NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

STATE OF OKLAHOMA,

Plaintiff/Appellee,

vs.

JEREMY GLENN ROBERTS,

Defendant,

and

JASON D. MAY,

Appellant.

Case No. 115,393

APPEAL FROM THE DISTRICT COURT OF
MURRAY COUNTY, OKLAHOMA

HONORABLE AARON DUCK, TRIAL JUDGE

REVERSED

S. Craig Ladd
DISTRICT ATTORNEY
David Pyle
ASSISTANT DISTRICT ATTORNEY
MURRAY COUNTY
Sulphur, Oklahoma — For Plaintiff/Appellee

Jason D. May
Ardmore, Oklahoma — *Pro Se*

OPINION BY KEITH RAPP, JUDGE:

This is an appeal by attorney Jason D. May (May) from a Corrected Court Order (Order) of the District Court of Murray County, Oklahoma (trial court), imposing a monetary sanction for his failure to appear on behalf of a client in a criminal proceeding. The Office of the District Attorney of Murray County, Oklahoma has filed a response to the petition-in-error, but has not filed a Brief. And there is no appellate Brief responding to or opposing May's Brief.

BACKGROUND

In this case, the trial court imposed a monetary sanction on May on the ground that May did not appear on August 2, 2016, a date set by the Court for entry of a plea by May's client. May claims that he did not receive the order setting the hearing. He further argues that the trial court should not have heard the case, but should have assigned the matter to another judge. Last, he argues that any statutory or Court Rule premise for the imposition of a sanction does not apply here, or there is no factual basis for application of such statute or Court Rule.

May represented two defendants, Roberts and Yeboah, separately charged with a criminal offense. Attorney Ellis represented a third defendant, Bortey, who was charged with the same offense as Yeboah, but by separate information and case number.

These three cases were set for a hearing in July, 2016. Prior to the hearing, the Assistant District Attorney Pyle (ADA Pyle) contacted May and Attorney Ellis for the purpose of continuing the hearing. Ellis agreed and she and ADA Pyle agreed to a setting on August 9, 2016. Ellis did not discuss the Roberts case at that time. ADA Pyle also reached agreement with May to reset Yeboah on August 9, 2016.

On July 12, 2016, AD Pyle filed a motion for continuance in the Roberts case. The Motion did not request a day certain or mention any date discussions with defense counsel. The Motion document also contained an Order, dated July 8, 2016, where the court set the matter for August 2, 2016.[1]

The Record contains a document styled in the Roberts case as "Court Clerk's Certificate of Service."[2] This document states that an "Order" (otherwise unidentified) was mailed to J. May (no address shown) and by "regular U.S.Mail." The document is initialed on the deputy signature line. The deputy testified in the sanctions hearing that she mailed the Order to May at his record address.

May testified at the sanction hearing. His testimony was that both of his cases, Roberts and Yeboah, were reset to August 9, 2016, as a result of his conversation with ADA Pyle. May placed the cases on his calendar for a time of

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[1] Record, p. 1.

[2] Record, p. 2.

day on August 9, 2016. ADA Pyle did not testify at that hearing. The Record reflects that the State obtained a Writ of Habeas Corpus to bring Roberts from his place of incarceration to court on August 2, 2016.

May testified that he did not question whether the Order was mailed as stated by the deputy clerk.[3] However, he and his legal assistant denied ever receiving the Order setting the Roberts case for hearing on August 2, 2016.

In summary, May's testimony is that he believed that both of his cases were reset for the same day, August 9, 2016, pursuant to his discussion with ADA Pyle. The Record and transcript do not contain Pyle's version of what transpired. Moreover, no appellate Brief has been filed in response to May's Brief.[4]

After May did not appear on August 2, 2015, the court called his office and advised May's assistant that the Roberts case was set for August 3, 2016. May wrote a letter to the court stating he would not be there and would appear on

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[3] Tr., p. 20.

[4] ADA Pyle filed a response to the petition-in-error. In that response, the statement of the case recites that the telephone discussion with May about the continuance resulted in selection of August 2, 2016. This is the date in the court's order. The substance of the conversation as recited in the response is not contained in the transcript or other Record document, including the State's Motion for Continuance. However, the petition-in-error and the response are documents in the nature of pleadings. *See Markwell v. Whinery's Real Estate, Inc.*, 1994 OK 24, 869 P.2d 840. Thus, absent a formal record, ADA Pyle's recital is not considered as evidence.

August 9, 2016.[5] The court issued a show cause order for May to shown why sanction should not be imposed and the evidentiary hearing followed.

After hearing evidence, the court entered its sanctions Order. The Order recited the Roberts case history and determined that it was reset to August 2, 2016. The court ruled that the Order setting the hearing was mailed and that the mailing raised a presumption of delivery, which May failed to rebut.

The court also found that all of May's cases were set on August 2, 2016 and only Attorney Ellis had a continuance. Attorney Ellis testified that her understanding of her conversation with ADA Pyle was that the State wanted to have the hearings for her client and May's client Yeboah at the same time because of the common evidence and witnesses in each case. The Appellate Record does not contain any Orders setting these two cases for a common or different date.[6]

The sanction Order does not set out the authority upon which the court relied to impose the sanction. The response to the petition-in-error suggests Rule 20, Rules For District Courts, 12 O.S.2011, Ch. 2, App. In his Brief, May argues that Rule 20 does not apply and also that neither Rule 5(J), Rules For District Courts,

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[5] In his Brief, May acknowledged that the letter lacked restraint and clearly, the court found the letter disrespectful. Nevertheless, it appears to this Court that the sanction was imposed for failure to appear rather than for the content and tenor of the letter.

[6] The court took judicial notice of the Roberts case but not the other two cases. Corrected Court Order, Record, p. 11.

12 O.S.2011, Ch, 2, App. (failure to appear at pretrial or scheduling) nor 21 O.S.2011, § 567(indirect contempt) apply.[7]

After finding against May on the question of receipt of the Order setting the Roberts case for August 2, 2016, the trial court sanctioned May $175.00. The sum was computed as the cost to house his client in jail for the extended period. May appeals. ADA Pyle filed a response but no one has filed an Appellate Answer Brief and the case has been assigned for review and decision.

STANDARD OF REVIEW

Ordinarily, the standard of review of a sanction ruling is abuse of discretion. *State ex rel. Tal v. City of Oklahoma City*, 2002 OK 97, 61 P.3d 234. However, here the Standard of review is affected by the absence of an Answer Brief.

> Where, [as here] there is an unexcused failure to file an answer brief, this Court is under no duty to search the record for some theory to sustain the trial court judgment; and where the brief in chief is reasonably supportive of the allegations of error, this Court will ordinarily reverse the appealed judgment with appropriate directions. However, where the brief in chief is not reasonably supportive of the allegations of error, the decision of the trial court will be affirmed.

Cooper v. Cooper, 1980 OK 128, ¶ 6, 616 P.2d 1154, 1156 (affirming in part and reversing in part; citation omitted).

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[7] The appellate Record does not reflect the specific authority utilized by the trial court. The Record contains an order setting an evidentiary hearing which mentions "show cause hearing on sanctions." Record, p. 9. The sanctions hearing transcript announcing the hearing as a hearing "as to whether or not sanctions should be issued against (May) for failing to appear for a hearing on August 2, 2016, for a plea." Tr., p. 4.

However, "[R]eversal is never automatic on a party's failure to file an answer brief." *Enochs v. Martin Properties, Inc.*, 1997 OK 132, ¶ 6, 954 P.2d 124, 127; *Hamid v. Sew Original*, 1982 OK 46, ¶ 7, 645 P.2d 496, 497. "When the record presented fails to support the error alleged in the brief of the party who lost below, the decision to be reviewed cannot be disturbed. It is presumed correct until the contrary is shown by the record." *Enochs*, 1997 OK 132 ¶ 6, 954 P.2d at 127.

The appellate court has the plenary, independent, and nondeferential authority to reexamine a trial court's legal rulings. *Neil Acquisition, L.L.C. v. Wingrod Inv. Corp.*, 1996 OK 125, 932 P.2d 1100 n.1

ANALYSIS AND REVIEW

A. Receipt or Not of Order

May does not dispute that the Order setting a hearing on his Roberts case for August 2, 2016 was mailed. Mailing raises a presumption of delivery. *Liberty Plan Company v. Francis T. Smith Lumber Company*, 1961 OK 30, ¶ 14, 360 P.2d 500, 504. The rule is set out in *Shamblin v. Beasley,* 1998 OK 88, n.51, 967 P.2d 1200, n.51, as follows:

> Generally, a letter placed in the mail is presumed to have been received. When a letter is sent by post, properly addressed, a prima facie presumption of its delivery to the party to whom it is addressed, which arises from it, may be overcome by contradictory evidence. *Oaks v. Motors Ins. Corp.*, 1979 OK 77, 595 P.2d 789, 792 n.10; *Liberty Plan Co. v. Francis T. Smith Lumber Co.*, 1961 OK 30, 360

> P.2d 500, 504; *Hagner v. United States*, 285 U.S. 427, 430, 52 S.Ct. 417, 418, 76 L.Ed. 861 (1932) (there is a rebuttable presumption that any letter mailed in the ordinary course will reach its destination); C. McCormick, *McCormick's Handbook of the Law of Evidence* § 343 (1972)(a "letter properly addressed, stamped and mailed is presumed to have been duly delivered to the addressee").

A presumption is a relationship between an established basic fact, or facts, and the presumed fact. 12 O.S. 2001, § 2301. Here, the basic facts would be the proof of: (1) a letter, (2) properly addressed, (3) with sufficient postage applied, and (4) mailed in the United States mail. Once these basic facts are established, as they were by May's concession, then the presumption of receipt of the mail follows and the burden shifts to the person, here May, against whom the presumption operates to persuade the trier of fact that the presumed fact, receipt of the Order setting a hearing date does not exist. 12 O.S.2001, § 2303(1).

If the basic facts have not been established, the presumed fact (here receipt of mail) is disregarded. Then, if the opposing party presents contrary evidence, the determination of the ultimate fact is accomplished from the evidence presented by the parties as if no presumption existed. 12 O.S.2001, § 2303(2).

If there is a successful establishment of the basic facts then May has the burden to persuade the trier of fact that the Order setting the hearing was not received. ""Persuasion' describes the intellectual process employed by the trier of fact in concluding that a fact is proved or disproved." Whinery, *Oklahoma Evidence: Commentary on the Law of Evidence*, § 8.02 (West Publishing Co.

1994). Whether May's testimony and that of his assistant is sufficient to overcome the presumption is a matter initially for the trier of fact. *National Aid Life Ins. Co. v. Parker*, 1942 OK 213, 127 P.2d 168 syl. 2.

The trial court received documentary evidence, supplemented by the testimony of the clerk and May's concession, showing that the Order was properly addressed and mailed in the United States mail with sufficient postage applied. This evidence satisfied the criteria for raising a presumption of delivery.

May and his assistant testified that the Order was not received. This evidence was sufficient to rebut the presumption.

Thus, receipt or non-receipt of the Order then became a disputed fact matter unaided by a presumption. The trial court's sanctions order speaks of May's failure to rebut the presumption, but that is an incorrect analysis.

On the Record before this Court, the trial court's finding and ruling are not supported by the evidence. Therefore, this Court concludes that there is reversible error.

B. Ground(s) For Sanction

The fact that May did not appear on August 2, 2016 for a plea in the Roberts criminal action is undisputed. The Order setting the show cause hearing directed May "to show cause why this Court should not hold him in indirect contempt for

failing to appear as directed and/or impose sanctions pursuant to Rule 5."[8] However, the Corrected Order does not specify the legal basis for the trial court's sanction action.

The unknown factor here is: Upon what authority did the trial court rely to impose this sanction?[9] The answer to that inquiry leads to an understanding of the factual and legal elements necessary to warrant sanctions, and thus an appellate review of the sanctions ordered.

Indirect contempt occurs when there "is the willful disobedience of any process or order lawfully issued or made by [the] court." 21 O.S.2011, § 565; *Henry v. Schmidt*, 2004 OK 34, ¶ 12, 91 P.3d 651, 654.

May presented evidence suggesting confusion and miscommunication about whether the Roberts case was reset to August 9, 2016. Here, the trial court did not make any finding of willfulness on the part of May.

In addition, punishment for indirect contempt may be remedial to coerce defendant's behavior, or it may be penal to punish defendant for disobedient or disorderly behavior. *Henry,* 2004 OK 34 ¶ 13, 91 P.3d at 654. The statute

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[8] Record, p. 5 at 6.

[9] The State's suggestion of Rule 20 of the Rules for District Courts has no merit. This is a Rule regarding direct contempt and when and how any sanction might be imposed. Here, the facts did not show direct contempt as defined in Rule 20. Moreover, the trial court did not mention Rule 20 at any time.

authorizes a fine, but makes no provision for reimbursements occurring as a result of conduct. 21 O.S.2011, § 566. Moreover, Penal sanctions require compliance with constitutional safeguards and statutory procedures. *Henry,* 2004 OK 34 ¶ 19, 91 P.3d at 658.

In summary, if the trial court's adjudication is for indirect contempt, then May's brief in chief is reasonably supportive of the allegations of error thereby requiring reversal.

The trial court also cited Rule 5 of Rules for District Courts. Rule 5 pertains to holding pretrials and scheduling conferences in civil actions. Here, the case was set for a plea in a criminal action. May argues that Rule 5 does not apply as a matter of law. However, the Record does not show that the trial court relied on Rule 5. Therefore, this Court finds that Rule 5 is not here a basis for the pretrial court's action

Similarly, a trial court has inherent authority to sanction in appropriate cases. However, conditions apply. "There must be a finding of bad faith or oppressive behavior where the trial court has imposed sanctions on the basis of its inherent or equitable power to do so." *Walker v. Ferguson*, 2004 OK 81, ¶ 14, 102 P.3d 144, 147 (citations omitted). Such findings are absent here and the trial court did not express its intention to exercise its inherent authority.

C. Trial Court Recusal

May argues that the trial judge should not have heard the case and should not have participated in the questioning of witnesses. May's argument is not considered in this appeal because the Record does not show that he complied with Rule 15, Rules for District Courts, 12 O.S.2011, Ch. 2, App.

D. Conclusion and Disposition of Appeal

The fact that May did not appear for a plea in the Roberts criminal action on August 2, 2016 is undisputed. However, the Record does not establish that May received the Order setting that hearing notwithstanding it was mailed to May. The Corrected Court Order does not specify the legal basis for the trial court's sanction action or include other facts necessary to support imposition of sanctions.

The "Corrected Court Order" is reversed. This Court's Opinion is based on the Record presented. This Opinion in no manner approves or condones the action of attorney May in his disrespectful letter to the trial court.

REVERSED.

FISCHER, P.J., and GOODMAN, J., concur.

December 14, 2017

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

ENVIRONMENTAL CLEANUP, INC.,)
)
Plaintiff/Appellant,)
)
vs.) Case No. 116,031
)
SHER & SONS TRUCKING, INC.,)
)
Defendant,)
)
and)
)
UNITED SPECIALTY INSURANCE COMPANY,)
)
Garnishee/Appellee.)

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE JAMES B. CROY, TRIAL JUDGE

AFFIRMED

Perry E. Kaufman
Mary B. Abernathy
GOOLSBY, PROCTOR,
HEEFNER & GIBBS, PC
Oklahoma City, Oklahoma

For Plaintiff/Appellant

Joseph R. Farris
Jennifer D. Ary
FRANDEN FARRIS QUILLIN
GOODNIGHT + ROBERTS
Tulsa, Oklahoma

For Garnishee/Appellee

OPINION BY P. THOMAS THORNBRUGH, VICE-CHIEF JUDGE:

Appellant, Environmental Cleanup, Inc. (ECI), appeals a decision of the district court holding that the insurance policy issued by Appellee United Specialty Insurance Company (USIC) did not cover the cost of removing or cleaning up a load of blasting sand after a tractor-trailer left the highway while negotiating an off-ramp. On review, we affirm the decision of the district court.

BACKGROUND

The matter begins with a single vehicle accident involving a tractor-trailer that was carrying a load of blasting sand, which was apparently bagged and on pallets. The facts provided by the record are somewhat limited, as the initial decision was decided by default. The tractor-trailer was owned by Defendant Sher & Sons Trucking, Inc. (Sher). The police report of the incident indicates that the tractor-trailer left the highway while negotiating an off-ramp from Interstate 40, and ended up off the highway in a jack-knifed posture. The record establishes that either Sher, or a third-party wrecker service (AAA Wrecker) working on Sher's behalf, called in ECI to "remove" the blasting sand, although the exact nature of this work is not clearly detailed in the record.

ECI initially invoiced Sher for $4,943 for "load transfer." Sher did not pay. On January 21, 2016, ECI sued Sher, seeking $4,943 plus fees and "continuing storage costs." Sher did not reply. Approximately 40 days later, on March 3, 2016, the court made a journal entry of default judgment awarding ECI $45,365.75 in damages, which consisted of the original claim for $4,943; $23,600 for the storage of the sand removed from the jack-knifed tractor trailer; an additional $14,449.34 in interest on this balance, and $2,373.41 in fees and costs.[1] These damages were based on an affidavit submitted to the court by an ECI employee.

In July 2016, ECI filed a garnishment affidavit against Sher's liability insurer, USIC, seeking a one-time garnishment which had by then risen by the operation of post- judgment interest to a total of $47,550.88. USIC answered, denying that the policy issued to Sher covered this liability. In December 2016, ECI filed a motion for summary judgment on the question of coverage. In January 2017, USIC filed its opposition to Sher's motion, and a cross-motion for summary judgment. In April 2017, finding no coverage for the removal of the sand in the USIC policy, the district court ruled in favor of USIC's motion and against ECI's motion. This ruling was memorialized in a comprehensive journal entry carefully

[1] We note that, inexplicably, ECI filed suit on the intermediate claims docket at a time when the amount they were seeking was *clearly above* the $10,000 jurisdictional limit that a special judge may hear. However, Sher's default presumably acts as a waiver of the jurisdictional limit.

explaining the court's rationale, which was filed on April 11, 2017. ECI now appeals this decision.

STANDARD OF REVIEW

Summary relief issues stand before us for *de novo* review. All facts and inferences must be viewed in the light most favorable to the non-movant. Appellate tribunals bear the same affirmative duty as is borne by courts to test for legal sufficiency all evidentiary material received in summary process in support of the relief sought by the movant. *Reeds v. Walker,* 2006 OK 43, ¶ 9, 157 P.3d 100. Only if the court should conclude there is no material fact (or inference) in dispute and the law favors the movant's claim or liability-defeating defense is the moving party entitled to summary relief in its favor. *Id.*

ANALYSIS

I. LIABILITY PURSUANT TO 47 O.S.2011 § 11-1110(C)

ECI's case centered around 47 O.S.2011 § 11-1110(C), which provides that:

> C. Any person removing a wrecked or damaged vehicle from a highway, highway right-of-way or any other location as the result of an accident shall remove any glass or other injurious substance dropped upon the highway or highway right-of-way or other location from such vehicle. The owner or **insurer of the owner** of the vehicle **if the owner's insurance policy provides coverage for such expense** shall be responsible for the cost of removal of the vehicle and the glass or other injurious substance and any vehicle storage fees. The cost of the removal of the vehicle and any storage fees shall be the same as established by the Corporation Commission for nonconsensual tows. (Emphasis added).

ECI's argument on summary judgment may be summarized as follows:

1. The bagged blasting sand carried on the trailer was "deposited on a public highway" by the accident;
2. The sand constituted either "a substance likely to injure any person, animal or vehicle upon such highway" or a "destructive or injurious material" under the statute;
3. Sections B and C of § 11-1110 create a duty to remove any "glass or other injurious substance dropped upon the highway or highway right-of-way or other location from such vehicle" and the insurer is responsible for the cost of such removal if the owner's insurance policy provides coverage for such expense.[2]
4. The USIC policy covered this expense.

Examining § 11-1110, two statutory principles appear. The first is that Oklahoma law creates a duty to remove *injurious substances* dropped *upon the highway* or the *highway right-of-way* or other location from a vehicle. The second is that "the insurer is responsible for the cost of such removal *if* the [vehicle]

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[2] ECI appears to have initially based its argument on an Attorney General's Opinion, 2000 OK AG 42, indicating that an insurer was responsible for cleanup under the statute, *irrespective of whether the policy covered such cleanup*. The statute was later amended to add the caveat that an insurer shall be responsible only if "the owner's insurance policy provides coverage for such expense."

owner's insurance policy provides coverage for such expense." Several questions are thereby presented:

1. Was the bagged blasting sand an "injurious substance?"

2. If the bags were ruptured, was loose sand an "injurious substance?"

3. Was either loose or bagged sand "dropped upon the highway or highway right-of-way or other location from such vehicle"?

4. And, if these conditions are met, does the insurance policy in question provide coverage for the expense of removing the blasting sand?

Was an "Injurious Substance" Dropped "upon the Highway" or the Highway Right-of-Way?

Interpreting § 11-1110 without the aid of any further definition is difficult. No published or unpublished case available to us has attempted to define "injurious substance" as used in this statute. Even the phrase "dropped upon the highway or highway right-of-way" presents some difficulty of interpretation in this case. In ¶ 2 of 2000 OK AG 42, the opinion relied on by ECI, the Attorney General's office opined that:

> . . . Utilizing the rule of ejusdem generis, the meaning of more general words in a statute will be construed restrictively by the more specific words in the statute, to include things of the same kind, class and character. Thus, an 'injurious substance' includes anything which **poses a danger of physical injury to vehicles, persons or animals in the specific context of roadway safety.** Injurious substances might include any item or substance which could puncture vehicle tires, **or any obstruction such as spilled cargo or debris from a collision which may impair the movement of other vehicles,**

persons or animals resulting in injury to them. (Footnotes omitted, emphasis added).

This definition is helpful, in that it focuses the inquiry on the effects a substance may have on ***highway safety***, rather than the inherent nature of the substance itself. Blasting sand may not constitute "a danger of physical injury to vehicles, persons or animals" or "impair the movement of other vehicles" when confined in bags on the back of a truck or spilled some distance from the edge of the road, but it may well constitute a hazard if the same bags, or loose sand are *dropped on the roadway*. Unfortunately, the record before us is extremely vague on this crucial point of interest – **did the sand pose any hazard to road safety**? ECI's summary judgment motion cites the affidavit of ECI employee Jorge Cruz (ECI MSJ Ex. 1), the police accident report (Ex. 2) and ECI'S invoice (Ex. 3) as demonstrating that sand was "spilled along the roadway." The Cruz affidavit, however, makes no mention of any part of the load being spilled, or of bagged or unbagged sand "impairing the movement of other vehicles." It states that the truck ended up on the side of the road, and specifically refers to services "necessary to move the *loaded materials* from the trailer owned by Sher and Sons Trucking to an ECI trailer."

The truck is described in the police report as having ended up in a "jack knife" position, i.e., with the tractor and trailer upright at an acute angle to each other. The police report also implies that the truck came to rest a substantial

distance from the highway. Neither the police report, nor any other affidavits make any mention of the trailer having turned over, or of the load being spilled, or of any hazard on the highway itself. ECI's original invoice describes the job as a "load transfer," and lists the use of pallet jacks and a "Cat Track machine including forks." These machines appear more suitable for removing pallets of bagged sand from the bed of a truck than scraping and sweeping loose sand from the roadway. Even assuming that some sand was spilled, we find no record of the sand actually ending up on the roadway and "pos[ing] a danger of physical injury to vehicles, persons or animals in the specific context of roadway safety."

A. The Effect of the Default Judgment

ECI argues, however, that the trial court's order of default had established as *res judicata* that the truck has "spilled its load of materials onto the roadway," and that this act constituted "a danger to the public and created a public liability due to the hazard on the roads" because these facts and conclusions were alleged in ECI's petition. A line of established cases, however, including *U.S. Fid. & Guar. Co. v. Dawson Produce Co.*, 1937 OK 317, 68 P.2d 105, and *Greene v. Circle Ins. Co.*, 1976 OK 173, 557 P.2d 422, hold that a confession by a defaulting insured is conclusive only as to the facts **material** to the claim. ECI's petition against Sher is clear that ECI sought liability based on a contractual debt ("On or about October 23, 2015, Defendant hired Plaintiff . . . to provide cleanup services."). It makes no

specific claim for statutory liability, *nor was such liability necessary to find the alleged contractual obligation*. We therefore find that Sher's default has established neither the fact that sand was spilled on the highway, nor the legal conclusion that "a danger to the public and a public liability" was created.

B. The Vehicle or the Load-in-Place as a "Public Danger"

ECI's next argument is less clear, but appears to be one that § 11-1110 also mandates the removal of a wrecked or damaged vehicle from the side of the road as a "public danger" and that ECI's "load transfer" was a statutorily required part of this duty. ECI further appears to argue that the jack-knifed tractor-trailer that was standing off the highway, and/or any bagged sand still on the trailer, directly constituted some form of "injurious substance dropped upon the highway or highway right-of-way" Although ECI demonstrates no direct statutory duty to remove the cargo-in-place of a vehicle that is incapacitated on a roadside due to accident, another Attorney General's Opinion, 2002 OK AG 3, states that "an insurer is responsible for the cost of removal of an insured's wrecked or damaged vehicle under 47 O.S. 2001, § 11-1110(C), even if the insured only has a motor vehicle liability policy."

Pursuant to this Opinion, this cost of removing the tractor-trailer *could* include the cost of removing its load if this was a necessary part of removing a "wrecked or damaged vehicle." We must also be mindful, however, that the

Legislature deliberately amended § 11-1110 after 2000 OK AG 42 and 2002 OK AG 3 were published to state that such coverage exists only **if** "the owner's insurance policy provides coverage for such expense," in which case the insurer "shall be responsible for the cost of removal of the vehicle . . . and injurious substances." We find it clear that § 11-1110 does not *mandate* coverage for the cost of removing a vehicle from the side of the road.

II. USIC's MOTION FOR SUMMARY JUDGMENT

Although we find no *mandatory requirement* that the USIC policy cover the removal of the sand, and no undisputed evidence that the sand constituted an "injurious substance" as defined by the Attorney General's opinion, this does not immediately equate to summary judgment in favor of USIC. USIC could still obtain summary judgment, however, if the policy indisputably *does not cover* any liability for removing the sand that *may* arise under § 11-1110 or any other policy basis.

A. Coverage for Vehicle Removal

As we noted above, § 11-1110 requires that owners pay the cost of removing a disabled vehicle from the highway, and possibly the cost of removing the vehicle's load if it is a necessary part of removing the vehicle, but does not *mandate* that an insurance policy cover this expense. The USIC policy clearly covers the towing of a "private passenger auto" from the scene of an accident, but

we find no indication in the USIC policy that it covers the costs of the removal of a commercial tractor-trailer.

B. Coverage for "Property Damage"

ECI does not point to any specific policy provisions regarding the clean-up of spilled cargo in the policy. ECI argued during the summary judgment briefing that either the alleged spilling of the sand, or the presence of the loaded jack-knifed tractor-trailer on the side of the road, constituted some form of covered property damage. Even if we were to accept this somewhat expansive definition of property damage pursuant to the policy, it appears clear that no "property damage" has been suffered by *ECI*. If the State has suffered property damage because of the accident, it is the State that may have a claim pursuant to the policy, not ECI. Equally, if Sher, or the (unknown) owners of the sand have suffered any covered property damage, those entities could have a claim pursuant to the policy, not ECI.[3]

C. Pollution Coverage

The ECI policy further provides for "covered pollution costs and expenses." The policy covers any demand or statutory requirement that any insured "clean up, treat, de-toxify or neutralize Pollutants." The policy defines "Pollutants" as "irritants or contaminants." Even though bagged or loose sand on a highway may

[3] ECI initially also argued that coverage was created by the "MCS-90" endorsement required of federal motor carriers. However, ECI later agreed that the "MCS-90" did not provide coverage.

be a "hazardous material" pursuant to § 11-1110, 2000 OK AG 42 is clear that "hazardous materials" is a larger class than that of "pollutants." We find no indication that any bagged or loose sand on the truck or highway was a covered polluting "irritant or contaminant" for the purposes of the USIC policy.[4]

CONCLUSION

We find no coverage for the removal of the sand pursuant to § 11-1110, and find no other policy section that would cover this expense. We therefore affirm the decision of the district court.

AFFIRMED.

BARNES, P.J., and WISEMAN, J., concur.

December 14, 2017

[4] Like any particulate matter, blasting sand may constitute an irritant to the lungs at the time it is floating in the air during blasting operations. We find no indication that the sand is an irritant in its normal state, however.