



Oklahoma Comprehensive Tort Reform Act of 2009

Compiled by S. Sandy Sanbar, MD, PhD, JD, FCLM
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For

more than a decade, some Oklahoma lawmakers have said that frivolous lawsuits have increased health care costs, driven talented doctors out of Oklahoma because of high malpractice insurance rates and told companies to look to more business-friendly states when considering relocation or jobs creation. Oklahoma had the reputation of being known as a jackpot justice state.

On May 22, 2009, Governor Brad Henry signed into law House Bill 1603 by Rep. Dan Sullivan and Senate President Pro Tempore Glenn Coffee, which deals with tort reform legislation aimed at curbing frivolous lawsuits, reducing costs associated with the justice system, improving the legal process, changing the economic landscape of Oklahoma by saying to companies and doctors that their businesses are welcome in Oklahoma *without* impeding a citizen's access to the courts. Gov. Henry stated that the measure "enacts reasonable and responsible reforms that improve the civil justice system without impairing a citizen's constitutional right to have his or her legitimate grievances appropriately addressed in court."

The comprehensive tort reform act of 2009, which goes into effect on November 1, 2009, resulted pursuant to a compromise between lawmakers, business advocates, trial lawyers and doctors, and represents years of hard work to deliver common sense reform to Oklahoma's legal system.

The

following are the highlights of the legislature's actions:

1. **Expert Affidavits 12 O.S. 19 (New)**

In any civil action alleging "professional negligence", the Plaintiff must attach an affidavit to their Petition attesting that:

1. The Plaintiff has consulted with a qualified expert;
2. The Plaintiff has obtained a written opinion from the expert that identifies the Plaintiff and that, based on a review of all the available relevant material, the expert believes that a reasonable interpretation of the factors supports a finding that the acts or omissions of the Defendant constitutes professional negligence; and

3. Based on this review by the expert the Plaintiff believes the claim is meritorious and based on good cause. The expert's written opinion must include the specific acts and omissions which constitute professional negligence and the reasons why. These written opinions are **not** admissible at trial and may **not** be used or discussed for any reason during discovery or at trial.

Upon request, the report and medical authorizations for the past 5 years must be provided, but written opinions are not admissible at trial and may not be used or discussed for any reason during discovery or at trial. The new statute broadens the prior statute applying only to healthcare professionals which was found unconstitutional in ***Zeir v. Zimmer, Inc.***, 2006 OK98, 152 P.3d 861. Claimants may apply for indigents the status if they cannot afford to obtain the expert opinion. 12 O.S. 192 (New).

If the Petition is filed without this affidavit and the court has not granted an extension, the court shall dismiss the Petition without prejudice upon motion of the Defendant. The court may grant an extension of time to provide an affidavit, not to exceed 90 days, for good cause shown.

2. **Voluntary Dismissal 12 O.S. 683 (Amended)**

Changes existing law to allow a Plaintiff to voluntarily dismiss an action at any time prior to pretrial. **After** pretrial a Plaintiff may dismiss without prejudice **only** by agreement of the parties or by order of the court. If a Plaintiff dismisses and later refiles the lawsuit, alleging the same cause of action, the court may award costs to the Defendant of the previous action.

3. **Prejudgment Interest 12 O.S. 727.1**

In personal injury or injury to someone's personal rights, prejudgment interest doesn't start until 24 months after the filing of the lawsuit. The prejudgment interest rate was lowered to the United States Treasury Bill rate.

4. **Appeal Bonds 12 O.S. 990.4**

Appeal bonds will not exceed \$25 Million and no appeal bond needs be pledged to appeal an award of punitive damages. The court can still lower the statutory bond requirements, which have not been changed, upon a showing of substantial economic harm. This hasn't been a problem for most of us!

5. **Summons 12 O.S. 2004**

This change is significant. If a summons is not served within 180 days the petition shall be deemed dismissed without prejudice.

6. **Pleading 12 O.S. 2011**

A Plaintiff's petition must state whether the Plaintiff is seeking damages in excess of the amount required for diversity jurisdiction under 28 U.S.C. 1332 (presently \$75,000). If the Plaintiff seeks less than the current \$75,000.00, the petition must state the actual amount sought.

7. **Summary Judgment 12 O.S. 2056**

This statute adopts Federal Rule 56 and requires a court grant summary judgment if it finds that there is no genuine issue of material fact. ***The change is not really significant.***

8. **Expert Testimony 12 O.S. 2702, 2703**

The legislation essentially incorporates Federal Rule 702 and 703 which adds language from Daubert v. Merrill Dow, 509 U.S. 579, as to the requirements for expert testimony. ***This is not a significant change.***

9. **Discovery 12 O.S. 3226**

The Plaintiff must disclose, ***within 60 days of service*** of the petition and ***without request by the Defendant***, a computation of the damages and provide all documents and evidence used to calculate the damages. ***This statute may not be useful. Plaintiffs will be forced to exaggerate their claims or risk a court implying some prejudice to defendants.***

10. **Joint and Several Liability 23 O.S. 15**

Under the previous law, the liability of joint tortfeasors is several unless:

1. A Defendant is greater than 50% responsible; or
2. A Defendant acted willfully and wantonly or with reckless disregard; or
3. The Plaintiff is fault free.

Under the New Act, the liability of joint tortfeasors is several unless:

1. A Defendant is greater than 50% responsible; or
2. A joint tortfeasor acted willfully and wantonly or with reckless disregard, in which case all Defendants are jointly and severally responsible.

11. **Damages 23 O.S. 61.2**

Non Economic Damages in any suit alleging bodily injury are capped at \$400,000, except:

1. In suits against a physician, if the judge and jury find by clear and convincing evidence the Plaintiff suffered a permanent and substantial physical abnormality or disfigurement, loss of use of a limb or loss of, or substantial impairment to, a major body organ or system; or
2. The Plaintiff has suffered a permanent physical functional injury that prevents them from being able to independently care for themselves and perform life sustaining activities; or
3. The Defendant's acts were with reckless disregard, grossly negligent, fraudulent or intentional and with malice.
4. In other cases not involving doctors, if the jury finds, by a preponderance of the evidence, that the Plaintiff suffered a permanent and substantial physical abnormality or disfigurement, loss of use of a limb or loss of, or substantial impairment to, a major body organ or system; or
5. Plaintiff has suffered a permanent physical functional injury that prevents them from being able to independently care for themselves and perform life sustaining activities; or

6. The Defendant's acts were with reckless disregard, grossly negligent, fraudulent or intentional and with malice.

The jury will not be told about the cap, on non-economic damages but will be asked to return a general verdict with answers to the following interrogatories:

1. What is the total amount of damages awarded to Plaintiff?
2. What portion of these damages is being awarded for economic loss?
3. What portion of these damages is being awarded for non economic loss?
4. Did Plaintiff's injuries, for which they are being compensated, include damages for a permanent and substantial physical abnormality or disfigurement, loss of use of a limb or loss of, or substantial impairment to, a major body organ or system?
5. Did Plaintiff's injuries, for which they are being compensated, include damages for a permanent physical functional injury that prevents them from being able to independently care for themselves and perform life sustaining activities?
6. Did the Defendant act with reckless disregard, grossly negligently, fraudulently or intentionally and with malice?

For lawsuits against doctors, any damages awarded over and above the \$400,000 cap are to be paid from the Health Care Indemnity Fund, a fund to be created and funded by the State of Oklahoma. A physician must carry professional liability insurance of at least \$1 million to be eligible for the protection of the fund.

This act will not apply to claims governed by the Oklahoma Governmental Tort Claim Act or claims for wrongful death.

The legislation has some Constitutional problems and may not stand up to judicial scrutiny.

- **Seat Belts 47 O.S. 11-1112**

Evidence of the use or nonuse of seatbelts will be admissible in a civil action except for minors under the age of 16.

- **Immunity 63 O.S. 683.9**

The Uniform Emergency Volunteer Health Practitioners Act provides immunity to health care providers who volunteer during times when the Governor has declared a state of emergency.

- **Common Sense Consumption Act 76 O.S. 33**

The distributor or seller of food will not be responsible for food that caused a Plaintiff to become obese. It does not preclude suits alleging a food product was adulterated or misbranded, and caused a Plaintiff injury. If you want to blame someone else for your weight, better do it before November 1st.

- **Livestock Activities Liability Limitations Act 76 O.S. 50.2**

The statute gives greater protection to people conducting “agritourism” activities on their property.

- **Firearms 76 O.S. 51**

Immunity is granted to firearms manufacturers from lawsuits alleging that a manufacturer's gun was used by another person to injure or kill someone. The statute does not apply to suits alleging product liability, breach of warranty or suits against the transferor of a gun.

- **Product Liability 76 O.S. 57**

This section adopts existing case law, as well as the Restatement of Torts, and puts it in the form of a statute. A manufacturer or distributor of a product may not be held liable if the product is inherently unsafe and known to be unsafe by the ordinary consumer who consumes or uses the product with the knowledge readily known to the community. A Defendant must show:

1. The product is a common consumer product;
2. The product's utility outweighs the risk created by its use;
3. The risk imposed by the product was one known by the ordinary consumer who consumes the product with the knowledge common to the community;
4. The product was properly prepared and reached the consumer without a substantial change in its condition; and
5. Adequate warnings of the risk posed by the product were given to the consumer.

This statute does not apply to claims alleging a manufacturing defect or for breach of warranty.

The statute essentially adopts Federal Rule 407 (but does not repeal existing 12 O.S. 2407). The legislature left lawyers and judges to fight over what they intended.

