IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

LESLIE CROSSLEY, individually and LORI WALKE, as Guardian Ad Litem for the minor child, L.D.,

Plaintiffs/Appellees,

vs.

DERESA GRAY,

Defendant/Appellant.

Case No. 120,805

APPEAL FROM THE DISTRICT COURT OF
PONTOTOC COUNTY, OKLAHOMA

HONORABLE JEFF VIRGIN, TRIAL JUDGE

AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS

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OPINION BY JOHN F. FISCHER, JUDGE:

¶1 Defendant Deresa Gray appeals the district court's order granting Plaintiff Leslie Crossley a new trial after a jury verdict in Gray's favor. Plaintiff Lori Walke, Guardian ad Litem for minor child L.D. (hereinafter "L.D."), appeals the part of the order denying L.D. a new trial based on the court granting Gray a directed verdict on all L.D.'s theories of recovery.

¶2 Crossley is L.D.'s Mother. Crossley was in a relationship with Josh Nemecek, and they lived together. Gray was Nemecek's long-time attorney, who represented him after he was arrested for drunk driving and drug possession. Shortly thereafter, law enforcement learned that Nemecek had photos on his cell phone of him sexually abusing four-year-old L.D. An investigation ensued, revealing Nemecek had taken the photos the evening of his arrest by pausing a video on his personal computer he kept at his workplace. Crossley and L.D. allege that after learning about the investigation, Gray took that computer and kept it in her car for several days, knowing law enforcement was searching for it. Gray allegedly later gave the computer back to Nemecek, and it disappeared.

¶3 Crossley and L.D. filed suit against Gray, seeking compensatory and punitive damages based on several theories of recovery. At trial, the district court entered a directed verdict in favor of Gray on L.D.'s claim, only submitting Crossley's claim to the jury. The jury returned a verdict in Gray's favor, and Crossley and L.D. filed a motion for new trial. The court granted Crossley a new

trial based on the jury's misunderstanding of its instructions about what it could consider as evidence. The court denied L.D.'s motion for a new trial.

¶4 Though the jury issue was not a proper basis for granting Crossley a new trial, a new trial was properly granted based on the court's failure to give an adverse inference instruction to the jury. As for L.D., the district court abused its discretion by denying her a new trial on her cause of action because the court erred by entering a directed verdict on her conversion theory of recovery. Thus, the portion of the order granting a new trial to Crossley is affirmed, and the portion denying L.D. a new trial is reversed. The case is remanded for further proceedings consistent with this Opinion.

BACKGROUND

¶5 Gray had long represented Nemecek and his father in various legal matters.[1] She represented another man, Glen Foster, in his divorce case.[2] The men were acquainted.[3] In fact, Foster suspected Nemecek of having an affair with his estranged wife, so he went to the casino with him in hopes of gathering information.[4] The men left the casino in Nemecek's truck in the early morning

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[1] Tr. II, 248.

[2] Tr. II, 316.

[3] Tr. II, 367-68.

[4] Tr. II, 368-69.

hours of June 23, 2015.[5] Thereafter, Nemecek was arrested for driving under the influence of alcohol, and jailors found methamphetamine on him during booking.[6] Nemecek left his other belongings, including his cell phone, with Foster.[7]

¶6 Foster was not impaired and drove Nemecek's truck home.[8] Foster thought Nemecek's phone might contain evidence of the alleged affair, so he looked through it.[9] Disturbingly, Foster found images of Nemecek sexually abusing a young child.[10] Foster was initially unsure of what to do but then tried to identify the child by texting Nemecek's ex-girlfriend.[11] Various communications ensued among Nemecek's contacts.[12] As a result, Foster determined the child was L.D., and that her mother, Crossley, was in a relationship with Nemecek.[13] Crossley learned about the images during Foster's inquiry.[14] After identifying L.D., Foster decided to report the images to law enforcement.[15]

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[5] Tr. II, 366-67.

[6] Tr. I, 182; Tr. II 275.

[7] Tr. II, 370.

[8] Tr. I, 183.

[9] Tr. II, 371.

[10] Tr. II, 371, 413.

[11] Tr. II 372; Plaintiffs' Ex. 11.

[12] Plaintiffs' Ex. 11.

[13] *Id.*

[14] *Id.*

[15] *Id.*

¶7 Meanwhile, at around 1:15 p.m., Nemecek was arraigned on charges of driving under the influence and drug possession.[16] Gray had already been in contact with Nemecek that morning.[17] She represented him at his arraignment, reaching an agreement with a prosecutor to release Nemecek on his own recognizance.[18] Around this same time, Foster arrived at the Pontotoc County Sheriff's Office and reported the images.[19] At around 1:35 p.m., the Sheriff's Office called and told the jail not to release Nemecek.[20] Shortly thereafter, Nemecek called Gray from the jail and told a jailer an investigative-hold was placed on him, so he could not leave per the prior agreement.[21] The Sheriff's Office called the jail again at 2:10 p.m., advising that Nemecek was not allowed to use the phone until further notice.[22]

¶8 The day after Nemecek's arrest, June 24th, Deputy Michael Hurley executed a search warrant on Nemecek's residence to seize any other child sexual abuse material and all his electronic devices, on which perpetrators frequently store such

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[16] Tr. II, 275-76.

[17] Tr. II, 273.

[18] Tr. II, 279.

[19] Tr. I, 186-88.

[20] Plaintiffs' Ex. 11.

[21] Tr. II, 281.

[22] Tr. I, 226-27; Plaintiffs' Ex. 11.

material.[23] Deputies found and seized cell phones and USB drives, but not any computers.[24]

¶9 The next day, June 25th, Deputy Hurley obtained a warrant for the phone Foster had provided, and Captain Ronald Musgrove with the Ada Police Department performed a forensic examination.[25] The examination revealed eight images of Nemecek sexually abusing L.D.[26] Captain Musgrove observed scan lines, along with boxes of text, indicating Nemecek took the still images on the phone by pausing a video he was playing on a computer.[27] By using metadata from the phone and information obtained from a warrant to the phone company, Captain Musgrove determined that Nemecek took the images on his phone while he was at A&J Trucking the evening before his arrest.[28] A&J is a family business that employed Nemecek. Nemecek kept a personal computer at his desk.[29] The President of the company and Nemecek's aunt, Lena Winton, regularly allowed

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[23] Tr. I, 211-13; Plaintiffs' Ex. 11. The term "child sexual abuse material" refers to what was called "child pornography" in prior versions of the applicable criminal statutes. *See, e.g.*, 21 O.S. Supp.2026 § 1040.80. We use the current term, which more accurately describes the images at issue.

[24] Plaintiffs' Ex. 11.

[25] Tr. I, 207-08; Tr. II, 411-13; Plaintiffs' Ex. 11.

[26] Tr. II, 413.

[27] Tr. II, 414-17.

[28] Tr. II, 418-21.

[29] Tr. II, 397.

him access to the business after hours to use his computer, ostensibly to play games.[30]

¶10 At this point in the investigation, Deputy Hurley learned significant information: Gray had taken Nemecek's computer from A&J on the day of his arrest.[31] He also learned that A&J had a surveillance system, consisting of six cameras aimed at various parts of the facility, and he obtained the footage with a warrant.[32] The footage confirmed that Gray was at A&J on the day of Nemecek's arrest.[33] The time stamp showed she arrived at approximately 2:46 p.m.[34] The footage shows Gray looking up at the camera before making a phone call, after which several of the cameras stopped recording for about 30 minutes.[35] When the cameras commenced recording at around 3:20 p.m., they show men carrying items, including a computer monitor, out of a shop building.[36]

¶11 Gray admitted that she went to A&J on the day of Nemecek's arrest to remove his property, including his computer, from the premises.[37] However, she

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[30] Tr. II, 397-98.

[31] Tr. I, 214; Tr. II 425.

[32] Tr. I, 216; Tr. II 427.

[33] Tr. II, 427-28; Plaintiffs' Ex. 17.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] Tr. II, 285-92. Nemecek also had a company computer, which is not at issue. This computer was later determined not to contain child sexual abuse material. Tr. II, 398-99.

claimed she arrived between 12:00 p.m. and 1:00 p.m.—before Nemecek's arraignment and allegedly before she knew about the images on his phone and the accompanying investigation.[38] Gray testified and Winton's testimony indicated that the time stamp on the surveillance footage was inaccurate, but they did not give any reason for the claimed inaccuracy.[39] Winton claimed that she called Gray to remove the computer from A&J on the morning of Nemecek's arrest because she terminated his employment after learning of his drug charge.[40] She denied that she knew about the images on his phone when she called Gray.[41] At her deposition, however, Winton explained that she "didn't want to be in possession of [the computer]" but that she "didn't know if somebody would want to look at it" and "wanted somebody in authority to have it in case it was asked for," indicating knowledge of the investigation.[42]

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[38] Tr. II, 295.

[39] Tr. II, 294; Tr. III, 548, 557, 566-68.

[40] Tr. II, 401, 403-04.

[41] Tr. II, 404.

[42] Tr. II, 401. Time-stamped surveillance footage from A&J shows Nemecek entering and leaving the facility the evening of his arrest. Tr. II, 423-25; Plaintiffs' Ex. 16. Captain Musgrove confirmed that the time stamp on this footage was accurate using Nemecek's cell phone location data. Tr. II, 425. He found nothing indicating an error with the timestamp on the footage of Gray, taken less than 24 hours later. Tr. II, 425-26. Furthermore, Gray never provided her phone records, which could have corroborated (or dispelled) her claim that the time stamp was incorrect. Tr. III, 558.

¶12 Regardless of the timing of Gray's arrival at A&J on June 23rd, it is undisputed that she knew at some point during that day that Nemecek was being investigated for possessing/manufacturing child sexual abuse material and that she also knew about the photos of L.D. on his phone.[43] She was also aware that Nemecek's computer was in the trunk of her car.[44] Further, Gray was a criminal defense attorney, who knew that child sexual abuse material is often stored digitally on computers.[45]

¶13 Despite this knowledge, Gray, together with Nemecek's family members, continued collecting his property. The evening of his arrest, Gray contacted Foster about getting Nemecek's truck from him.[46] One of Nemecek's family members went with her to assist with collecting the truck.[47] When Foster told Gray that there were drugs in the truck and that he planned to impound the vehicle, she still insisted on coming to get it.[48] Gray told Foster she would "take care of it" and to "forget what you see."[49] When Foster began trying to tell Gray about the images

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[43] Tr. II, 276, 311-18. Gray testified she learned about the investigation from Nemecek's father, who learned about it from Crossley. Tr. II, 311-12. Crossley learned about the images of L.D. on Nemecek's phone before Foster took the phone to the Sheriff's office. *See* Plaintiffs' Ex. 11.

[44] Tr. II, 292.

[45] Tr. II, 312-13.

[46] Tr. II, 321-22.

[47] Tr. II, 330.

[48] Tr. II, 374.

[49] Tr. II, 374-75.

he found on Nemecek's phone, Gray told him something to the effect of "stop talking."[50] Gray then took the truck to Nemecek's parents' house.[51] While at his parents' house, Gray and Nemecek's parents discussed the allegations involving the images on his phone.[52] All the while, according to Gray, Nemecek's computer remained in her trunk.[53]

¶14 Gray admittedly had possession of the computer the next day, on June 24th, when she learned that deputies were executing a warrant at Nemecek's home searching for his electronic devices and that his bond had been set at $250,000 based on allegations of possessing/manufacturing child sexual abuse material and child sexual abuse.[54] Jail records indicate Gray met with Nemecek while he was in jail on June 28th.[55] He was released on bond later that day.[56] Gray gave him a ride from the jail to his parents' house, where he was staying.[57] Gray admitted that Nemecek's computer was still in her trunk at this time.[58]

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[50] Tr. II, 328.

[51] Tr. II, 331.

[52] Tr. II, 334-35.

[53] Tr. II, 330, 336.

[54] Tr. II, 298, 336-37; Plaintiffs' Ex. 11.

[55] Plaintiffs' Ex. 11.

[56] Tr. II, 344-45; Plaintiffs' Ex. 11.

[57] Tr. II, 344-45.

[58] Tr. II, 345-46.

¶15 Notwithstanding all her involvement in Nemecek's case, including collecting Nemecek's property and providing him with transportation, Gray decided she could no longer represent him because she represented Foster.[59] She then recommended two new attorneys.[60] Gray claimed that as part of transitioning the case to the new attorneys, she met the attorneys at Nemecek's parents' house on June 29th, the day after Nemecek's release from jail.[61] According to Gray, several of Nemecek's family members were present, including his parents and his grandmother.[62] Winton was also there, despite her testimony that she was so concerned about Nemecek's drug charge that she terminated his employment and had Gray remove his belongings from A&J's premises, just days before.[63] While at this family gathering, Gray claimed that she was going to get a bucket of tomatoes out of her car for Nemecek's grandmother when Nemecek approached her and asked if he could get his "stuff."[64] With Gray's permission, Nemecek then removed his computer from her trunk.[65]

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[59] Tr. II, 341.

[60] Tr. II, 348.

[61] Tr. II, 346-49.

[62] Tr. II, 348-49.

[63] Tr. II, 348.

[64] Tr. II, 350-51.

[65] Tr. II, 351.

¶16 According to Gray's version of these events, she returned Nemecek's computer to him a few days before Deputy Hurley learned that she had removed Nemecek's computer from A&J and before Deputy Hurley had searched Nemecek's parents' house for that computer on July 2nd.[66] Gray's timeline also conveniently has her returning the computer to Nemecek before the prosecutor of Nemecek's child sexual abuse case learned of her involvement, was livid about the situation, and had a conversation with her in which he discussed the fact that Gray should face criminal charges if she did not produce the computer.[67]

¶17 However, the computer was never located.

¶18 Eventually, Nemecek pled guilty and received 15-year concurrent prison sentences for three counts: 1) procuring child sexual abuse material, 2) possessing child sexual abuse material, and 3) forcible oral sodomy.[68] He also pled guilty and received a suspended life sentence for sexual abuse of a child under 12.[69] Crossley and L.D. also sued him in a civil action. They later filed the present suit against A&J and Gray, though A&J was dismissed upon settlement.

¶19 As against Gray, Crossley and L.D. sought compensatory and punitive damages based on several theories of recovery: negligence, negligence per se,

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[66] *See* Plaintiffs' Ex. 11.

[67] Tr. III, 488-89.

[68] Tr. II, 468-69.

[69] *Id.*

tortious spoliation, fraudulent concealment, and civil conspiracy.[70] L.D. also sought recovery on a conversion theory. The trial was conducted from November 8th through the 10th of 2021. Crossley's claim for recovery based on negligence, negligence per se, and civil conspiracy theories was submitted to the jury, though the district court declined to give the jury her requested "adverse inference" instruction based on Gray's spoliation of the computer evidence. The jury returned a verdict in Gray's favor on Crossley's claim. As for L.D.'s claim, the court entered a directed verdict in Gray's favor, not allowing the jury to consider any of her theories of recovery.

¶20 After trial, based on information received by her attorney, Crossley alleged that the jury had misunderstood their instructions to mean that they could only consider the written exhibits during their deliberations but not any of the trial testimony. On this basis, Crossley filed a timely motion for new trial pursuant to 12 O.S.2021 § 651. She also argued that she should receive a new trial because the district court did not give the jury her requested adverse inference instruction, among other reasons. As for L.D.'s claim, L.D. argued the court should grant a new trial because it erred by granting Gray a directed verdict on all her theories of recovery. The district court granted a new trial to Crossley based on the issue with

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[70] Crossley initially also sought recovery pursuant to a theory of loss of filial consortium but did not proceed with this theory at trial, agreeing for the instruction to be withdrawn. Tr. III, 599.

the jury misunderstanding the instructions but did not grant a new trial to L.D.[71] Gray appeals the part of the district court's order granting a new trial to Crossley, and L.D. counter-appeals the part of the order denying her a new trial.[72]

STANDARD OF REVIEW

¶21 The district court's decision to grant a new trial will not be reversed unless "error is clearly established in respect to some pure, simple, and unmixed question of law." *Ledbetter v. Howard*, 2012 OK 39, ¶ 9, 276 P.3d 1031, 1034. When a district court grants a new trial, "a clear showing of manifest error and an abuse of discretion must be made before this Court is justified in reversing the ruling." *Id.*

¶22 When, as in this case, the same judge who granted the new trial presided over the trial, "a much stronger showing of error or abuse of discretion is required for this Court to reverse than if a party appeals from a refusal to grant a new trial." *Id.*

¶23 The court's decision to deny a new trial is reviewed for an abuse of discretion. *Smith v. City of Stillwater*, 2014 OK 42, ¶ 11, 328 P.3d 1192, 1197.

¶24 When reviewing the district court's decision on a motion for new trial requires resolving an issue of law, such as the issues of statutory interpretation and

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[71] Crossley and L.D. alternatively requested the court vacate the judgment based on the court's term-time authority recognized in 12 O.S.2021 § 1031.1, but the order specifically states the new trial was granted pursuant to 12 O.S.2021 § 651.

[72] Gray's petition in error lists several propositions of error that are not addressed in her brief-in-chief. These omitted issues are waived. *See* Okla. Sup. Ct. R. 1.11(k)(1).

the grant of a directed verdict raised in this appeal, these issues are reviewed de novo. *See Indep. Sch. Dist. # 52 of Oklahoma Cnty. v. Hofmeister*, 2020 OK 56, ¶ 17, 473 P.3d 475, 485 (explaining de novo review is used when deciding an issue of law when reviewing a motion for new trial for an abuse of discretion); *Computer Pub's, Inc. v. Welton*, 2002 OK 50, ¶ 6, 49 P.3d 732, 735 (reviewing the district court's decision on a motion for directed verdict de novo).

ANALYSIS

1. Gray's Appeal

¶25 In her appeal, Gray alleges the district court improperly granted a new trial to Crossley based on the jury's misunderstanding about the evidence it could consider in reaching the verdict. Despite the jury being properly instructed that they could consider both witness testimony and exhibits as evidence, one mistaken juror apparently convinced the others to consider only the exhibits as evidence and not any testimony. Crossley's attorney submitted affidavits containing statements from jurors to this effect, and the order notes the court heard similar statements directly from jurors.

¶26 Regardless, juror impeachment of a verdict is generally prohibited by 12 O.S.2021 § 2606(B), which states that upon inquiry into the validity of a verdict:

> a juror shall not testify as to any matter or statement occurring during the course of the jury's deliberations or as to the effect of anything upon the juror's mind or another juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or

> indictment or concerning the juror's mental processes during deliberations. . . . An affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying shall not be received for these purposes.

¶27 Section 2606(B) provides one exception to the prohibition against juror impeachment. A juror may testify "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." *Id.*

¶28 Ignoring that the jurors' statements in the attorneys' affidavits are hearsay, the statements are a prime example of the type of juror testimony that section 2606(B) prohibits. The statements involve "the juror's mind or another juror's mind or emotions as influencing the juror to assent to or dissent from the verdict." They also concern "the juror's mental processes during deliberations." Moreover, a juror's misunderstanding of the instructions does not amount to "extraneous prejudicial information" or "outside influence" within the meaning of the statute.

¶29 Though it appears at least one juror sought out Crossley's attorney, rather than the attorney seeking out the juror, the Oklahoma Supreme Court has made clear that it does not condone "efforts by the parties or their counsel to discover a juror's thoughts or personal decision-making process." *Fields v. Saunders*, 2012 OK 17, ¶ 15, 278 P.3d 577, 582. Nor does the Court endorse "jurors impeaching verdicts, or disclosing statements made by other jurors during deliberations." *Id.*

Because the statements at issue are improper jury impeachment of a verdict, the district court erred by granting Crossley a new trial on this basis.

¶30 However, the district court's grant of a new trial may be affirmed if a new trial was warranted for a different reason. *See Matter of Estate of Foresee*, 2020 OK 88, ¶ 12, 475 P.3d 862, 866 ("[W]e we may affirm a judgment below when the trial court reaches the correct result but for the wrong reason."); *Parker v.* Washington, 1966 OK 263, ¶ 15, 421 P.2d 861, 865 (holding the Court will not confine its review of a grant of a new trial to the reasons given by the district court and overruling prior cases to the contrary).

2. Crossley's appeal

¶31 Accordingly, we turn to Crossley's argument in her motion for new trial that the district court erred by not instructing the jury on the adverse inference that arises upon the willful destruction or suppression, i.e., "spoliation" of evidence. The instruction authorized in such circumstances by the Oklahoma Uniform Jury Instructions states:

> [Name of Party] had a duty to preserve [Specify Evidence] in this case and [Name of Party] destroyed/hid/[failed to preserve] the evidence. You may therefore conclude that the evidence would have been unfavorable to [Name of Party].

OUJI-Civil No. 3.11A.[73] Crossley argued that Gray had a duty to preserve Nemecek's computer and that her willful failure to do so justified the adverse inference instruction.

¶32 Spoliation is "the destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Barnett v. Simmons*, 2008 OK 100, ¶ 21, 197 P.3d 12, 20 (addressing the factors necessary to impose discovery sanctions for spoilation of evidence pursuant to 12 O.S.2021 § 3237(B)(2)). In *Barnett*, the Supreme Court stated that "spoliation occurs when evidence relevant to prospective civil litigation is destroyed, adversely affecting the ability of a litigant to prove his or her claim." *Id.* Spoliation includes "the intentional . . . destruction . . . of tangible and relevant evidence which impairs a party's ability to prove or defend a claim." *Id.* (citing *Koch v. Koch Industries, Inc.*, 197 F.R.D. 488, 490 (N.D. Okla. 1999)).

¶33 It is well established that Oklahoma law recognizes "the existence of an adverse presumption that follows 'the destruction or spoliation' of evidence." *Beverly v. Wal-Mart Stores, Inc.*, 2000 OK CIV APP 45, ¶ 3, 3 P.3d 163, 165

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[73] This Instruction was adopted effective February 12, 2020, and was therefore applicable during the trial of this case in November of 2021. The Instruction was amended after the trial, but those amendments did not change the language of the Instruction. The amendments modified the Notes on Use to delete reference to negligent spoliation of evidence as a basis for providing the Instruction and a cite to *Akins v. Ben Milam Heat, Air & Elec., Inc.*, 2019 OK CIV APP 52, ¶ 63, 451 P.3d 166, which holds "negligent . . . conduct does not warrant an adverse inference jury instruction in this case." Gray's negligent destruction of Nemecek's computer is not an issue.

(citing *Harrill v. Penn*, 1927 OK 492, ¶ 8, 273 P. 235, 237). Upon a showing of "willful destruction [or] suppression," of evidence, a presumption arises that, if produced, the evidence "would be injurious to the one who has thus hindered the investigation of the facts." *Harrill*, 1927 OK 492, ¶ 8. The presumption arises "'if it is shown that a person has attempted to . . . suppress or destroy evidence, [because] such conduct may be justly construed as an indication of his consciousness that his case or defense is lacking in merit. . . . [but] only in cases of 'willful destruction [or] suppression.'" *Beverly*, 2000 OK CIV APP 45, ¶ 3, (quoting *Harrill*, 1927 OK 492, ¶ 8).[74]

a. Duty to preserve evidence

¶34 The first element Crossley had to establish to invoke the adverse inference instruction was proving that Gray had a duty to preserve Nemecek's computer. Gray frames the issue as a requirement to show that Gray could have "foreseen a civil lawsuit against her" when she returned Nemecek's computer to him. Although that proof might satisfy the "duty element" for an adverse inference instruction, Gray's proposed test is too narrow. The scope of the presumption that

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[74] The adverse inference instruction is different from the tort of spoliation, which the Oklahoma Supreme Court has declined to recognize. *See Patel v. OMH Med. Ctr., Inc.*, 1999 OK 33, ¶¶ 45-46, 987 P.2d 1185, 1202 (declining to recognize the tort of spoliation and noting most courts considering the issue have not recognized spoliation as an independent tort action). The adverse inference instruction also differs from the sanctions that can be imposed for discovery abuses. *See Barnett*, 2008 OK 100, ¶ 24 ("Section 3237(B)(2) contains no requirement of willfulness . . . .").

one who destroys evidence is conscious that the claim or defense lacks merit "is as broad as the conceivable circumstances in which it may have logical application." *Harrill*, 1927 OK 492, ¶ 8 (quoting a secondary source discussing the broad scope of the presumption and referring to it as the "pertinent rule.").

¶35 The duty to preserve evidence may result from a court order during litigation. *See Barnett*, 2008 OK 100, ¶ 14 (explaining section 3237(B)(2) of the Discovery Code provides for sanctions imposed by the court for failure to obey an order to provide or permit discovery). The duty may arise in the absence of a court order during the litigation. *See Harrill*, 1927 OK 492, ¶¶ 8-9 (finding adverse inference presumption arose when defendant destroyed meeting minutes of key transactions after case was filed); *Holm-Waddle v. William D. Hawley, M.D., Inc.*, 1998 OK 53, ¶¶ 8-11, 967 P.2d 1180, 1182-83 (finding an autopsy performed by plaintiff's expert, which was reasonably foreseeable to destroy evidence and performed without notice to opposing counsel, deprived defendant of a fair trial and warranted sanction of excluding evidence from the examination or dismissal of case). But the duty to preserve evidence may also arise, as in this case, before the case is filed. A litigant "who is on notice that documents and information in its possession are relevant to litigation or potential litigation or are reasonably calculated to lead to the discovery of admissible evidence has a duty to preserve such evidence." *Barnett*, 2008 OK 100, ¶ 20.

¶36 Gray's focus on the foreseeability of Crossley's present lawsuit avoids the obvious. When Gray took possession of Nemecek's computer and later delivered that computer to him, she was aware that Nemecek was being investigated for possession of child sexual abuse material and sexual abuse of a child. There was enough evidence that Nemecek's personal computer contained a video of Nemecek sexually abusing L.D to cause the district court to approve a search warrant for that computer.

¶37 Crossley presented evidence, including time-stamped surveillance footage, showing that Gray removed or had removed Nemecek's personal property from A&J and had that property put in the trunk of her car. The evidence showed that Nemecek's personal computer was included in the property in the trunk of Gray's car. Gray took possession of Nemecek's computer after learning about the pending investigation involving his possession and creation of child sexual abuse material and the probable existence of evidence of that crime on Nemecek's computer. By Gray's own admission, she then kept Nemecek's computer in her trunk for a number of days, although she knew it was the subject of a search warrant and that law enforcement authorities were actively looking for it. Nonetheless, according to Gray's own testimony, rather than surrendering the computer to law enforcement, she gave the computer to Nemecek. As a criminal defense attorney, Gray knew or

should have known he had a powerful motive to hide or destroy evidence of his child sexual abuse crimes.

¶38 Gray's conduct implicates or proves the violation of several legal and professional duties. First, Gray's conduct occurred during the ongoing criminal investigation of Nemecek's crimes including the possession of child sexual abuse material on his computer. Gray was acutely aware of that investigation. It is unlawful to knowingly possess child sexual abuse material. *See* 21 O.S.Supp.2026 § 1024.2.[75] Title 21 O.S.Supp.2026 § 543 prohibits any person who knows of the actual commission of a crime from taking any property of another with the agreement, express or implied, to compound or conceal such crime. Title 21 O.S.2021 § 454 prohibits every person who knows that any "record . . . matter or thing, is about to be produced in evidence upon any trial, proceeding, inquiry or investigation" from willfully destroying the same, "with intent thereby to prevent the same from being produced . . . ." And it is a crime to "maliciously practice[] any deceit . . . with intent to prevent any party to an action or proceeding from obtaining or producing therein any book, paper, or other matter or thing which might be evidence . . . ." 21 O.S.2021 § 546.

[75] We cite to the most recent version of the statute. Though the statute has been amended since Gray's actions in 2015, it obviously was and remains illegal to possess child sexual abuse material. Hereinafter, we cite to the most recent version of the statute when the current version illustrates the same point as the version in effect in 2015.

¶39 Gray may not have personally destroyed Nemecek's computer, but that does not exonerate her conduct. All persons "concerned in the commission of crime . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present . . ." are guilty of the offense. 21 O.S.2021 § 172. *See also Harrill*, 1927 OK 492, ¶ 9 ("If that rule obtained, the agents or employees of a partnership could destroy or spoliate records of the partnership business, and the complaining partner in a suit against the other members of the firm would be deprived of the benefits of the above wholesome principle of the law of evidence."). We recognize that Gray was never charged with any of these crimes, although an assistant district attorney apparently threatened charges at one point. However, the adverse inference instruction does not require proof of criminal conduct; it requires proof that Gray had a duty to preserve the evidence.

¶40 Second, as an attorney, Gray had a professional and ethical duty to conform her conduct "to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs." Rules of Professional Conduct, Preamble, ¶ 5. 5 O.S. ch. 1, app. 3-A. Failure to perform this duty constitutes professional misconduct. It is professional misconduct "for a lawyer to: (b) commit a criminal act . . . (c) engage in conduct involving dishonesty, fraud, deceit . . . [or] (d) engage in conduct that is prejudicial to the administration of justice . . . ." *Id.* at Rule 8.4. The commission "by any lawyer of any act contrary

to prescribed standards of conduct, whether in the course of [her] professional capacity, or otherwise, which act would reasonably be found to bring discredit upon the legal profession, shall be grounds for disciplinary action, whether or not the act is a felony or misdemeanor, or a crime at all." Rules Governing Disciplinary Proceedings, Rule 1, § 1.3. 5 O.S. ch. 1, app. 1-A.

¶41 At all potentially relevant times—when Gray initially took the computer containing the video from A&J, hid it from law enforcement in her trunk while the search warrant was outstanding, and returned it to Nemecek—it was reasonably foreseeable that the computer and information thereon was relevant to the impending criminal litigation and the eventual civil litigation involving Nemecek. The evidence in this record is sufficient to establish Gray's duty to preserve Nemecek's computer whether she could anticipate Crossley's lawsuit or not.

b. Intentional destruction of the evidence

¶42 It is clear from these facts that Gray knew or should have known that evidence of child sexual abuse was on Nemecek's computer. At a minimum, by her own admission she knew that law enforcement was searching for the computer as part of their investigation of Nemecek for that crime while the computer was in the trunk of her car. Nonetheless, Gray did not surrender the computer to law enforcement officials. She delivered it to Nemecek knowing he had a strong motive to hide or destroy it. Gray also had her own personal interest in seeing

Nemecek's computer destroyed. As an experienced criminal defense attorney, she would have known that her possession of a computer containing child sexual abuse material may have subjected her to criminal liability.

¶43 As the federal courts observe, an adverse inference instruction "should be used with caution." *McNeese v. Access Midstream Partners, L.P.*, No. CIV-14-503-D , 2016 WL 10570226, at *2 (W.D. Okla. Nov. 4, 2016) (reserving the spoliation issue until trial). An adverse inference instruction "is a powerful sanction as it 'brands one party as a bad actor' and 'necessarily opens the door to a certain degree of speculation ... that [a trier of fact] may infer the presence of damaging information in the unknown contents of [the destroyed evidence]." *Id.* (citations omitted). In this case, however, the adverse inference instruction was warranted. The district court erred by not giving Crossley's requested adverse inference instruction, and therefore, the court did not abuse its discretion in granting Crossley a new trial, albeit for a different reason. That decision is affirmed.

3. L.D.'s counter-appeal

¶44 In her counter-appeal, L.D. argues the district court should have granted her a new trial because the court erroneously granted Gray a directed verdict on all her theories of recovery.

¶45 A motion for directed verdict should only be granted "if the party opposing the motion has failed to demonstrate a prima facie case for recovery." *Gillham v. Lake Country Raceway*, 2001 OK 41, ¶ 7, 24 P.3d 858, 860. In deciding a motion for directed verdict, the district court "must consider as true all the evidence and inferences reasonably drawn therefrom favorable to the non-movant, and disregard any evidence which favors the movant." *Id.* On appeal, this Court must also review the evidence in the light most favorable to the non-moving party and will not disturb the district court's decision "if there is competent evidence to support the material elements of the plaintiff's cause of action." *Id.*

¶46 A plaintiff seeking recovery for conversion must show: 1) ownership or right to possess the property in question, 2) the defendant wrongfully interfered with such right, and 3) the extent of damages. *Southwest Orthopaedic Specialists, P.L.L.C. v. Allison*, 2018 OK CIV APP 69, ¶ 20, 439 P.3d 430, 437 (citing *White v. Webber-Workman Co.*, 1979 OK CIV APP 6, ¶ 4, 591 P.2d 348, 350).

¶47 In one paragraph, lacking citation to the record, Gray claims L.D. cannot establish the prima facie elements of conversion because she did not own Nemecek's computer nor have the right to possess it. Ownership of the computer is not the issue and is not dispositive. Viewing the evidence in the light most favorable to L.D., the computer contained a video depicting Nemecek sexually abusing L.D. Thus, the crux of the issue is who had the superior right to possess

the video. *See Randol v. Harbour Longmire Co.*, 1927 OK 304, ¶ 2, 259 P. 548, 548 (referencing a party's "superior right" to property in the context of an unlawful conversion); *Bank of Wilson v. Pevehouse*, 1967 OK 88, ¶ 8, 426 P.2d 705, 706 (affirming dismissal of a petition when the plaintiff did not allege his "superior right to possession[.]").

¶48 Gray had no legal right to possess the video. *See* 21 O.S.Supp.2026 § 1024.2 (prohibiting possession of child sexual abuse material). In contrast, L.D. had an interest in possessing it at least for the limited purpose of giving it to law enforcement to assist in the ongoing criminal investigation and prosecution of Nemecek. *See Carlson v. State*, 355 S.W.3d 78, 81 (Tex. App. 2011) (finding a child victim did not commit theft against a criminal defendant by taking a videotape he made of her engaging in underaged sexual conduct and providing it to police). As a victim of the crime, L.D. had an interest in the prosecution. This interest is so strong that victims' rights are now explicitly recognized in the Oklahoma Constitution and criminal statute. *See* Okla. Const. Art. 2, § 34 (providing a litany of rights to crime victims); 21 O.S.2021 § 142A-2 (outlining victims' rights, including the right to be heard in any proceeding that implicates their rights and to confer with the prosecutor about plea negotiations); 21 O.S.2021 § 142A-3 (recognizing a victim's right to request that charges be pressed against her assailant). The video in question was highly relevant to the investigation and

prosecution of Nemecek. It could have provided more information about the timing and extent of Nemecek's crimes, potentially led to more charges being filed, and could have allowed prosecutors to seek a harsher sentence than what Nemecek received.

¶49 Furthermore, L.D. had an interest in providing the video to law enforcement to ensure her own privacy was protected and to prevent its publication. *See Carlson*, 355 S.W.3d at 81. Oklahoma law generally recognizes an individual's right to privacy and interest in her own image. *See McCormack v. Oklahoma Pub. Co.*, 1980 OK 98, ¶¶ 8-9, 613 P.2d 737, 740 (acknowledging an individual's privacy rights are invaded when another person unreasonably intrudes on the individual's seclusion, appropriates her name or likeness, gives unreasonable publicity to her private life, or unreasonably places the other in a false light before the public); 12 O.S.2021 § 1449 (governing unauthorized use of a person's photograph or likeness for commercial purposes).

¶50 Specifically, as to victims of child sexual abuse, the United States Supreme Court has recognized that a child's privacy interests are invaded when acts of sexual abuse are recorded and distributed. *See New York v. Ferber*, 458 U.S. 747, 758 n.9, 102 S. Ct. 3348, 3355 n.9, 73 L. Ed. 2d 1113 (1982). In recognition of these interests, Oklahoma law specifies how law enforcement and prosecutors must handle child sexual abuse material during criminal investigations and prosecutions

to prevent accidental reproduction and distribution of the images. *See* 21 O.S.Supp.2024 § 1022 (requiring law enforcement to obtain all copies of child sexual abuse material obtained from a perpetrator and to deliver them to the magistrate); 21 O.S.Supp.2024 § 1023 (requiring a magistrate to certify evidence as child sexual abuse material before delivery to the district attorney for prosecution purposes). The law also requires destruction of child sexual abuse material upon final conviction. *See* 21 O.S.Supp.2024 § 1024.4. Thus, at a minimum, L.D. had a right to possess the video for the purpose of giving it to law enforcement. Her right was superior to that of Gray, who had no legal right to possess the video.

¶51 Moreover, the evidence shows Gray intentionally interfered with L.D.'s right, particularly when viewed in the light most favorable to L.D. as the non-moving party. L.D. presented evidence that Gray took possession of the video when she removed Nemecek's computer from A&J after learning about the pending investigation involving Nemecek's possession and creation of child sexual abuse material. Gray admittedly kept the evidence in her trunk knowing law enforcement officers were searching for it. Finally, she gave it to Nemecek knowing he had a strong motive to hide or destroy it. When viewed in the light most favorable to L.D., this conduct demonstrates Gray's intentional interference with L.D.'s right.

¶52 As for the issue of damages, 23 O.S.2021 § 64 states that the detriment caused by a wrongful conversion is "presumed" to be:

> 1. The value of the property at the time of the conversion with the interest from that time; or,
>
> 2. Where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; and,
>
> 3. A fair compensation for the time and money properly expended in pursuit of the property.

¶53 Although this description does not accurately describe the kind of damage L.D. suffered, she notes that 18 U.S.C. § 2255 would allow her, if shown to be a victim of federal laws against child sexual abuse material, to recover liquidated damages in the amount of $150,000 for her personal injury in a United States District Court. To the extent Gray's wrongful interference with L.D.'s right prevented L.D. from successfully bringing a suit to recover $150,000 in federal court, the point is well-taken that a jury could use this amount to set the value of L.D.'s damages for conversion.[76] However, L.D. did not present evidence

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[76] Oklahoma statute allows a victim of child sexual abuse material to recover against a producer, promoter, or intentional possessor of the material for "actual, special and punitive damages such person sustained and the cost of the suit, including reasonable attorney fees." 21 O.S.Supp.2024 § 1040.56. Unlike the federal statute, section 1040.56 does not provide an amount of liquidated damages, which the child is not required to submit evidence of to obtain. The liquidated damages provision of the federal law allows victims to recover without having to suffer potential harm caused by having to testify as to damages, particularly when a victim may have already had to testify and face her abuser in the underlying criminal proceedings. *See Doe v. Boland*, 698 F.3d 877, 882 (6th Cir. 2012).

regarding this particular issue to the jury, though her attorney discussed the federal statute with the district court and requested the court inform the jury about the statute without any context.

¶54 Regardless, nominal damages are recoverable for conversion. *See* 23 O.S.2021 § 98; *Fourth Nat. Bank of Tulsa v. Dyer*, 1960 OK 66, ¶ 10, 350 P.2d 481, 482 (explaining that a plaintiff could have recovered nominal damages even if a converted promissory note had no value). Even without proof of actual damages, L.D. could maintain a conversion theory to conclusion because only nominal damages are required. *See Morgan v. State Farm Mut. Auto. Ins. Co.*, 2021 OK 27, ¶ 24, 488 P.3d 743, 750 (applying the same rationale to a breach of contract claim). Accordingly, the lack of testimony as to L.D.'s damages for conversion did not entitle Gray to a directed verdict on this theory.

¶55 Thus, the district court erred by granting Gray a directed verdict on L.D.'s conversion theory of recovery and abused its discretion by not granting L.D. a new trial on this basis. Because she is entitled to a new trial for this reason, it is not necessary to address her other arguments in favor of a new trial.

CONCLUSION

¶56 The district court did not abuse its discretion by granting Crossley a new trial because the court erred by not giving the jury an adverse inference instruction based on Gray's spoliation of evidence. However, the district court erred by not

granting L.D. a new trial on her cause of action because Gray was not entitled to a directed verdict on L.D.'s conversion theory of recovery. Therefore, the portion of the order granting Crossley a new trial is affirmed, and the portion denying L.D. a new trial is reversed. The case is remanded for further proceedings consistent with this Opinion.

¶57 AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS.

HUBER, J., concurs, and BLACKWELL, P.J., dissents.

BLACKWELL, J., dissenting:

¶1 The draft opinion I previously circulated to this panel—less the caption and with minor grammatical changes—is reproduced in full between the dinkuses below.[1] As this draft ultimately failed to maintain a majority, the case was reassigned to its current author. I agree with the majority opinion that the trial court erred in granting the motion for new trial for the reasons it gave. *See infra*, Part III.A. However, I part ways with the majority's conclusion that a new trial must be

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[1] *Dinkuses* is the plural form of *dinkus*, a typographical asterism which, despite prevalent use in judicial opinions and an origin dating back to the 1920s, does not (much to my dismay) appear in any of the dictionaries that I tend to reference or have ready access to. *Wiktionary* is the best I could do. A "dinkus" is "[a] small ornament, usually a line of three asterisks (* * *), especially [used] for the purpose of breaking up sections of a chapter, article, or other text." WIKTIONARY, https://*en.wiktionary.org/wiki/dinkus* (last visited May 5, 2026). *See also* Daisy Alioto, Ode to the Dinkus, THE PARIS REVIEW (June 8, 2018), https://www.theparisreview.org/blog/2018/06/08/ode-to-the-dinkus/ (celebrating the "success story" of the dinkus).

conducted because the trial court failed to give an adverse-inference instruction. The instruction was not warranted under the circumstances. *See infra*, Part III.B.5. I also disagree that any of the plaintiffs' claims were erroneously taken from jury or should be revived. *See infra*, Part III.B.1–4. I would reverse the trial court's order granting a new trial but affirm in all other respects, thus reinstating the jury's verdict in full. There is no need to remand this case for any reason. I respectfully dissent.

* * *

¶2 Deresa Gray—defendant below—appeals the district court's grant of a new trial after a jury verdict was entered in her favor. Leslie Crossley, mother of minor child L.D., and Lori Walke, as guardian ad litem for minor child L.D.—both plaintiffs below—counter-appeal the court's judgment against several of their theories of recovery. On review, we find that the grant of new trial was premised on juror impeachment evidence that is prohibited by 12 O.S. § 2606. The order granting a new trial is therefore reversed. We find no error in the other decisions of the court and thereby affirm all orders plaintiffs challenge in their counter-appeal.

I.

¶3 Timing is key to the allegations examined here. As such, we will make an effort to be as precise as possible in this summary as the record allows. On the night of June 22, 2015, nonparties Josh Nemecek and Glen Foster went drinking at

a local casino. Around 2 a.m. the next morning—Tuesday, June 23rd—Nemecek's vehicle was stopped after leaving the casino and Nemecek was arrested for drunk driving. The arresting officer determined that passenger Foster was not impaired and allowed him to proceed on his way with Nemecek's truck.

¶4 Nemecek was booked into jail around 3:35 a.m. During a routine search, he was found to be in possession of methamphetamine. That morning at around 9:30 a.m., Nemecek's father contacted attorney Deresa Gray, who had previously handled minor criminal and civil matters for Nemecek and was apparently familiar with the family. Nemecek was scheduled to be arraigned at 1:15 p.m. the same day, still June 23rd, on charges of drunk driving and possession of controlled substances. Gray was scheduled to represent Nemecek at the arraignment, and a tentative plan was apparently reached that Nemecek would be released on his own recognizance to attend a rehabilitation program.

¶5 On the morning of the 23rd, Gray received a call from Nemecek's employer, A&J Transportation. A&J was owned or operated by Nemecek's aunt and uncle, and the record indicates that Nemecek had been a less-than-model employee. A&J allegedly decided that Nemecek's arrest was the last straw and decided to fire him. Nemecek had several items of personal property at A&J's office, and Gray agreed to come and pick up his property.

¶6 Immediately before the scheduled arraignment, Gray went to A&J's office and picked up several items of property, assisted by A&J employees.[2] Among the property the employees loaded into the trunk of Gray's car were a number of video games and a large "gaming" computer and monitor belonging to Nemecek. The 1:15 p.m. arraignment proceeded normally, and Nemecek was ordered released. Before the release took place, however, the sheriff's office received instructions that Nemecek was to be held.

¶7 This hold occurred because of a parallel chain of events that was developing. Foster, who was left to drive Nemecek's truck home after the arrest, found that Nemecek had left his phone in the truck. Foster suspected that Nemecek might be involved with Foster's estranged wife and decided that this presented a good opportunity to search Nemecek's phone for evidence of his suspicions. Foster did not apparently find anything relating to his estranged wife on Nemecek's phone, but he did find eight pictures of Nemecek involved in sexual activity with an obviously minor child.

¶8 Foster did not immediately report this but conducted his own inquires to try and find out the identity of the child. At some time on the morning of the 23rd, he

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[2] The plaintiffs contend, based on surveillance video of the office, that this visit occurred beginning at 2:50 p.m., not between noon and 1:00 p.m. as Deresa insists. Deresa and Lena Winton were adamant at trial that the timestamps on the surveillance video must have been inaccurate. The discrepancy and its relevance, if any, was left for the jury to resolve.

established that the child was the daughter of the plaintiff Leslie Crossley, who was living with Nemecek. In the early afternoon that same day, Foster took the phone to the sheriff's office. It was because of this discovery that Nemecek's release was put on hold.

¶9 Gray was informed of the hold. She testified that, on the afternoon of the 23rd she attempted to find out why Nemecek was being held, but the sheriff's office would not release further information. She testified that, around 5 p.m. on the 23rd, she was told by Nemecek's aunt and uncle that they understood that Nemecek was under investigation for creating and possessing child pornography. At this time, Nemecek's personal computer and other items from his workplace were in the trunk of Gray's car.

¶10 The next day, Wednesday the 24th, Gray heard that bond had been increased to $250,000 and that Nemecek was being held under the suspicion that he had manufactured child pornography and molested a minor. She also learned of a search of Nemecek's house on the same day, while Nemecek's computer from A&J was still in the trunk of her car.

¶11 Apparently on the same day, Gray decided she would not represent Nemecek on the new charges.[3] New counsel was obtained. Gray visited Nemecek

[3] Gray was simultaneously representing Foster in divorce proceedings with his aforementioned estranged wife. Because Foster was clearly a witness in Nemecek's criminal proceedings, Gray sought withdrawal from Nemecek's proceedings.

in jail on Thursday the 25th to discuss the new bail requirement because new counsel had not yet entered an appearance. On Sunday, June 28th, Nemecek was released on bond. On Monday, June 29th, Gray went to Nemecek's parents' house, bringing his new attorneys to meet Nemecek. Gray testified that she went to her car to fetch some tomatoes she had brought for Nemecek's grandmother. While she was there, Nemecek approached her and asked if he could have the "stuff" removed from his workplace. According to Gray's testimony, she opened her trunk with a key fob and allowed Nemecek to remove all of his belongings, including the computer. What happened to the computer after this is unknown. It was never recovered.

¶12 Nemecek was criminally prosecuted on four charges related to the production and possession of child pornography, as well as the acts associated with its production. He was sentenced to three fifteen-year terms, to run concurrently, as well as a suspended life sentence. In January 2017, the plaintiffs filed a civil suit against Nemecek in Pontotoc County Case No. CJ-2017-25.[4] In June 2017, the plaintiffs filed this suit against Gray personally, alleging negligence, negligence *per se*, conversion, tortious spoliation, fraudulent concealment, and civil conspiracy. The plaintiffs also sued A&J raising similar claims and a claim of "negligent employment."

[4] No action has occurred in this suit since February 2019.

¶13 The record submitted on appeal is sparse between July 2017 and January 2019 and again between September 2019 and November 2021. The docket sheet shows the following significant events. Although an amended petition was filed in July 2017, Gray did not answer until January 2019, the interim time being absorbed by the voluntary recusal of several judges, motions to dismiss by both defendants, and the plaintiffs' unsuccessful quest for a change of venue.

¶14 In August 2019, Gray filed a motion for summary judgment on all claims. In September 2019, the court granted Gray's motion for summary judgment only on plaintiffs' claim of "tortious spoilation." In June 2020, the plaintiffs' dismissed all claims against A&J with prejudice. In October 2021, the pretrial order settled plaintiffs' claims against Gray as negligence, negligence *per se*, conversion, civil conspiracy, and loss of filial consortium.[5]

¶15 After plaintiffs had presented their evidence at trial, Gray moved for a directed verdict. The court granted a directed verdict against the minor plaintiff's claims on the grounds that, although the minor was aware of Nemecek's actions, she was unaware of Gray's actions, and hence, could not have suffered emotional

[5] The ultimate disposition of the filial consortium claim is uncertain. Plaintiffs did submit a jury instruction on it, R. 569, but it was not given. We assume the court found either the claim was not legally viable, that plaintiffs had failed to make a *prima facie* case, or that the claim related to L.D.'s damages only, which, as noted below, were eliminated upon Gray's motion for directed verdict. No allegation of error regarding this claim was presented in the motion for new trial or in the briefs.

trauma by them. The court also decided not to send plaintiffs' claim that Gray had "converted" the image of the minor child to the jury. After a contentious hearing over jury instructions, in which the plaintiffs re-urged their case of tortious spoliation, the jury was instructed on claims of negligence, negligence *per se*, and civil conspiracy.

¶16 During deliberations, the jury sent out a note asking if it could see a deposition of Deresa Gray that had been referenced during her testimony but not admitted into evidence. The court replied with a familiar response: "You have everything that you need, all the law and evidence in order to reach a decision in this matter." Tr.Vol.III, 658; *Court's Exhibit 1*. Both parties agreed to this response before it was sent to the jury. Tr.Vol.III, 658. The jury returned a 9-3 verdict in favor of Gray.

¶17 On January 10, 2022, plaintiffs filed a motion for new trial. The central claim was that plaintiffs' counsel had been contacted post-verdict by a juror and had subsequently talked with two other jurors, all who claimed that the jury had misunderstood the instruction given after they asked to see Gray's deposition. They claimed that the jury believed it to mean that they could not consider any witness testimony they had heard at trial. Hence, the jurors claimed, the jury had considered only the physical evidence actually taken into the jury room with them but not the testimony of the witnesses.

¶18 The motion also sought a new trial on plaintiffs' claims of tortious spoliation; on the minor child's claims that had been dismissed on the grounds of failure to show damages; on plaintiffs' claims that Gray had "converted" the minor child's image; on plaintiffs' claim of "fraudulent concealment;"[6] and on the court's refusal to give a spoliation of evidence instruction.

¶19 The court ordered a new trial based on "juror irregularity" but rejected the other claims for relief. Gray appeals the grant of a new trial. The plaintiffs appeal the judgments against their other theories of recovery.

II.

¶20 The standard of review for the grant of a motion for new trial is abuse of discretion. *Capshaw v. Gulf Ins. Co.*, 2005 OK 5, ¶ 7, 107 P.3d 595, 600 ("In reviewing a trial court's grant of new trial, the standard of review an appellate court must apply is whether the trial court abused its discretion."). The showing required to uphold the grant of a new trial is lower than required to reverse a denial of a new trial. *Ledbetter v. Howard*, 2012 OK 39, ¶ 9, 276 P.3d 1031, 1034. The discretion vested in a trial court in granting or denying a new trial must be "exercised in accordance with recognized principles of law," however. *Bateman v.*

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[6] The record is unclear as to what stage in the proceedings this claim was disposed of. It is listed in plaintiff's petition, but *not listed as a theory of recovery in the pretrial order.* Nonetheless, plaintiffs submitted a jury instruction on "concealment." No such instruction was given to the jury, however. We are not directed to any part of the record where the claim was rejected as a matter of law or because it was not identified in the pretrial order.

Glenn, 1969 OK 158, ¶ 11, 459 P.2d 854, 857. This case also involves questions of statutory interpretation and whether the evidence was sufficient to raise a jury question. When examining the correctness of an alleged error of law, "[a]pplication of the appellate abuse-of-discretion standard for reviewing a motion for new trial" requires *de novo* review. *Independent School District # 52 v. Hofmeister*, 2020 OK 56, ¶ 17, 473 P.3d 475.

III.

A.

¶21 We address first the appellant's claim that the trial court abused its discretion in ordering a new trial.

¶22 Juror impeachment of a verdict was long prohibited by the common law. *Egan v. First Nat. Bank of Tulsa*, 1917 OK 541, ¶ 9, 169 P. 621, 623 ("[T]his court has repeatedly followed the well-established rule that affidavits or testimony of jurors will not be received for the purpose of impeaching the verdict which they have solemnly made, and publicly returned into court."). This prohibition, with limited exceptions, has been codified in Oklahoma since 1978. The statute states:

> Upon an inquiry into the validity of a verdict or indictment, a juror shall not testify as to any matter or statement occurring during the course of the jury's deliberations or as to the effect of anything upon the juror's mind or another juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes during deliberations. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether

> any outside influence was improperly brought to bear upon any juror. An affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying shall not be received for these purposes.

12 O.S. § 2606(B).[7]

¶23 Upon review, we are convinced that the purported testimony of the three jurors—identified in the affidavits of attorneys Leavitt and Adair—does exactly what § 2606 and its predecessor common-law rule forbids. Plaintiffs' motion for new trial stated:

> After the jury was sent home, [juror] J.L. tracked down Plaintiffs' counsel Ken Adair's cell phone number, called it, and explained to him what had occurred. Mr. Adair was told that at the beginning of deliberations the jury was in favor of the Plaintiffs 10-2, and they were about to discuss the amount of damages to award. The jury then got wrapped up in perhaps the worst form of wordsmithing of the jury instructions imaginable and began questioning what evidence they could consider in deliberations. The Court's responsive note (in response to the jury question described above) resulted in a seismic shift in the panel's perception of the case leading to the 3-9 defense verdict. This turmoil from the jury room spilled out into the courtroom when the verdict was announced with several jurors crying.

R. 634-35, *Plaintiff's Motion for New Trial.*

¶24 Assuming we take the attorney affidavits as accurate testimony,[8] they are a prime example of jurors testifying as to the "effect of anything upon the juror's

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[7] There has been only one amendment to the statute. In 2002, the statute was made gender neutral.

[8] The affidavits are also hearsay. The trial judge, however, recalled in the order granting a new trial that he had "heard the same statements from members of the jury," apparently when discussing the case with jurors after the verdict. R. 698. Even if this does render the statements as

mind or another juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes during deliberations." 12 O.S. § 2606(B). The Supreme Court has repeatedly warned against considering testimony such as this as a basis for a new trial. "[T]his Court does not condone jurors impeaching verdicts, or disclosing statements made by other jurors during deliberations. Neither do we endorse efforts by the parties or their counsel to discover a juror's thoughts or personal decision-making process." *Fields v. Saunders*, 2012 OK 17, ¶ 15, 278 P.3d 577, 582. "The cases are legion in which this Court has ruled that affidavits, depositions and oral testimony of jurors may not be used to impeach a jury verdict." *Oxley v. City of Tulsa, By & Through Tulsa Airport Auth.*, 1989 OK 166, ¶ 25, 794 P.2d 742, 747.

¶25 Nor does the "single exception to this established rule," *id.*, relating to "extraneous prejudicial information" and "outside influence" save the plaintiffs here. The information brought into the jury room was the trial court's instruction.

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admissible—which is problematic, as we have no way to tell if what the jurors told the judge matches the detailed attorney affidavits—they remain subject to the limitations of § 2606. We further note the concern expressed in *Kerlin v. Hunt*, 2013 OK CIV APP 83, ¶ 34, 310 P.3d 1114, 1125, that discussions between the judge and the jury after a case has been tried to a conclusion run the significant risk that one or more jurors will attempt to improperly impeach the verdict in an unrecorded *ex parte* proceeding, as apparently happened here. For purposes of this appeal, however, we presume the affidavits accurately recount the events they describe.

The fact that it may have been misapprehended by some or all of the jury does not transform it into impermissible outside information.[9]

¶26 There are also solid policy considerations behind this rule. If this form of juror impeachment of a verdict is admissible, it is difficult to see what remains inadmissible. The traditional bases for a new trial, including insufficiency of evidence, improperly admitted evidence, improper instructions, errors of law, and misconduct would be supplemented by apparently unlimited testimony as to how and why the jury reached the conclusion it did, and whether the court and parties found its method and reasoning acceptable. A much larger number of verdicts could be subject to review based on post-verdict testimony going to the deliberative process and the understanding of the law and evidence by the jury. Coupled with the traditionally wide discretion to grant a new trial, any such loosening of the rules created by the common law and § 2606 would radically

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[9] The plaintiffs do not challenge the instruction itself, which appears to have been in a regularly used form, *see, e.g.*, *Barnard v. State*, 2012 OK CR 15, ¶ 18, 290 P.3d 759, 765-66 ("You have been given all of the law and evidence that is proper for you to consider in reaching a verdict. Please continue deliberations."); *Roy v. State*, 2006 OK CR 47, ¶ 19, 152 P.3d 217, 223 (same), and was approved by all parties before being sent to the jury. Further, Instruction No. 4 given in this case, which was an unmodified OUJI instruction, gives an accurate and thorough definition of "evidence," which includes "testimony." R. 597, *Jury Instructions* ("The evidence which you are to consider consists of the testimony of the witnesses; the exhibits, if any, admitted into evidence; any facts admitted or agreed to by the attorneys; and any facts which I instruct you to accept as true.").

expand the existing bases for a new trial. Nevertheless, even if such an expansion were advisable, its implementation is beyond the power of this Court.[10]

¶27 Plaintiffs finally argue that the court did not rely solely on the inadmissible testimony of the three jurors but based its finding of an irregularity on an "'appraisal of the fairness' of the entirety of the three-day trial." *Counter-appellants' Brief-in-Chief*, 16-17. Although a trial court is granted substantial discretion in granting a new trial, that discretion must be "exercised in accordance with recognized principles of law." *Bateman,* 1969 OK 158, ¶ 11. The trial court stated no cognizable basis for a new trial outside the inadmissible juror testimony. As such, we reverse the grant of a new trial and reinstate the jury's verdict in favor of Gray.

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[10] We note that 12 O.S. § 651(1) and § 651(2) respectively identify juror irregularity and juror misconduct as separate bases for a new trial. Evidently, the legislature considers juror misconduct and irregularity to have differing elements. Case law involving § 2606 generally refers to juror misconduct, rather than an irregularity, and the plaintiffs allege that the jury's misunderstanding of the court's instruction amounts to an "irregularity" within the meaning of § 651, rather than misconduct. They imply that cases involving juror irregularity, as opposed to misconduct, are not subject to the clear restrictions of § 2606 and the accompanying common law but governed only by the equitable discretion of the court.

We need not define how "misconduct" and "irregularity" differ under § 651, however. The limitations of § 2606 apply on their face to any "inquiry into the validity of a verdict or indictment." Section 2606(B) "created a single exception to this common law rule." *Walker v. Ison Transportation Services, Inc.*, 2007 OK CIV APP 14, ¶ 7, 152 P.3d 894, 895. If § 2606(B) applies when a jury's actions are characterized as misconduct, but not when the same actions are characterized as an irregularity, § 2606(B) would be nullified. As such, we find that a new trial cannot be sustained on evidence prohibited by § 2606(B), irrespective of which § 651 theory is cited.

B.

¶28 In their counter-appeal, the plaintiffs allege the following as reversible errors: (1) the failure to instruct on the conversion claim, (2) the failure to instruct on the "fraudulent concealment" claim, (3) the grant of summary judgment on the spoliation cause of action, (4) the directed verdict as to L.D.'s claims for damages, and (5) the refusal to issue a spoliation adverse inference instruction.[11] Each will be addressed in turn.

1.

¶29 The plaintiffs contend the trial court's refusal to instruct on their claim for "conversion" was in error. The legal basis for this claim was that the involved minor child had a property right in the images allegedly contained on the computer. That is, by taking possession of the computer, Gray possessed the images for six days without the child's consent and thereby converted them.

¶30 The theory that a digital copy of a personal image constitutes convertible personal property of the person imaged does not arise in Oklahoma law. Nor does it appear to be a general principle in other jurisdictions. Instead, plaintiffs cite to commercial trademark and copyright cases from other jurisdictions in support of

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[11] Plaintiffs also contend that failure to grant a new trial on each of these issues, which was timely requested, was error. Because the argument for a new trial was premised on errors of law, our review of the failure to grant a new trial is governed in each case by propriety of the underlying ruling. *See Reeds v. Walker*, 2006 OK 43, ¶ 9, 157 P.3d 100, 107.

their proposition. Of these cases, *The Cousteau Soc'y, Inc. v. Cousteau*, 498 F. Supp. 3d 287, 308 (D. Conn. 2020), concerned a Lanham Act trademark claim that the use of Jacques-Yves Cousteau's likeness in promotional materials for a documentary produced by the Celine Cousteau Film Fellowship improperly suggested that Coustean's estate endorsed or sponsored the documentary. *Taylor v. Trapeze Mgmt.*, LLC, 0:17-CV-62262-KMM, 2019 WL 1977514, at *1 (S.D. Fla. Feb. 28, 2019) similarly involved image and trademark claims by certain models that Trapeze Management had used their pictures in advertisements for its clubs, giving the false impression to consumers that the models endorsed Trapeze or were associated with the clubs. *Id.*[12] In that case, the court found the plaintiffs to be

> professional models who earn a living by promoting their images and likenesses to select clients, commercial brands, and entertainment outlets, as well as relying on their reputations and brands for modeling. Plaintiffs' careers in modeling, acting, and/or private enterprise have value stemming from the goodwill and reputation that each has built, both of which are critical to establishing a brand, being selected for jobs and maximizing earnings.

Id. at *1 (S.D. Fla. Feb. 28, 2019) (citation omitted).

[12] The opinion primarily concerns *Daubert* challenges to the methodology of the plaintiffs' experts' research exploring whether advertisements using plaintiffs' pictures might cause consumers to believe that the plaintiffs were associated with the advertised clubs, rather than the merits of the claims. *Id.* at *2.

¶31 Neither of these cases involving a personal image as a trademark support the broad rule suggested by the plaintiffs that a digital copy of a personal image constitutes convertible personal property of the person imaged.

¶32 In another case the case the plaintiffs rely on, *Coton v. Televised Visual X-Ography, Inc.*, 740 F. Supp. 2d 1299, 1303 (M.D. Fla. 2010), a photographer found that a self-portrait she had taken and published was being used without her permission to market a pornographic movie. The court did not find that the photographer had shown a conversion of her "image," but found an unauthorized use of the copyright she held in the original artistic elements of the photograph. *Id.* at 1308. *See also Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1073 (9th Cir. 2000) (holding that "[t]he essence of copyrightability is originality of artistic, creative expression" and that the photographer holds a copyright in his or her artistic expression embodied within a photograph). Hence, she was entitled to damages for *copyright infringement*. No copyright is involved here.

¶33 Finally, plaintiffs argued that the images must be "property" because federal law assigns them a monetary value. The cited statute is 18 U.S.C. § 2255(a), which states:

> (3) In general—Any person who, while a minor, was a victim of a violation of section 1589, 1590, 1591, 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423 of this title and who suffers personal injury as a result of such violation, regardless of whether the injury occurred while such person was a minor, may sue in any appropriate United States District Court and shall recover

> the actual damages such person sustains or liquidated damages in the amount of $150,000.

Section 2255(a) provides civil damages for violations of the enumerated criminal statutes. None of the criminal statutes cited in § 2255(a) appear to create a property right in an image, however, and damages are for the personal injury caused by violations of the enumerated federal criminal laws, not for any "conversion" of an image.[13]

¶34 None of the cases the plaintiffs cite establish that a person has a general personal property right in an image of themselves stored on another's phone or computer such that any person in possession of that device without their permission has "converted" the image. The ramifications of such a rule could be substantial and far-reaching. We find no basis for the plaintiffs' conversion claim and affirm the trial court's decision.

2.

¶35 The court also refused to instruct on plaintiffs' claims for "fraudulent concealment."[14] The phrase "fraudulent concealment" generally arises in the context of tolling a statute of limitations by the discovery rule, *i.e.*, that a party could not have reasonably known of an injury because evidence that would have

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[13] *See* note 20, *infra*, for a more detailed description of each of the individual statues cited by § 2255(a).

[14] *See* note 6, *supra*, noting the ambiguity of the record on this question.

led to discovery was concealed by the tortfeasor. Here, however, it is raised as a form of fraud. According to the jury instruction plaintiffs cite, the elements of this claim are:

> 1. That the Defendant concealed or failed to disclose a past or present fact which he had a duty to disclose;
>
> 2. That the fact was material;
>
> 3. That the Defendant concealed or failed to disclose it with the intent of creating a false impression of the actual facts in the mind of Plaintiff;
>
> 4. That the Defendant concealed or failed to disclose it with the intention that it should be acted upon by the Plaintiff;
>
> 5. That the Plaintiff acted in reliance upon it; and
>
> 6. That the Plaintiff thereby suffered injury.

OUJI 18.2.[15]

¶36 This instruction was derived from two cases: *Hubbard v. Bryson*, 1970 OK 140, ¶ 26, 474 P.2d 407, 410, and *United States v. Curtis,* 537 F.2d 1091, 1097 (10th Cir. 1976). Both detail the concept that a failure to speak on a subject may constitute fraud where "there is a positive duty on the part of one of the parties to a

[15] The jury instruction cited by the plaintiff, OUJI 18.2, does not actually refer to fraud but to a tort of "deceit" which is defined by its own statutory section, 76 O.S. § 3. However, although § 3 "may in some respects enlarge the common law right of action for fraud and deceit the same still rests upon fraud." *Jewell v. Allen*, 1940 OK 464, 109 P.2d 235, 237. This is confirmed by the fact that both cases cited as the source of OUJI 18.2 are "fraud" not "deceit" cases.

contract to speak." *Bryson*, ¶ 26. The first case clearly identifying such a duty, *Morris v. McLendon*, 1933 OK 619, 27 P.2d 811, also did so specifically in the context of a contract. It held:

> Where, on account of the peculiar circumstances entering into the execution of a contract, there exists a positive duty on the part of one of the parties to speak, and he remains silent to his material benefit and to the positive detriment of the other party, such failure to speak constitutes fraud.

Id. ¶ 0 (syllabus of the Court).

¶37 Eleven other cases have since discussed the circumstances under which the "duty to speak" arises.[16] None of the cases apply the rule outside of a contractual, fiduciary, or quasi-contractual relationship.

¶38 The record shows no contract, no negotiation, no agreement, no conversation, no communication, and in fact no relationship whatsoever between

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[16] *See Sutton v. David Stanley Chevrolet, Inc.,* 2020 OK 87, ¶ 14, 475 P.3d 847, 854, (contract to arbitrate); *Key Fin., Inc. v. Koon*, 2016 OK CIV APP 27, ¶ 14, 371 P.3d 1133, 1138 (positive duty on the part of one of the parties to a contract to speak); *Croslin v. Enerlex*, Inc., 2013 OK 34, ¶ 17, 308 P.3d 1041, 1047 (concerning purchase of minerals); *Lester v. Smith*, 2008 OK CIV APP 97, 198 P.3d 402 (failure to disclose defects when selling real estate); *Rogers v. Meiser,* 2003 OK 6, ¶ 15, 68 P.3d 967, 977 (concerning purchase of residence); *Gentry v. Am. Motorist Ins. Co.*, 1994 OK 4, ¶ 12, 867 P.2d 468, 472 (insurance company had a duty to inform its insured of policy exclusions at the time of contract negotiations); *Testerman v. First Family Life Ins. Co.*, 1990 OK CIV APP 108, ¶ 16, 808 P.2d 703, 707 (alleged fraud in sale of disability policy); *Silk v. Phillips Petroleum Co.*, 1988 OK 93, ¶ 29, 760 P.2d 174, 179 (no duty to point out renew clause when negotiating lease); *Hubbard v. Bryson*, 1970 OK 140, ¶ 26, 474 P.2d 407, 410 (fraud and deceit on the part of defendants for failure to reveal that price offered for said land was wholly inadequate); *Webster v. Webb,* 1957 OK 120, ¶ 13, 312 P.2d 467, 471 (fiduciary was bound to disclose material facts concerning mineral lease); *Hughes v. Baker*, 1934 OK 446, 35 P.2d 926, 932 (failure to deny mistaken belief that defendant was a partner in a business venture).

Gray and the plaintiffs. Even if we were to expand the "duty to speak" rule beyond the current contractual and fiduciary relationship cases, some relationship between the parties that gives rise to a duty to speak is still a fundamental requirement. No such relationship appears here.

¶39 The central pillar of plaintiffs' case was the argument that, by possessing the computer, Gray "knowingly" possessed child pornography, and hence a relationship and a duty to speak to plaintiffs arose. There was no evidence that Gray accessed the computer (or even removed it from the trunk her car) or that anyone informed her that it contained child pornography. Indeed, it remains unknown *if* the computer contained child pornography. Hence, the plaintiffs argue that Gray should have extrapolated from the fact that that Nemecek was being investigated regarding child pornography that the computer he kept at his workplace contained child pornography, and she therefore "knowingly" possessed such contraband.

¶40 Oklahoma law is sparce on this issue because the facts are usually far more direct—an image is downloaded onto a computer by its owner, usually via the owner's registered IP address.[17] We find no Oklahoma "knowing possession" case

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[17] *See e.g., Hamilton v. State,* 2016 OK CR 13, ¶ 5, 387 P.3d 903, 905 (holding that that, given the distribution of obscene material originating from appellant's IP address, the discovery of the same type of material on appellant's computer, the suspicious log of Internet search queries on that computer, and appellant's statements to police, a rational juror could conclude,

involving a defendant who *neither owned nor accessed the computer*. We further find no case where the computer was not actually examined and found to contain such images.

¶41 Similar federal law appears to impose a requirement of actual knowledge of, at a minimum, "the nature of the material's contents." *United States v. Gendron*, 18 F.3d 955, 960 (1st Cir. 1994). "To satisfy the knowledge element of § 2252(a)(4)(B), the government must make a showing that the defendant knew the files in question contained a visual depiction of minors engaging in sexually explicit conduct." *United States v. Alfaro–Moncada*, 607 F.3d 720, 733 (11th Cir. 2010).

¶42 Even assuming, however, that a jury could be allowed to infer that Gray had actual knowledge that the computer contained a "visual depiction of minors engaging in sexually explicit conduct," and this created a duty to speak to plaintiffs,[18] plaintiffs' briefing fails to address the other requirements of the fraudulent concealment instruction. Plaintiffs make no attempt to demonstrate the additional required elements of intending plaintiffs to act based on the silence, nor

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beyond a reasonable doubt, that appellant knowingly possessed and distributed the obscene material).

[18] Assuming such a duty did arise as a "duty to report" under these facts, the duty would appear to be one to report to some authority, such as the police or social services, not an individual.

any reliance by the plaintiffs on Gray's silence. We find no error in the court's decision regarding this claim.

3.

¶43 The court also refused to instruct the jury on a tortious spoliation claim. We find it clear that Oklahoma law does not recognize a separate tort claim for spoliation of evidence.

> Oklahoma has yet to recognize spoliation as an independent tort. *Patel v. OMH Medical Center, Inc.*, 1999 OK 33, ¶ 48, 987 P.2d 1185. In Texas and Oklahoma, "[s]poliation is an evidentiary concept, not a separate cause of action." *Brookshire Bros.*, 438 S.W.3d at 19-20; *Harrill v. Penn*, 1927 OK 492, ¶ 9, 134 Okla. 259, 273 P. 235 (describing spoliation as a "wholesome principle of the law of evidence."). "Evidentiary matters are resolved by the trial court." *Brookshire Bros.* The same applies in Oklahoma, especially with spoliation of evidence.

Akins v. Ben Milam Heat, Air & Elec., Inc., 2019 OK CIV APP 52, ¶ 64, 451 P.3d 166, 18.

¶44 Further:

> Spoliation is defined as "[t]he destruction of evidence.... The destruction, or the significant and meaningful alteration of a document or instrument." Spoliation occurs when evidence relevant to prospective civil litigation is destroyed, adversely affecting the ability of a litigant to prove his or her claim. Although a few jurisdictions have adopted the tort of spoliation, most of the courts which have considered the issue have refused to recognize spoliation as an independent cause of action in tort.

Patel v. OMH Med. Ctr., Inc., 1999 OK 33, ¶ 46, 987 P.2d 1185, 1202 (footnotes omitted).

¶45 Our Supreme Court has declined to recognize such a tort, despite multiple opportunities to do so. Nor has the legislature codified spoliation as a tort. We decline plaintiffs' request to recognize a new tort here.

4.

¶46 The plaintiffs also appeal the trial court's grant of a directed verdict on the issue of whether Gray had caused damages to the minor child. The court essentially held that, although the child was clearly aware of and injured by Nemecek's heinous behavior, she could not have suffered damages from Gray's acts because she was entirely unaware of any issue involving Gray and the computer.

¶47 Plaintiffs first argue that the aforementioned federal statute, 18 U.S.C. § 2255(a), automatically provides for statutory damages to the minor child in this case, although the court refused to give an instruction on it.[19] Section 2255(a) requires, however, that the minor child be "a victim of a violation of section 1589, 1590, 1591, 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423" and suffer "personal injury as a result of such violation" in order for the statute to award liquidated civil damages.

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[19] We note that this statute does not provide remedies for any violation of a state statute or common law duty. It appears to be a *separate federal theory of recovery* that has no state equivalent and is premised solely on the violation of a federal criminal statute. This theory of recovery was neither pled nor identified in the pretrial order. This would be sufficient in itself for the trial court to deny an instruction on this theory.

¶48 Although plaintiffs declined to go into any greater depth, none of the numerous offenses dealt with by the cited statutes encompass any act by *Gray* in this case except possibly § 2252A, which outlaws knowing possession of any "computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce ...."[20] We find no evidence was presented, however, that any image on the computer was "mailed, shipped or transported" to Gray or by Gray by any means or facility of interstate commerce. The images were made in Pontotoc County and the computer was transported to Gray's car by an A&J

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[20] Title 18 U.S.C. § 2255(a) provides for damages for a breach of the following statutes: § 1589: forced labor; § 1590: trafficking with respect to peonage, slavery, involuntary servitude, or forced labor; § 1591: sex trafficking of children or by force, fraud, or coercion; § 2241: crossing a state line with intent to engage in a sexual act with a person who has not attained the age of 12 years; § 2242: causing another person to engage in a sexual act by threatening or placing that other person in fear or engaging in a sexual act with another person if that other person is incapable of appraising the nature of the conduct; § 2243: sexual abuse of a minor, a ward, or an individual in federal custody; § 2251: employing, using persuading, inducing, enticing or coercing any minor to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct; § 2251A: selling or buying of children; § 2252: knowingly transporting or shipping visual depictions involving the use of a minor engaging in sexually explicit conduct; § 2252A: knowingly reproducing any child pornography for distribution; knowingly selling or possessing with the intent to sell or knowingly possessing or accessing material that contains an image of child pornography with intent to view; knowingly possessing, any computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce; § 2260: production of sexually explicit depictions of a minor for importation into the United States; § 2421: transporting any individual in interstate or foreign commerce, or in any territory or possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity; § 2422: persuading, any individual to travel in interstate or foreign commerce, or in any territory or possession of the United States, to engage in prostitution, or in any sexual activity; and § 2423: transportation with intent to engage in criminal sexual activity and travel with intent to engage in illicit sexual conduct.

employee carrying it a short distance within Pontotoc County. There is neither evidence that it left the state of Oklahoma while in Gray's possession, nor evidence that it was connected to the internet while in her possession. There is no evidence that the images on the computer, if any, ever traveled by any means or facility of interstate commerce, let alone that they did so while Gray was in possession of the computer. We find no error in the court's refusal to give the federal statutory damages instruction.

¶49 Plaintiffs also argued that the minor child would suffer future emotional harm from Gray's actions because mother later intends to tell L.D. that "an officer of the system removed and hid the evidence so it could not be found by law enforcement and then gave that evidence back to the abuser." *Counter-appellants' Brief-in-Chief*, 32. Although the brief characterizes this statement as "testimony," no record citation to this purported testimony was given in the brief. Mother's testimony at trial did not mention "an officer of the court system" at any time. Mother's testimony at trial was that she had not told minor child of any claims against Gray. Tr.Vol.II, 472. Mother testified that she would have to have a conversation with the child in the future regarding being abused and videotaped by Nemecek, *id.* at 464, but did not mention any discussion of Gray.

¶50 We also find plaintiffs' citation of various cases stating that victims of sexual abuse inherently suffer emotional damages (and hence such damages need

not be proved) correct but unavailing here. The emotional damages are inherently suffered because of the actions of the abuser, and are the responsibility of the abuser, not the abuser's defense counsel.

¶51 The actual basis of the plaintiffs' claim on behalf of the minor child was more properly stated at trial by mother as this: had the computer been recovered, it might have been forensically possible to determine if the images had been shared to other persons. Because the computer was never recovered, the child will never know if the images were destroyed when the computer was destroyed or are in wider circulation. Plaintiffs argue that this uncertainty as to what may occur in the future, *i.e.*, that the images may at some time resurface, will later create compensable emotional damages when it is understood by the minor child.

¶52 One immediate obstacle to the plaintiffs' argument here is that Oklahoma law has traditionally required emotional damages to be accompanied by physical injury absent special circumstances where the perpetrator causes emotional distress by a willful, actionable tort, or commits intentional infliction of emotional distress.[21]

> This Court has explained that "[e]motional distress as a consequence of an intentional tort is distinguishable from distress resulting from breach of contract or negligence, which requires a showing of physical injury." *Coble v. Bowers,* 1990 OK CIV APP 109, ¶ 19, 809 P.2d 69, 73 (citing *Ellington v. Coca Cola Bottling Co.*, 1986 OK 11,

[21] *See Ellington v. Coca Cola Bottling Co. of Tulsa,* Inc., 1986 OK 11, ¶¶ 3-8, 717 P.2d 109, 111, detailing the history of this rule.

> 717 P.2d 109; *Seidenbach's, Inc. v. Williams*, 1961 OK 77, 361 P.2d 185). We also explained in *Coble* that "emotional distress caused by a willful, actionable tort is recoverable, even absent physical injury, if it is the natural and probable consequence of the tortious act." *Id.*

Cleveland v. Dyn-A-Mite Pest Control, Inc., 2002 OK CIV APP 95, ¶ 52, 57 P.3d 119, 131.

¶53 The only potential intentional torts here were the claims of fraud and tortious spoliation. We have previously found that neither was viable. The right to recover in an action for intentional infliction of emotional distress is also not dependent on physical injury. *Chandler v. Denton,* 1987 OK 38, ¶ 25, 741 P.2d 855, 867. No intentional infliction of emotional distress was pled here, however. Hence, plaintiffs must show associated physical injury to maintain a claim for emotional damages.

¶54 Plaintiffs note that case law from other states establishes that a person who has been molested has automatically suffered a physical injury and argues that physical injury was therefore established for the purposes of emotional damages.[22] If this general principle that molestation always constitutes a physical injury or the argument that the minor child's separation anxiety constitutes a physical injury is

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[22] Plaintiffs cite *Liner v. Goord,* 196 F.3d 132, 135 (2d Cir. 1999) (alleged sexual assaults would constitute more than de minimis injury) and *Castillo v. Bobelu*, 1 F. Supp. 3d 1190, 1211 (W.D. Okla. 2014) (for purposes of satisfying the physical injury requirement of an emotional injury, a person who is raped has sustained a "physical injury").

accepted, a problem still remains because Nemecek, not Gray, was the perpetrator of these physical injuries.

¶55 Case law on emotional injuries is plentiful is in Oklahoma, but the large number of published cases on this issue all involve the infliction of accompanying physical harm by the defendant.[23] Plaintiffs ask us to expand Oklahoma law to allow a physical injury caused by a *non-party* to provide the basis for a separate claim of emotional injury against a *party who had no role in causing the physical injury.*

¶56 Plaintiffs argue that, in *Louis v. Mercy Health*, 659 Fed. Appx. 491, 493 (10th Cir. 2016), the Tenth Circuit expanded the current rule, holding that, under Oklahoma law, "the defendant who caused the emotional trauma need not be the cause of the connected physical injury." *Counter-appellants' Brief-in-Chief*, 32.

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[23] *See, e.g., Ridings v. Maze*, 2018 OK 18, ¶ 7, 414 P.3d 835, 837-38; *Shaw v. City of Oklahoma City*, 2016 OK CIV APP 55, ¶ 13, 380 P.3d 894, 897; *Jackson v. Oklahoma City Pub. Sch.*, 2014 OK CIV APP 61, 333 P.3d 975; *Murie v. Harting,* 2014 OK CIV APP 49, ¶ 2, 324 P.3d 1269, 1271; *Simington v. Parker*, 2011 OK CIV APP 28, ¶ 8, 250 P.3d 351, 354; *Cleveland v. Dyn-A-Mite Pest Control, Inc.*, 2002 OK CIV APP 95, ¶ 52, 57 P.3d 119, 131; *Sriffin v. Baker Petrolite Corp.*, 2004 OK CIV APP 87, ¶ 4, 99 P.3d 262, 263; *Ishmael v. Andrew*, 2006 OK CIV APP 82, ¶ 3, 137 P.3d 1271, 1273; *Worsham v. Nix,* 2004 OK CIV APP 2, ¶ 28, 83 P.3d 879, 888; *Miner v. Mid-Am. Door Co.,* 2003 OK CIV APP 32, ¶ 40, 68 P.3d 212, 223; *Kraszewski v. Baptist Med. Ctr. of Oklahoma, Inc.,* 1996 OK 141, ¶ 1, 916 P.2d 241, 242–43; *Rodebush By & Through Rodebush v. Oklahoma Nursing Homes, Ltd.,* 1993 OK 160, 867 P.2d 1241; and *McMeakin v. Roofing & Sheet Metal Supply Co. of Tulsa*, 1990 OK CIV APP 101, ¶ 3, 807 P.2d 288, 289.

We find no such statement on page 493 of *Louis*, however, and it does not concern the issue we have here.[24]

¶57 The current law is clear that emotional damages are an additional item of damages against the perpetrator of the accompanying physical injury. *See Gonzalez v. Sessom*, 2006 OK CIV APP 61, ¶ 15, 137 P.3d 1245, 1249, citing *Kraszewski v. Baptist Medical Center of Oklahoma, Inc.,* 1996 OK 141, 916 P.2d 241, 243 ("The trial court correctly ruled that negligent infliction of emotional distress was an item of damage, not an independent claim."). We find no basis in Oklahoma law to sever this linkage. Hence, Nemecek's molestation cannot provide the accompanying physical injury required to bring emotional injury claims against Gray.

¶58 Next, Plaintiffs claim that the child suffered the physical injury of separation anxiety because of emotional trauma "caused by Gray" and this provides the required linkage between physical and emotional injury. *Counter-appellants' Brief-in-Chief*, 32. Examining this claim, the evidence of a physical injury caused

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[24] *Louis* concerns an argument that the stipulation by a plaintiff that she had not suffered a physical injury at a hospital barred recovery of emotional damages. *Louis* repeats the common principle that, irrespective of whether physical harm leads to emotional harm, or emotional harm leads to physical harm, the required linkage is met in both cases. Hence, the stipulation that the hospital had not directly caused a physical injury did not necessarily bar recovery because the emotional harm had later led to physical harm. *Louis* does not establish that physical harm caused by a non-party can be used as the basis for a claim of emotional damages against a defendant who had no role in causing the physical harm.

by separation anxiety was inadequate. The testimony plaintiffs rely on to establish that child's separation anxiety constitutes a physical injury is this:

> Q. Have you observed what you would perceive as any physical and I'm going to use the word "symptoms." It's a medical term, but I can't think of a nonmedical term. Physical reactions or symptoms or attributes of your daughter that you attribute to the effect that this Deresa Gray case has had on you and your daughter?
>
> A. Any physical?
>
> Q Yes.
>
> A. Well, she has separation anxiety from me. And that might not seem like it's physical, but I think that's very physical. I mean, I don't know what you mean as physical, like the effects of broken bones or physical things?
>
> Q. Something you can physically observe.
>
> A. I can physically observe when she's like that.

Tr. Vol. II, 466-67. We find this this testimony—that a mother can tell when child is feeling anxious by observing the child—insufficient to show physical injury resulting from separation anxiety.

¶59 Further even if this testimony was sufficient to establish a *prima facie* case of physical injury, guardian ad litem Lori Walke testified that the child has no knowledge of anything Gray did. Mother also testified that child currently had no knowledge of anything Gray did and that nothing Gray had done affected child at this point in time. Precisely how the child's separation anxiety could be caused by Gray when child knows nothing of Gray's actions is unexplained. Gray did not

molest the child, and the child knows nothing of Gray's actions. Hence, the child cannot currently be suffering separation anxiety attributable to Gray. We affirm the trial court's directed verdict in favor of Gray as to damages to the child.

5.

¶60 Plaintiffs also argue that they were entitled to a new trial because the court refused to sanction Gray by giving a spoliation of evidence instruction—that "evidence on the computer would have been unfavorable to Gray." OUJI 3.11A[25] states that it is to be used "if the court has imposed a sanction for spoliation of evidence." The instruction states:

> [Name of Party] had a duty to preserve [Specify Evidence] in this case and [Name of Party] [destroyed/hid/failed to preserve] the evidence. You may therefore conclude that the evidence would have been unfavorable to [Name of Party].

¶61 A spoliation instruction is not a typical jury instruction based purely on the evidence presented at trial. It is a sanction against a party. *See Am. Honda Motor Co. Inc. v. Thygesen*, 2018 OK 14, ¶ 2, 416 P.3d 1059, 1060. It is substantially similar to the discovery sanction provided in 12 O.S. 3237(B)(2)(a) that certain

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[25] The plaintiffs also argue that, in the event the standard instruction is considered inadequate, "the Court should take this opportunity to provide the trial courts with appropriate modification to the OUJI." *Appellee's Response Brief and Counter-Appellant's Brief-in-Chief*, 38. In their briefing, the plaintiffs do not proffer the precise instruction the trial court erred in failing to give, although they offered at least four different versions of a spoilation instruction at trial. *See* R. 466, 549 (standard OUJI); R. 487, 570 (proposed instruction citing *Barnett v. Simmons*, 2008 OK 100, 197 P.3d 12); R. 488, 571 (modified OUJI and instruction based on California law). As discussed below, we do not believe the trial court erred in failing to give the OUJI instruction. We also decline the plaintiffs' suggestion that we craft a new instruction.

"designated facts shall be taken to be established for the purposes of the action." The power to sanction for spoliation appears to arise from the court's power to sanction a failure to provide discovery, albeit because the relevant material has been lost or destroyed by a party while anticipating litigation, rather than simply not produced. *See e.g.*, *Barnett v. Simmons,* 2008 OK 100, ¶¶ 17-18 (discussing spoliation of evidence in conjunction with refusal to turn over evidence in discovery); *Am. Honda Motor Co. Inc.,* 2018 OK 14,¶¶ 2-4 (examining the giving of an "adverse inference" jury instruction for spoliation under the discovery provision of 12 O.S.2011 § 3237(G)).

¶62 The spoliation sanction is somewhat unique because, instead of directly imposing an evidentiary sanction such as the exclusion of evidence, or declaring certain facts to be established, the court enforces the sanction in the form of a jury instruction allowing the jury to make an unfavorable inference against the sanctioned party regarding the absent evidence. As such, there appear to be two questions presented: did the court err in refusing to sanction Gray with an adverse-inference instruction, and, if so, did the resulting lack of such an instruction require reversal of the jury verdict. Because we find the answer to the first question must be "no," we need not address the second.

¶63 *Barnett v. Simmons* provides a comprehensive definition of spoliation.

> Spoliation refers to the destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in

> pending or reasonably foreseeable litigation. *West v. Goodyear Tire*, 167 F.3d 776, 779 (2nd Cir.1999). In *Patel v. OMH Medical Center, Inc.*, 1999 OK 33, 987 P.2d 1185, 1202, spoliation was defined as the destruction or significant and meaningful alteration of a document or instrument. We said that spoliation occurs when evidence relevant to prospective civil litigation is destroyed, adversely affecting the ability of a litigant to prove his or her claim. *Id.*, 987 P.2d at 1202. Spoliation includes the intentional or negligent destruction or loss of tangible and relevant evidence which impairs a party's ability to prove or defend a claim. *Koch v. Koch* Industries, Inc., 197 F.R.D. 488, 490 (N.D.Okla.1999).

2008 OK 100, ¶ 21, 197 P.3d 12, 20.

¶64 The "duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation." *Id.* ¶ 20. This case law is clear that spoliation is not simply the destruction of evidence. It is the destruction or negligent loss of evidence known to be relevant to *reasonably anticipated* litigation. It inherently recognizes that evidence that is eventually relevant can sometimes be destroyed without constituting spoliation if the reasonable anticipation of litigation element is missing.

¶65 It is clear that both Gray and Nemecek should have anticipated or reasonably foreseen litigation *against Nemecek.* Hence, they both had a duty under spoliation law[26] to preserve the computer for use in the civil and criminal cases against

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[26] We emphasize the phase "under spoliation law" here. The duty to preserve the evidence arises only under that evidentiary doctrine and is *not a general tort duty.* As we have previously noted, Oklahoma does not recognize the tort of spoliation of evidence.

Nemecek, and a spoliation instruction would be appropriate in both those cases. The case against Gray is unprecedented, however, and based largely on requests for an extension of existing law. We think it highly unlikely that Gray should have anticipated being sued personally in a separate suit, and hence the computer being relevant to a personal suit against her.

¶66 The question can therefore be reduced to one of whether a sanction is appropriate *against Gray* because she should have anticipated that the computer would be evidence in a separate case against *Nemecek*. Stated generally: should a party be sanctioned for loss or destruction of evidence in a suit that was *not* reasonably anticipated because a different suit against a different party *was* anticipated? We answer in the negative.

¶67 The spoliation instruction, OUJI 3.11A, speaks of a duty to preserve *in this case,* not some other case. This is consistent with the basic theory of spoliation that a party is sanctioned in a case for destroying or failing to preserve evidence when they should have anticipated *that case.* The reasonable anticipation of litigation element weighs against the court granting a sanction in this case.

¶68 Further the OUJI instruction proposed by the plaintiffs was problematic. They suggested the following:

> Deresa Gray had a duty to preserve Joshua Nemecek's computer in this case and Deresa Gray failed to preserve the evidence. You may therefore conclude that the evidence would have been unfavorable to Deresa Gray.

R. 466, 549. In a simple spoliation case, such as one where, for example, allegedly defective brakes were repaired after an accident, the unfavorable conclusion the instruction allows is clear—a conclusion that the brakes were defective. In comparison, the range of unfavorable evidence a jury might conclude was contained on a computer drive appears nearly unlimited.

¶69 The negligence *per se* instruction given to the jury in this case stated that Gray may have "cause[d] the participation of any minor ... in child pornography;" and "willfully and maliciously engage[d] in child exploitation." R. 612 (Instruction 17). The suggested spoliation instruction that the computer generally contained "unfavorable evidence" could allow the jury to conclude that the computer contained evidence of all these things, even though there was *no record evidence to support such findings*.[27] Outside of situations where the evidentiary conclusion suggested to the jury by the standard instruction is clear, proper clarification appears necessary to limit the conclusions the jury is allowed to draw to those supported by something other than pure speculation.

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[27] As such, the negligence *per se* instruction was likely improper. Instructions may only be given when they are supported by evidence sufficient to raise a jury question. There was *no evidence whatsoever* that Gray "caused the participation of a minor in child pornography" or "willfully and maliciously engaged in child exploitation." The trial court appeared to agree that these parts of the instruction were inappropriate but kept them upon Plaintiffs' insistence. Tr.Vol.III, 591-93. We caution that, when forming a *per se* negligence instruction, courts should list only those statutory sections that the *evidence indicates were violated,* rather than an entire statute.

¶70 The law of spoliation appears to be less completely developed in Oklahoma compared to some other states. However, it is clear that a spoliation instruction is a harsh and severe sanction, in that it allows a jury to decide a core issue in a case in the absence of supporting evidence. *See Akins v. Ben Milam Heat, Air & Elec., Inc.*, 2019 OK CIV APP 52, ¶¶ 60-61, 451 P.3d 166, 180. In this case the trial court decided, after hearing all the evidence and testimony of the parties, not to impose a sanction for spoliation. We find no error in this decision.

IV.

¶71 We find that the juror impeachment evidence relied on in the grant of a new trial is inadmissible pursuant to 12 O.S. § 2606. Accordingly, we reverse the trial court's grant of a new trial. We also conclude that the trial court did not err when it granted judgment against, or refused to instruct on, Plaintiff's claims that were not submitted to the jury. Accordingly, the judgment entered on the jury's verdict is affirmed.

¶72 **AFFIRMED IN PART AND REVERSED IN PART.**

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¶73 For the reasons set forth above, I respectfully dissent. The trial court's grant of a new trial should be undone and the judgment entered on the jury's verdict should be affirmed in full.

May 6, 2026