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IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

JAMES ALLAN MCKAY,
Plaintiff/Appellant,

vs.

DANNA BERNARDI,
Defendant/Appellee,

and

RYAN PETERS and
DARRELL COLE, et al.,

Defendants.

SEP 11 2025

SELDEN JONES
CLERK

Case No. 122,708

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APPEAL FROM THE DISTRICT COURT OF
MURRAY COUNTY, OKLAHOMA

HONORABLE WALLACE COPPEDGE, DISTRICT JUDGE

AFFIRMED

Stephen P. Gray
STEPHEN P. GRAY & ASSOCIATES, PC
Broken Arrow, Oklahoma

and

Gary L. Richardson
RICHARDSON RICHARDSON
BOUDREAUX KEESLING
Tulsa, Oklahoma

For Plaintiff/Appellant

Fob F. Jones
Sulphur, Oklahoma

For Defendant/Appellee

OPINION BY GREGORY C. BLACKWELL, JUDGE:

The plaintiff and appellant, James Allan McKay, appeals the trial court's grant of the defendants' motion to dismiss under the Oklahoma Citizens Participation Act (OCPA). Upon review, we find that the court properly granted the defendants' motion and thereby affirm.

BACKGROUND

In August of 2023, a recall petition was circulated among the citizens of Sulphur, Oklahoma, requesting that McKay, a then-sitting member of the city council, be removed for various reasons. Namely, the petition alleges that McKay created a hostile work environment for other city employees, violated his oath of office, slandered Pitmon Oil & Gas and the Chickasaw Nation, and made derogatory statements regarding the citizens of Sulphur (specifically the Elrod family and the residents of the Woodruff Apartments). Sixty-seven citizens of Sulphur signed the petition, including defendants Ryan Peters, Darrell Cole, Daniel Gordon, and Cheri Gordon. Additionally, defendant Danna Bernardi witnessed the signatures and presented the petition to the city council pursuant to city ordinance.

McKay brought this action against the defendants for abuse of process, defamation, and intentional infliction of emotional distress. The defendants filed a motion to dismiss under the OCPA, alleging that McKay could not make a prima facie case for any of his claims and the defendants had valid defenses.

McKay responded, defending only his claim for defamation. The court granted the motion, and McKay appeals.¹

STANDARD OF REVIEW

We apply the *de novo* appellate standard of review to dismissals under the OCPA. *Krimbill v. Talarico*, 2018 OK CIV APP 37, ¶ 4, 417 P.3d 1240. The constitutionality of the OCPA also is at issue in this appeal, which is a question of law to be reviewed *de novo*. *Lee v. Bueno*, 2016 OK 97, ¶ 6, 381 P.3d 736, 739. Under this standard of review, “this Court possesses plenary, independent, and non-deferential authority to examine the issues presented.” *Id.* When considering the constitutional validity of a statute, this Court does not consider policy. *Id.* ¶ 8. Instead, this Court is guided by well-established principles, including that “[a] legislative act is presumed to be constitutional and will be upheld unless it is clearly, palpably and plainly inconsistent with the Constitution.” *Id.* ¶ 7. Indeed, “[e]very presumption is to be indulged in favor of a statute’s constitutionality.” *Id.*

ANALYSIS

McKay raises three propositions of error related to the court’s dismissal of his case; however, the overarching question before us is whether the OCPA justified the trial court’s dismissal of McKay’s claims for failing to establish “by

¹ The motion to dismiss at issue in this case was brought by, and granted in favor of, all the defendants below. However, in his petition in error, McKay named Bernardi as the only appellee but included all defendants as appellees in his counsel’s entry of appearance. Fob Jones entered his appearance and filed his response to the petition in error on behalf of all defendants and “appellees,” not just Bernardi. Our analysis and conclusion apply equally to all defendants if McKay intended to include defendants other than Bernardi in this appeal.

clear and specific evidence a prima facie case for each essential element of the claim in question.” We find that the motion to dismiss was properly granted and thereby affirm the decision of the trial court.

Whether the OCPA Applies

The OCPA was enacted “to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.” 12 O.S. § 1230. It includes among its provisions specific procedures for the filing, review, and ruling on motions to dismiss. *Id.* §§ 1432-37. The OCPA’s dismissal procedure may be invoked where a plaintiff’s claim “is based on, relates to, or is in response to the [defendant’s] exercise of the right of free speech, the right to petition, or the right of association.” *Krimbill*, 2018 OK CIV APP 37, ¶ 9, 417 P.3d 1240 (citing 12 O.S. § 1434(B)). Once the defendant has shown that the OCPA applies, the burden shifts to the plaintiff to show “by clear and specific evidence a prima facie case for each essential element of the claim in question.” *Id.* (citing 12 O.S. § 1434(C)). If the court finds that the plaintiff has made a *prima facie* case for each element of each claim, the burden shifts “back to the defendant to show by a preponderance of the evidence a defense to the plaintiff’s claims.” *Id.* (citing 12 O.S. § 1434(D)).²

² *Krimbill* held, however, that this third stage presented constitutional problems because it may deny a previously existing right to jury trial, and restrict it to defenses shown as matter of law, rather than by a preponderance of the evidence.

In this case, it was demonstrated that the motion to dismiss, which was filed in response to McKay's petition, fell within the scope of the OCPA. The OCPA specifically protects one's "exercise of the right of free speech," which means a communication made in connection with a matter of public concern. *Id.* § 1431(3). The OCPA defines a "matter of public concern" as an issue related to a public official or public figure. *Id.* § 1431(7). The Act also protects the "exercise of the right to petition," which is defined by the OCPA in a variety of ways, including: a communication in or pertaining to a proceeding of the governing body of any political subdivision of this state, *id.* § 1431(4)(a)(7), and a communication "reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial or other governmental body or in another government or official proceeding." *Id.* § 1431(4)(d).

Here, the recall petition was drafted and circulated to encourage the public to participate in local government and express their concern over an elected city official. Additionally, the petition constitutes a communication made in connection of a matter of "public concern" as it attempted to promote the removal of a city councilman under allegations that the councilman was unfit for office.

Adhering to our constitutional mandate, we therefore hold that disputed questions of fact cannot be resolved in an OCPA dismissal proceeding. If a plaintiff has established a prima face case in the second-stage inquiry, the court may only properly consider defenses that turn solely on a question of law. It may not weigh and decide truly disputed questions of fact as "defenses" in this third stage.

Krimbill, 2018 OK CIV APP 37, ¶ 32.

Thus, the motion demonstrated that the defendants were engaged in activity protected by the OCPA, *i.e.*, the exercise of the right of free speech and the right to petition.

Because the motion to dismiss showed that McKay's claims fell under the OCPA, the burden shifted to McKay who, in order to avoid dismissal of his action, had to establish by "clear and specific evidence a prima facie case for each essential element of the claim [or claims] in question." *Id.* § 1434(D). In the present case, McKay brought claims against all defendants for abuse of process, defamation, and intentional infliction of emotional distress. As detailed below, we hold that, because there were valid defenses to McKay's defamation claim and he did not adequately pursue his other claims, the trial court properly dismissed McKay's action.

Defamation

In order to recover for defamation, a plaintiff must prove four elements: "(1) a false and defamatory statement; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either the actionability of the statement irrespective of special damage, or the existence of special damage caused by the publication." *Trice v. Burrell*, 2006 OK CIV APP 79, ¶ 10, 137 P.3d 1253, 1257. Further, if and when the plaintiff is a public official, a plaintiff also must establish that "the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Miskovsky v. Oklahoma Pub. Co.*, 1982 OK 8, ¶ 11, 654 P.2d 587, 590 (quoting *New York Times v. Sullivan*, 376 U.S.

254, 279-80, 84 S.Ct. 710, 726, 11 L.Ed.2d 686, 706 (1964). The parties do not dispute that McKay qualifies as a public official; thus, the higher standard of actual malice applies.

McKay argues that that the defendants' statements in the recall petition constitute defamation *per se* because they were false, the petition was circulated to third parties, the statements were made with actual malice or reckless disregard, and the petition has tarnished his reputation and standing in the community as it suggests ethical, professional, and criminal wrongdoing. The statements that McKay alleges are defamatory are listed in the recall petition as follows:

- A. James Alan McKay, Ward #1, voted against the City of Sulphur to save the City of Sulphur money.
- B. James Alan McKay, Ward #1 has falsely made accusations of laundering money.
- C. James Alan McKay, Ward #1 he has continuously caused unrest at each and every council meeting during his term.
- D. James Alan McKay, Ward #1 has slandered Pitmon Oil & Gas Company and the Chickasaw Nation
- E. James Alan McKay, Ward #1 has made derogatory statements regarding citizens of Sulphur specifically the Elrods and Woodroof apartment residents.
- F. James Alan McKay, Ward #1 has made the City of Sulphur employees to have a hostile work environment during his term of office.
- G. James Alan McKay, Ward #1 has violated his oath of office that he signed on April 11, 2022, concerning his duties of his office. James Alan McKay has pursued his personal and political interest in a manner that has harmed the City of Sulphur and the citizens of the City of Sulphur. Attached is a copy of the Oath of Office as Exhibit "A" and made a part hereof.

Doc. 23, Exhibit 2.

To the extent McKay intended to include all defendants as appellees, we first note that the role each of the defendants played in the drafting and

circulation of the recall petition, with the exception of Bernardi,³ is not clear from the record. In his petition, McKay alleges that the defendants, in concert, drafted and circulated the recall petition. However, he fails to put forth any evidence, let alone clear and specific evidence, that Ryan Peters, Darrell Cole, Daniel Gordon, and Cheri Gordon participated in drafting or circulating the petition. It appears that all defendants except Bernardi merely signed the petition. As stated above, defamation requires that a false statement be published to a third party. If the named defendants neither participated in the drafting of the allegedly false statements nor participated in the circulation or "publication" of the recall petition, it is clear that they cannot be held liable for defamation. The entire absence of evidence on this issue shows that McKay did not meet his burden and the trial court properly dismissed the defamation claim as to these defendants. However, even assuming signatories to a petition are authors and engaged in publishing the recall petition to third parties, McKay's defamation claim still fails as the defendants showed that the fair comment defense applies.

The statement that McKay violated his oath of office⁴ and all other statements in the recall petition are subject to the common law defense of fair

³ In a reply, the defendants stated that defendant Bernardi witnessed the signatures to the petition and then presented the petition to the City Council for the City of Sulphur. However, Bernardi also denied authoring the petition. The resolution of this factual dispute is not necessary to decide the legal questions that determine this appeal.

⁴ McKay argues that the recall petition contains "statements that are defamatory on their face, such as false accusations of criminal activity." Doc 3, *Response to Motion to Dismiss*, 9. McKay maintains that the fact that criminal or civil proceedings have not been initiated against him by the attorney general, district attorney, or city attorney for violating his oath of office or violating his duties constitutes prima facie proof that the statements that he violated his oath of office are false. *Id.* at 5. We disagree and also note that a

comment as discussed in *Magnusson v. New York Times Co.*, 2004 OK 53, 98

P.3d 1070. In *Magnusson*, the Supreme Court held,

Under the common law defense of fair comment, a statement is generally privileged when it: 1) deals with a matter of public concern; 2) is based on true or privileged facts; and 3) represents the actual opinion of the speaker, but is not made for the sole purpose of causing harm. In making the privilege determination, courts look to the phrasing of the statement, the context in which it appears, the medium through which it is disseminated, the circumstances surrounding its publication, and a consideration of whether the statement implies the existence of undisclosed facts.

Id. ¶ 11.

First, as discussed above, the statements in the present case clearly pertain to a matter of public concern, as the recall petition was circulated to incite change within local government after citizens expressed concerns about McKay's fitness for office. Second, while McKay contends that the statements made were false, *Magnusson* stands for the proposition that "statements about an individual which cannot be proven 'true' or 'false,' because they are opinions or conclusions based on a review of the individual's actions are privileged." *Id.* ¶ 13.⁵ Here, any statement regarding McKay's alleged violation of his oath of office, his creation of a hostile work environment, or making disparaging or otherwise untrue statements about other individuals or entities, are opinions based on a review of McKay's actions. Most of the statements in the recall petition

statement alleging McKay has violated his oath of office, in which he promised to discharge the duties of a councilmember to the best of his ability, is not necessarily an accusation of criminal activity.

⁵ *Magnusson* also notes that any statements of pure opinion based on fact "enjoy absolute immunity protected both by the First Amendment and by Art. 2, § 22 of the Oklahoma Constitution." *Id.*

cannot be proven true or false as they merely represent the opinion of the sixty-seven concerned citizens of Sulphur who signed the document. Third, the statements here cannot be reasonably interpreted as only being made “for the sole purpose of causing harm” as a recall petition is the proper channel by which citizens can bring about change in their local government. Thus, while McKay perceives the recall petition to be a personal and harmful attack, the defendants signed and circulated the petition to incite change in their local government, which is a legitimate purpose unrelated to a specific desire to harm McKay personally.

“Whether allegedly defamatory language is constitutionally privileged is a question of law subject to *de novo* review to ensure that there is no forbidden intrusion on the field of free expression.” *Id.* ¶ 16. Applying the standards of the fair comment privilege articulated above and considering the statements’ phrasing, their context, the medium through which they were presented, and the circumstances surrounding their publication, we hold that the statements made in the recall petition meet the requirements for application of the common law fair comment privilege.

Abuse of Process and Emotional Distress

As stated above, McKay only raised his abuse of process and intentional infliction of emotional distress claims in his petition and did not defend either cause of action in response to the defendants’ motion to dismiss or at the hearing on the motion. Thus, upon review of only the petition, we find that McKay did not present clear and specific evidence of his claims and McKay thereby failed to

meet his burden to survive a dismissal under the OCPA. *Krimbill v. Talarico*, 2018 OK CIV APP 37, ¶ 9, 417 P.3d 1240 (citing 12 O.S. § 1434(C)).

Constitutional Challenge

McKay's final proposition of error is that the court's decision granting the defendants' motion to dismiss violates Article 2, § 6, of the Oklahoma Constitution. The cited provision of our Constitution reads as follows:

The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice.

Article 2, § 6. This provision of the Constitution is referred to the "right-to-Remedies Clause" and courts have held that it embodies three distinct constitutional guarantees: "(1) access to the courts; (2) right-to-a-remedy for every wrong and every injury to person, property, or reputation; and (3) prohibition on the sale or denial of justice." *Gibby v. Hobby Lobby Stores, Inc.*, 2017 OK 78, ¶ 5, 404 P.3d 44, 46 (2017). The Oklahoma Supreme Court, in interpreting Art. 2, § 6, has previously held that "the right to remedy afforded by Art. 2, § 6, is a mandate to the judiciary and is *not* intended to be a limitation on the authority of the legislature." *Rivas v. Parkland Manor*, 2000 OK 68, ¶ 18, 12 P.3d 452, 457 (emphasis supplied). Further, this Court held in *Yates v. Gannett Co., Inc.*, 2022 OK CIV APP 41, 523 P.3d 69, that

although the OCPA sets forth specific procedures for the handling of cases involving the constitutional rights of persons to petition, speak, and associate freely, including the procedures for the filing, review, and ruling on motions to dismiss, it does so reasonably and carefully, and in a way that pertains to some peculiarity in the subject matter ... calling for the legislation.

Id. ¶ 26.

We agree with the *Yates* Court and adopt its reasoning here. The OCPA does not limit an individual's access to the courts, deny remedies, or otherwise promote the denial of justice. While it does impose specific procedures, including burden shifting and requiring plaintiffs to make an earlier showing of a prima facie case of their claims, such procedures are reasonable, careful, and within the authority of the legislature.⁶ As stated above, Oklahoma courts have consistently held that "every presumption is to be indulged in favor of a statute's constitutionality." *Lee v. Bueno*, 2016 OK 97, ¶ 7, 381 P.3d 736, 740. A heavy burden is cast on those challenging a legislative enactment to show its unconstitutionality, and we find that McKay failed to meet that burden as, consistent with *Yates*, the OCPA does not offend Art. 2, § 6, of the Oklahoma Constitution.

CONCLUSION

Upon careful review, we find that McKay failed to show by clear and specific evidence that any defendant abused the legal process available to them, defamed McKay, or intentionally inflicted emotional distress upon him.

⁶ In many instances, the OCPA's procedures appear to be aimed at requiring a plaintiff to identify with particularity that speech which they believe defamed them or is otherwise tortious, such that the trial court can make an early determination as to the often purely legal question of whether the particular speech is constitutionally protected. We do not find this to be a particularly onerous requirement. As relevant here, for example, McKay alleged in his petition that the defendants made "false and disparaging statements" about him "to individuals in [the] community." Doc. 1, ¶ 20. Notably, McKay did not identify in his response to the defendants' motion to dismiss precisely *what* statements he was referring to in this portion of his petition. As such, we find it clear that he did not present any evidence, let alone clear and specific evidence, of this claim sufficient to survive a motion to dismiss under the OCPA.

Accordingly, the trial court properly granted the defendants' motion to dismiss under the OCPA. Further, the court's decision to grant the motion does not offend our Constitution as the OCPA does not infringe upon a plaintiff's access to courts or their right to a remedy.

AFFIRMED.

WISEMAN, P.J., concurs, and FISCHER, J., concurs in result.

FISCHER, J., concurring in result:

James Allen McKay sued the defendants because they signed a recall petition which sought to remove him from his office as a member of the City of Sulphur City Council.¹ McKay alleged that the seven statements in the petition asserted as justifying his recall were defamatory, constituted an abuse of process and caused him emotional distress. In his briefing and argument to the district court, McKay abandoned his abuse of process and emotional distress claims and focused on only two of the seven statements in the recall petition: (1) he violated his oath of office, (2) he violated his duties as a City Councilman.²

Invoking the Citizens Participation Act, 12 O.S.2021 §§ 1430 through 1440, the defendants moved to dismiss McKay's petition arguing that their participation in the recall effort was constitutionally protected speech, citing

¹ The defendants were four of the sixty-seven Sulphur residents who signed the petition.

² McKay did not expressly or effectively challenge other statements in the recall petition, including that he made derogatory statements about the residents of the Elrods and Woodruff apartments, that he pursued his personal and political interests to the harm of the City of Sulphur, or that he slandered the Pitmon Oil & Gas Company and the Chickasaw Nation.

section 1434(B) of the Act: “a court shall dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to or is in response to the party’s exercise of: . . . 2. The right to petition. . . .” To avoid dismissal of his suit, McKay had to “establish[] by clear and specific evidence a prima facie case” for his defamation claim. 12 O.S.2021 § 1434(C). Because he did not, I would affirm the district court’s dismissal of McKay’s suit on that ground and find consideration of the defendants’ defense to this action unnecessary.

McKay raised three issues in his Petition in Error: (1) the district court erred in dismissing his petition because the pleadings and affidavits establish that he showed a prima facie case of defamation; (2) the district court erred because he raised a disputed issue of fact precluding dismissal of his petition at the pleading stage; and (3) the district court’s judgment “[ran] afoul of” Article 5 § 46 of the Oklahoma Constitution.

Article 5 § 46 of the Oklahoma Constitution prohibits local and special laws on certain subjects. McKay’s allegation of error on this point was not raised in his district court briefing nor at the hearing on the defendants’ motion to dismiss. “Trial courts are not traditionally reversed for error unless the error was called to their attention at a time when they themselves could reasonably be expected to correct it.” *Gaines v. Sun Refinery and Mktg.*, 1990 OK 33, ¶ 20, 790 P.2d 1073, 1080. Further, McKay does not identify what local or special law the district court’s judgment “runs afoul of.” This general proposition is too indefinite to advise this court of the error sought to be reviewed. *Markwell v.*

Whinery's Real Estate, Inc., 1994 OK 24, ¶ 6, 869 P.2d 840, 842 (“the specifications or assignment of error should designate the allegations of error clearly so that the court and opposing parties may ascertain the issues raised.”).³

With respect to his second proposition of error, citing this Court’s Opinion *Krimbill v. Talarico*, 2018 OK CIV APP 37, 417 P.3d 1240, McKay appears to argue that the trial court erred in granting the defendants’ motion to dismiss because he raised disputed issues of fact. In *Krimbill*, this Court identified a potential problem with the Citizens Participation Act procedure if legitimate disputes as to material facts must be resolved to decide a motion to dismiss. However, McKay has not identified in his petition in error or in his argument to the district court what issues of fact are sufficiently disputed to preclude granting the defendants’ motion. Consequently, this non-specific proposition of error does not require reversal. *Markwell*, 1994 OK 24, ¶ 6, 869 P.2d at 842.

Finally, based on the pleadings and evidence presented to the district court, there is no legitimate dispute regarding the dispositive fact necessary to establishing “by clear and specific evidence a prima facie case for each essential element of” McKay’s defamation claim. 12 O.S.2021 § 1434(C). There is simply no evidence in this record, other than McKay’s self-serving and otherwise unsubstantiated claim in his affidavit, that any of the defendants adopted and, therefore, published the facts asserted in the recall petition with actual malice,

³ McKay filed a “Notice of Errata” after his appeal was assigned to this Court, changing his constitutional argument to Article 2 § 6. Even if the errata was an effective correction pursuant to Oklahoma Supreme Court Rule 1.7, rather than an ineffective attempt to amend his petition in error, it did not preserve the issue for appellate review for the same reason.

an essential element of his defamation claim. "A public official (or public figure) who prosecutes a defamation case must prove that the publication was a defamatory falsehood and that the statement was made with actual malice (with knowledge that it was false or with reckless disregard of whether it was false)." *Gaylord Entm't Co. v. Thompson*, 1998 OK 30, ¶ 19 n.46, 958 P.2d 128, 141.⁴ Each of the defendants submitted an affidavit stating personal knowledge of facts on the basis of which they believed that McKay was unfit to continue serving on the Sulphur City Council and should be removed from office.

The defendants have clearly invoked their right to petition the government for McKay's removal from office, a right guaranteed by the United States and Oklahoma Constitutions. "[A]dvocacy that launches an initiative drive is an essential part of the political process designed ultimately to impact the government." *Gaylord*, 1998 OK 30, ¶ 17 (emphasis omitted). The issues is not, as framed by McKay in his affidavit, whether he violated his oath of office and/or his duties as a member of the City Council. The issue is whether he established

⁴ "The [United States] Supreme Court held in the New York Times case that the First Amendment 'prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Miskovsky v. Oklahoma Publ'g Co.*, 1982 OK 8, ¶ 11, 654 P.2d 587, 590 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710, 726 (1964)). The requirement that the defendant made the statement with "reckless disregard" of its truth means that the defendant must have entertained serious doubt as to its truth. *Miskovsky*, 1982 OK 8, ¶ 15, 654 P.2d at 591 (citing *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 1325 (1968)). The United States Supreme Court requires "actual malice" to be proved by "clear and convincing evidence." *Herbert v. Okla. Christian Coal.*, 1999 OK 90, ¶¶ 17-18, 992 P.2d 322, 328 (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 247 106 S. Ct. 2505, 2514-15 (1986)). See Comment to OUJI Instruction 28.2 - Defamation - Elements (Public Figure Plaintiff).

“by clear and specific evidence” that: (1) he did not violate his oath or duties, and (2) the defendants knew he did not, or (3) the defendants published those two statements in the recall petition with reckless disregard of whether they were false or not. Because McKay failed to do so, I concur in affirming the dismissal of McKay’s petition, although for a different reason.

September 11, 2025