence of financial standing was obtained, admitted, and relevant under § 9.1. Nothing about those rulings is presented in this appeal.

apportionment and *offered as a rationale* the language the majority cites. *Id.* at 992, n.* ("[T]he better rule is that punitive damages may be apportioned among joint tort feasors because punitive damages must be related to the degree of culpability and the defendants' ability to pay if they are to carry their intended sanction."). As noted above, the question of apportionment of punitive damages is not at issue in this case, and, even if it was, I agree that punitive damages can be apportioned among multiple defendants. However, nothing in *Remeikis* stands for the proposition that the apportionment of punitive damages must precisely align with the apportionment of actual damages as the majority holds here.

¶9 Likewise for *York v. InTrust Bank, N.A.*, 962 P.2d 405 (Kan. 1998), *Fisher v. McCrary Crescent, LLC*, 972 A.2d 954 (Md. Ct. Spec. App. 2009), and *Huckeby v. Spangler*, 563 S.W.2d 555 (Tenn. 1978). Each of those cases addressed the question of whether a punitive damage award against one defendant was in any way attributable to another defendant. The portion of the *York* case cited by the majority states, citing a Kansas statute and settled case law, that:

> The imposition of joint and several liability for punitive damages is contrary to the purpose for which punitive damages are awarded. Punitive damages are awarded to punish the wrongdoer. Each wrongdoer is liable to pay the punitive damages assessed against him or her. The amount of the award is to be calculated with the individual defendant's financial status and conduct in mind.

York, 962 P.2d at 433. In *Fisher*, the court held that punitive damages are subject to apportionment, addressing specifically a civil conspiracy case. The Court held:

> [T]he Maryland cases outlined above and the rationale behind punitive damages persuade us to apply the general rule, and hold that the circuit court should have apportioned the punitive damages

> award, despite the fact that this case involved a conspiracy. While the degree of culpability of co-conspirators may be the same, their ability to pay is not necessarily the same.

Fisher, 972 A.2d at 988. In *Huckeby*, as cited by the majority, the court ruled that apportionment of punitive damages was "the better view of the subject." *Huckeby*, 563 S.W.2d at 560. As previously noted, in our case there was only one defendant remaining at the punitive damages stage, and thus the question of apportionment of punitive damages among multiple defendants is simply not an issue. And, even if it were, apportionment of punitive damages is not inconsistent with my view that "the amount of the actual damages awarded" means just what it says.

¶10 Finally, the majority cites *Diversified Holdings, L.C. v. Turner*, 63 P.3d 686, 698 (Utah 2002), which does provide some support for its view. However, there are critical differences. First, and most importantly, the case was applying prior Utah case law that listed seven factors a factfinder must consider when determining the amount of punitive damages to award, if any. *Id.* at 694. However, unlike our statutory list in § 9.1(A), the Utah-court-provided list included "'the amount of damages awarded'" as a factor that must be considered. *Id.* (quoting *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 808 (Utah 1991)). In our case, the jury was not told to consider the amount of compensatory damages awarded as a factor in setting its punitive damages award, and to do so would have been error—that factor is not among those the legislature intended a jury to consider in setting punitive damages. *See* 23 O.S. § 9.1(A). Rather, that

amount was provided as a hard cap, above which the jury could make no award, no matter its desire.

¶11 Second, *Diversified* was primarily concerned with whether the trial court's imposition of excessive punitive damages violated state or federal due-process limitations as to any particular defendant. *See generally, Diversified,* 63 P.3d at 694-701. However, it is undisputed that an excessive award could surpass such limits.[7] That question—the constitutionality of the punitive damages award—was simply never an issue in this case and certainly is not one in this appeal. On balance, I am not persuaded that the Utah Supreme Court's decision in *Diversified* provides any useful guidance to this Court in determining the limited question presented—namely, the meaning of "the amount of the actual damages awarded" under § 9.1 in a multi-defendant case.

¶12 Finally, I admit to some confusion as to the majority's focus on the fact that the legislature used the singular "defendant" as opposed to "defendants," or "defendant or defendants" throughout § 9.1. It cannot be seriously contended that the legislature was unaware that there might be multiple defendants in any given lawsuit. We must construe the statute with this in mind. And even if it was shown that the singular usage causes some issue or creates some ambiguity, our statutes have long-since resolved that issue. *See* 25 O.S. § 25 ("Words used in the singular number include the plural, and the plural the singular, except

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[7] *See, e.g., Gilbert v. Security Finance Corp. of Oklahoma, Inc.*, 2006 OK 58, ¶ 30, 152 P.3d 165, 177 ("The Due Process Clause prohibits punitive damages awards which are 'grossly excessive' in relation to a state's legitimate interests in punishment and deterrence.").

where a contrary intention plainly appears."). I can find no reason not to apply this generally applicable statute here.

¶13 Because I would hold that the trial court erred in reducing the punitive damages award, I respectfully dissent from Part III-B of the majority opinion.

May 9, 2024