

## OKLAHOMA SUPREME COURT STRIKES DOWN TORT REFORM

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The Oklahoma Supreme Court handed down two decisions on June 4, 2013 with respect to the constitutionality of the Comprehensive Lawsuit Reform Act of 2009 (“Tort Reform Act” or “Act”). The first opinion, *Wall v. Marouk*, 2013 WL 2407160 (Okla. June 4, 2013), declared one section of the Act unconstitutional. More importantly, the second opinion, *Douglas v. Cox Retirement Properties, Inc.*, 2013 WL 2407169 (Okla. June 4, 2013), declared the entire act unconstitutional and void because it violates “the single-subject rule” of Article 5, section 57 of the Oklahoma Constitution.

### SUMMARY OF THE OPINIONS

*Wall* found section 19 of the Act (12 O.S. § 19) unconstitutional as violative of Article 5, section 46 of the Oklahoma Constitution and Article 2, section 6 of the Oklahoma Constitution. Section 19 provides that “in civil actions for professional negligence, the plaintiff must attach an expert’s affidavit.” The Court held that section 19 constituted a special law in violation of Article 5, section 46 of the Oklahoma Constitution. “A special law confers some right or imposes some duty on some but not all of the class of those who stand upon the same footing and same relation to the subject of the law.” *Oklahoma City v. Griffin*, 1965 OK 76, ¶ 8, 403 P.2d 463. The Court additionally held that section 19 violates Article 2, section 6 of the Oklahoma Constitution because it “creates a monetary barrier to access the court system, and then applies that barrier only to a specific subclass of potential tort victims, those who are the victims of professional negligence.”

The second case, *Douglas*, held that “H.B. 1603 violates the single-subject rule of Article 5, section 57 of the Oklahoma Constitution and is unconstitutional and void in its entirety.” That section of the Oklahoma Constitution provides: “Every act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title. . . .” The single-subject rule attempts to prevent “logrolling,” which is “the practice of ensuring the passage of a law by creating one choice in which a legislator or voter is forced to assent to an unfavorable provision to secure passage of a favorable one, or conversely, forced to vote against a favorable provision to ensure an unfavorable provision is not enacted.” *Nova Health Sys. v. Edmondson*, 2010 OK 21, 233 P.3d 380. To determine whether a law constitutes logrolling, Oklahoma adheres to the germaneness test, which asks “whether a voter, or legislator, is able to make a choice without being misled and is not forced to choose between two unrelated provisions contained in one measure.” *Thomas v. Henry*, 2011 OK 53, 8, 260 P.3d 1251, 1254.

The Court held in *Douglas* that the Act is “unconstitutional logrolling in violation of the single-subject rule. . . .” The Court found that the Act contains 90 sections which address a variety of subjects that “do not reflect a common, closely akin theme or purpose.” Although the Legislature stated that the Act covered the single topic of lawsuit reform, the Court found that this topic is too broad, and that designating the law as lawsuit reform does not “cure the bill’s single-subject defects.” Essentially, according to the Court, voters and/or legislators are faced with an “all or nothing” choice with respect to the bill and the multiple subjects it addresses.

The Court also found that because the Act encompasses so many differing subjects, severance of the offending sections is not an option. In summary, the Court stated: “We do not doubt that tort reform is an important issue for the Legislature. But the constitutional infirmity of logrolling, which is the basis of this opinion, can only be corrected by the Legislature by *considering the acts* within the CLRA of 2009 *separately*.”

Full copies of the opinions can be found [here](#).

### **CERTAIN REFORMS THAT WERE STRUCK DOWN**

Although some of the most sweeping reforms created by the Act related to professional negligence claims, several of the Act’s provisions addressed general litigation reforms. Some of those general reforms, which have been struck down, are:

SECTION 5 and 6 *amending* 12 O.S. § 683 and 12 O.S. § 684:

§ 683: Civil Procedure - Judgment - Dismissal without Prejudice (AMENDED):

§ 684: Civil Procedure - Judgment - Dismissal before Trial Commenced without Court Order (AMENDED):

- Allows actions to be dismissed by the plaintiff without court order by filing a notice of dismissal at any time before pre-trial, or by filing a stipulation for dismissal signed by all parties appearing in the action.

SECTION 7 *amending*: **12 O.S. § 727.1**: Civil Procedure - Judgment - Interest on Judgments of Courts of Record - Prejudgment Interest on Actions Filed after January 1, 2010 (AMENDED):

- Modifies the language related to prejudgment interest, stating that beginning Nov. 1, 2009, prejudgment interest shall begin to accrue 24 months after the suit resulting in the judgment was commenced.
- Directs that postjudgment interest be calculated using the prime rate plus 2%.
- Directs that prejudgment interest be calculated using a rate equal to the average U.S. Treasury Bill rate of the preceding calendar year.
- Significantly reduces the amount of prejudgment interest available in tort cases.

SECTION 8 *amending*: **12 O.S. § 990.4**: Civil Procedure - Appeal and Error - Stay of Enforcement of Judgment, Decree, or Final Order (AMENDED):

- Allows parties to obtain a stay of enforcement of a judgment, decree or final order during the time in which an appeal may be commenced or which an appeal is pending in any court inside or outside of the state.
- Prohibits bonds filed when seeking a stay of enforcement from exceeding \$25 million.
- Exempts appeals of punitive damages from an appeal bond requirement.

SECTION 9 *amending*: **12 O.S. § 993**: Civil Procedure - Appeal and Error - Appeals from Certain Interlocutory Orders - Undertaking (AMENDED):

- Adds the following order to the list of interlocutory orders that may be appealed without awaiting a final determination in the case:
  - An order that denies a motion in a class action asserting lack of jurisdiction because an agency of this state has exclusive or primary jurisdiction of the action

or a part of the action, or asserting that a party has failed to exhaust administrative remedies, but only if the class is subsequently certified and only as part of the appeal of the order certifying the class action.

SECTION 10 *creating*: **12 O.S. 994.1**: Civil Procedure - Appeal and Error - Recovery of Certain Payments and Costs - Computation (NEW LAW):

- Adds language related to Medicaid reducing its recovery (when Medicaid is the party that receives payment) to take account of the cost of procuring the judgment or settlement, setting forth procedures for the Oklahoma Health Care Authority to seek recovery.
- Sets forth language related to computation of the recovery if a Medicaid payment is less than the judgment or settlement amount and computation of the recovery if Medicaid payments equal or exceed the judgment or settlement amount.

SECTION 11 *amending*: **12 O.S. 2004(I)**: Civil Procedure - Oklahoma Pleading Code - Process - Summons: Time Limit for Service: (AMENDED):

- Changes permissive language to mandatory language.
- If service of process is not made upon a defendant within one hundred eighty (180) days after the filing of the petition and the plaintiff cannot show good cause why such service was not made within that period, the action **shall be deemed**, (replacing may be deemed), dismissed as to that defendant without prejudice.

SECTION 12 *amending*: **12 O.S. 2008(A)**: Civil Procedure - Oklahoma Pleading Code - General Rules of Pleading - Claims for Relief: (AMENDED):

- (A) Claims for Relief: Changes wording for amount of damages that must be plead from “\$10,000.00” to “the amount required for diversity jurisdiction pursuant to Section 1332 of Title 28 of the United States Code.”

SECTION 13 *amending*: **12 O.S. 2009(G)** and *creating* **12 O.S. 2009(H)**: Civil Procedure - Oklahoma Pleading Code - Pleading Special Matters - Special Damage and Motion to Clarify Damages (AMENDED/NEW LAW):

- (G) Claims for Relief: Changes wording in the section regarding special damages from “\$10,000.00” to “the amount required for diversity jurisdiction pursuant to Section 1332 of Title 28 of the United States Code.”
- Adds (H) Motion to Clarify Damages : If plaintiff seeks less than the amount required for diversity jurisdiction, defendant may file, for purposes of establishing diversity jurisdiction only, a Motion to Clarify Damages prior to the pretrial order to require plaintiff to show by a preponderance of the evidence that the amount of damages, if awarded, will not exceed the amount required for diversity. If the court finds that any damages awarded are more likely than not to exceed the amount required for diversity, the plaintiff shall amend their pleadings.

SECTION 16 *amending*: **12 O.S. 2023**: Civil Procedure - Oklahoma Pleading Code - Class Actions: (AMENDED):

- Modifies language related to filings of class actions.
- Requires a court order determining a class action entered on or after November 1, 2009, to define the class and the class claims, issues or defenses and appoint class counsel.

- Such orders are subject to a de novo standard of review by an appellate court reviewing the order.
- For certified classes, the court may direct appropriate notice to the class.
- Limits class membership on actions filed after November 1, 2009, to individuals or entities who are residents of the state or non residents who own an interest in property in the state that is relevant to the action or who have a significant portion of the nonresident's cause of action arising from conduct within the state.
- Modifies language related to dismissal or compromise in class actions, stating that claims, issues or defenses of a certified class may be settled, dismissed or compromised only with the court's approval.
- Sets forth procedures for such motions filed after November 1, 2009. (E)
- Sets forth new language regarding class counsel, stating that a court-certified class must appoint counsel. (F).
- Allows a court to award reasonable attorney fees and nontaxable costs in a certified class action. (G).

**SECTION 17 *creating* 12 O.S. §2056:** Civil Procedure - Oklahoma Pleading Code - Motion for Summary Judgment: (NEW LAW):

- Sets out procedure for moving for summary judgment.
- Includes sections titled: By a Claiming Party, By a Defending Party, Proceedings, Case not Fully Adjudicated on the Motion, Affidavits and Further Testimony, When Affidavits are Unavailable, and Affidavits Submitted in Bad Faith.

**SECTION 18 *amending* 12 O.S. § 2702:** Civil Procedure - Oklahoma Evidence Code - Expert and Opinion Testimony - Testimony by Experts: (AMENDED):

- Modifies language related to opinion testimony, allowing a qualified expert to testify in the form of an opinion if the testimony is based on sufficient facts or data, is the product of reliable principles and methods and if the witness has applied the principles and methods reliably to the facts of the case.

**SECTION 19 *amending* 12 O.S. § 2703:** Civil Procedure - Oklahoma Evidence Code - Expert and Opinion Testimony - Bases of Opinion Testimony by Experts: (AMENDED):

- Adds the following language: "Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."

**SECTION 20 *amending* 12 O.S. § 3226:** Civil Procedure - Discovery Code - General Provisions Governing Discovery: (AMENDED):

- Adds requirement of initial disclosures. (B)(2 & 3).
- Initial disclosures are limited to the computation of damages.

**SECTION 21 *amending* 12A O.S. § 1-304:** Uniform Commercial Code - General Provisions - Territorial Applicability and General Rules - Obligation of Good Faith: (AMENDED):

- Adds the following language regarding the obligation of good faith inherent in performance of a contract: “Breach of the obligation of good faith imposed by this section shall not give rise to a separate tort cause of action.”

**SECTION 23 amending 23 O.S. § 15:** Damages - In General - Several Liability - Civil Action Based on Fault, Not Arising Out of Contract: (AMENDED):

- Modifies language related to joint and several liability.
- Makes inapplicable a requirement that a defendant be joint and severally liable for damages if the percentage of responsibility attributed to the defendant is greater than 50 percent on actions brought by or on behalf of the state.
- Removes language that previously exempted political subdivisions of the state and actions in which no comparative negligence was found to be attributable to the plaintiff.

**SECTION 24 creating 23 O.S. § 61.2:** Damages - Measure of Damages - Limitations on Damages for Bodily Injury - Exceptions - Content of General Verdict and Interrogatories - Jury Instructions: (NEW LAW):

- States that in any civil action arising from a claimed bodily injury, there is no limitation on an award for economic loss.
- Modifies the cap on noneconomic damages, instituting a \$400,000 cap on noneconomic damages for civil actions arising from a claimed bodily injury, regardless of the number of parties against whom the action is brought or the number of actions brought.
- Defines process for issuing verdicts and gives definitions that control the new law.
- States that upon establishment of a Health Care Indemnity Fund, any damages awarded that exceed the \$400,000 limitation are to be paid from the fund; however, such provision does not apply to any action that accrues before the date of enactment of the fund, which is to be established pursuant to the recommendations of a task force.
- The fund is to include professional liability insurance coverage requirements in an amount no less than \$1 million for physicians and maintain availability of \$20 million annually.
- States legislative intent to purchase reinsurance of up to \$20 million to cover judgments through the fund.
- States that there is no limit on noneconomic damages that may be awarded in civil actions arising from a claimed bodily injury resulting from professional negligence against a physician if a judge and jury finds by clear and convincing evidence that the plaintiff or injured person suffered permanent and substantial physical abnormality or disfigurement, loss of use of a limb, loss of or substantial impairment to a major body organ or system; or the plaintiff or injured person has suffered permanent and physical functional injury that prevents him/her from being able to independently care for himself/herself and perform life sustaining activities; or the defendant’s acts or failures to act were in reckless disregard for the rights of others, grossly negligent, fraudulent or intentional or with malice.
- Places no limit on the amount of noneconomic damages that may be awarded in an action arising from claimed bodily injury not resulting from professional negligence against a physician if it is found by a preponderance of the evidence that one of the three previous scenarios existed.

- Sets forth guidelines for the court to enter judgments for economic damages and noneconomic damages.
- In jury-tried actions, the jury is not to be instructed with regard to the limit on noneconomic damages.
- States that the limits are not to apply to actions brought under the Governmental Tort Claims Act or actions for wrongful death.

**SECTION 28 *amending* 63 O.S. § 1-1709.1:** Public Health and Safety - Oklahoma Public Health Code - Miscellaneous Provisions - Peer Review: (AMENDED):

- Prohibits peer review information discovered pursuant to a claim of independent negligence against a health care facility from being used as evidence unless a judge or jury first find the professional to have been negligent in providing health care to the patient in the facility.
- Allows credentialing and recredentialing data to be used if the civil action claims allege that the health care facility was independently negligent as a result of permitting the health care professional to provide services.

**SECTION 52 *creating* 76 O.S. § 57:** Torts - Inherently Unsafe Product Liability Limitation - Product Liability Actions - Product that is Inherently Unsafe and Known to be Unsafe: (NEW LAW):

- Modifies language related to product liability, stating that a manufacturer or seller is not liable if the product is inherently unsafe and known to be unsafe by the ordinary consumer.

**SECTION 53 *creating* 76 O.S. § 58:** Torts - Unsafe Product Liability Limitation - Admissibility of Measures Taken to Make a Harm or Injury Less Likely to Occur: (NEW LAW):

- Adds the rule of evidence for subsequent improvements.
- States that “when an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product’s design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

It is likely that the legislature will attempt to cure the defects by legislating these subjects on an individual basis. However, that may take some time.

Tags: Tort, reform, legislature, struck, unconstitutional, constitution, Oklahoma