STATE OF OKLAHOMA COMPENDIUM OF LAW

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PRE-SUIT AND INITIAL CONSIDERATIONS

Pre-Suit Notice Requirements/Prerequisites to Suit

A) The pre-suit notice requirement for actions against the state or a political subdivision is governed by the Oklahoma Governmental Tort Claims Act ("GTCA"), OKLA. STAT. TIT. 51 § 151, *et. seq.* (2008). Prior to commencing the suit and within one (1) year of the date the loss occurs, the plaintiff must file written notice of intent to commence action. If the notice provided for by statute is not filed as provided, any such civil action commenced against the state or political subdivision shall be dismissed and the person to whom any such cause of action accrued for any personal injury will be forever barred from further suing.

1) **Filing.** "A claim against the state shall be in writing and filed with the Office of the Risk Management Administrator of the Department of Central Services." OKLA. STAT. TIT. 51 § 156(C) (2008).

   a) "A claim may be filed by certified mail with return receipt requested. A claim which is mailed shall be considered filed upon date of receipt." OKLA. STAT. TIT. 51 § 156(C).

2) "A claim against a political subdivision shall be in writing and filed with the office of the clerk of the governing body." OKLA. STAT. TIT. 51 § 156(D).

3) "A person may not initiate a suit against the state or a political subdivision unless the claim has been denied in whole or in part." OKLA. STAT. TIT. 51 §, 157(A) (2008).

4) OKLA. STAT. TIT. 51 § 157(A):

> A claim is deemed denied if the state or political subdivision fails to approve the claim in its entirety within ninety (90) days, unless the state or political subdivision has denied the claim or reached a settlement with the claimant before the expiration of that period. If the state or a political subdivision approves or denies the claim in ninety (90) days or less, the state or political subdivision shall give notice within five (5) days of such action to the claimant at the address listed in the claim. If the state or political subdivision fails to give the notice required by this subsection, the period for commencement of an action in subsection B of this section shall not begin until the expiration of the ninety-day period for approval.

5) The suit must be commenced "within one hundred eighty (180) days after denial of the claim." OKLA. STAT. TIT. 51 § 157(B).

   a) OKLA. STAT. TIT. 51 § 157(B):

> The claimant and the state or political subdivision may agree in writing to extend the time to commence an action for the purpose of continuing

to attempt settlement of the claim except no such extension shall be for longer than two (2) years from the date of the loss.

Relationship to the Federal Rules of Civil Procedure

Oklahoma has its own Code of Civil Procedure. OKLA. STAT. TIT. 12, *et. seq*. (2008). It has adopted certain portions of certain Federal rules.

Description of the Organization of the State Court System

A) **Judicial selection.** Justices for the Oklahoma Supreme Court and Judges Court of Criminal Appeals and Court of Civil Appeals are appointed by the governor from a list of three names submitted by the Oklahoma Judicial Nominating Commission. *See* OKLA. CONST. art. VII, § 3; OKLA. STAT. TIT. 20 § 30.17 (2008). Judges of the District Court are elected by the voters in non-partisan elections. *Id.* at art. VII, § 9. Special Judges at the district circuit court level are the exception and are appointed to the court by the district court judges within each circuit. *Id.* at art. VII §8. Judges are on a retention ballot and must receive a majority of the vote to retain office. *Id.* at art. VII-B, § 2.

B) **Structure.** The Oklahoma court system consists of three courts: the Supreme Court, the Appellate Court, and the District Court. Oklahoma has two separate courts of last resort, the Supreme Court and the Court of Criminal Appeals. The Court of Civil Appeals hears appeals assigned to the court from the Supreme Court. The District Court is divided into 26 judicial districts, each of which is comprised of one or more counties. To facilitate the trial and disposition of cases each district court maintains the following dockets: a civil docket, a criminal docket, a traffic docket, a probate docket, a juvenile and family relations docket, and a small claims docket; however, depending on the district, it may also maintain a business docket and/or a drug court docket. *Cf.* OKLA. STAT. TIT. 20 § 91.2 (2008).

C) **Alternative dispute resolution.** Oklahoma's alternative dispute resolution ("ADR") methods are governed by OKLA. STAT. TIT. 12 §§ 1801-1881 (2008). In general, state statutes and Supreme Court Rules make ADR programs optional by agreement between both parties. OKLA. STAT. TIT. 12 § 1804, 1823; OKLA. SUP. CT. R. 1.251(f).

1) **Mandatory arbitration.** Oklahoma does not have a system of mandatory arbitration. However, where a party asserts an agreement to arbitrate, the Provisions of OKLA. STAT. TIT. 12 §§1851-1881 apply to enforce and govern the arbitration.

2) **Mediation.** Mediation programs are governed by OKLA. STAT. TIT. 12 §§ 1821-1840.

Service of Summons

A) **Person.** Service of Summons upon a person is governed by OKLA. STAT. TIT. 12 § 2004 (C)(1)(c) (2008). Service on a person includes: (1) personal service; and (2) substituted

service, which is leaving a copy of the summons and petition at the defendant's residence with a person residing there who is 15 years or older or by delivering a copy to an agent authorized to receive service. The person who accepts service should be informed of the contents of the summons. A copy of the summons should also be mailed to defendant at that address.

1) **Infants.** If the person is an infant who is less than 15 years of age, service is good by serving the infant's parents or guardian; if the person is an incompetent person, service is good by serving the person personally and upon the person's guardian. *Id*. at § 2004(C)(1)(c)(2).

B) **Corporations.** Service of Summons upon a domestic or foreign corporation, partnerships, or other unincorporated associations is governed by OKLA. STAT. TIT. 12 § 2004(C)(1)(c)(3). Personal jurisdiction is acquired by serving the summons and petition to a corporate officer, a managing or general agent, or to any other agent authorized by statute. If service is done on a statutory agent, the defendant must also be served by mail.

1) **Secretary of State.** If in person or mail service on a domestic or foreign corporation is unsuccessful, service may be made by mailing the summons and petition to the Secretary of State. *Id*. at § 2004(C)(4)

C) **Mail.** Service of summons by mail is governed by OKLA. STAT. TIT. 12 § 2004(C)(2). A person authorized to serve a summons may mail the summons and petition with return receipt requested and delivery restricted to addressee at the address of the defendant. A default judgment will not be entered in a case involving mailed service unless the record contains a return receipt showing acceptance or a returned envelope showing refusal of service.

D) **Publication.** Service of summons by publication is governed by OKLA. STAT. TIT. 12 § 2004(C)(3). Service may be made by publication after giving notice to the court that with due diligence service cannot be made upon the defendant by any other method.

E) **Waiver.** Waiver of service is governed by OKLA. STAT. TIT. 12 § 2004(C)(5). A plaintiff may notify a defendant of an action and request that the defendant waive service of summons. An acknowledgment on the back of the summons or the voluntary appearance of a defendant is equivalent to service.

F) OKLA. STAT. TIT. 12 § 2004(E) provides the general basis for jurisdiction.

1) A "catch-all" provision allows Oklahoma courts to have jurisdiction on any basis permissible under the United States Constitution or the Oklahoma Constitution. *Id*. at (F)

Statutes of Limitations

A) **Construction.** OKLA. STAT. tit. 12 § 109 (2008):

> The statute of limitations for an alleged deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property, for injury to property, real or personal, arising out of any such deficiency, or for injury to the person or for wrongful death arising out of any such deficiency, is 10 (ten) years from the date of substantial completion or improvement.

B) **Contracts.** The statute of limitations for oral contracts is three (3) years. OKLA. STAT. tit. 12 § 95 (2008). The statute of limitations for written contracts is five (5) years. *Id.*

C) **Contribution.** Generally, the statute of limitations for a contribution claim is two (2) years from the date the judgment creating the obligation is rendered. *Id.* However, pursuant to OKLA. STAT. tit. 12 § 832(A) (2008), an action for contribution may be brought before the right of contribution accrues.

D) **Employment.** An action for discrimination in employment on the basis of handicap must be filed within two (2) years of filing of a charge with the Oklahoma Human Rights Commission. OKLA. STAT. tit. 25 § 1901 (2008).

1) **ADA.** A claim filed under the Americans with Disabilities Act must be filed within ninety (90) days of the Equal Employment Opportunity Commission's right to sue letter.

E) **Fraud.** The statue of limitations on a claim of fraud is two (2) years from the date of discovery of the fraud. OKLA. STAT. tit. 12 § 95.

F) **Government entities.** The Oklahoma Government Tort Claims Act sets forth the procedure for filing suit against Oklahoma state entities. OKLA. STAT. tit. 51 § 151, *et seq*. (2008). Notice of any claim against the government or political subdivision within one (1) year of the loss. OKLA. STAT. tit. 51 § 156 (2008).

1) If the government denies a claim (denial is presumed if no response is given within ninety (90) days of notice of claim) an action must be commenced within 180 days. 51 OKLA. STAT. § 157.

G) **Indemnity.** On a written contract for indemnity the statute of limitations is five (5) years. OKLA. STAT. tit. 12 § 95.

H) **Personal injury.** The statute of limitations on a claim for personal injury is two (2) years. OKLA. STAT. tit. 12 § 95.

I) **Professional liability.** The statute of limitations on a claim for professional liability is two (2) years from the date of known injury or the date the plaintiff knew or should have known of the negligence. OKLA. STAT. tit. 12 § 95.

J) **Property damage.** The statute of limitations on a claim for damage to property is two (2) years. OKLA. STAT. tit. 12 § 95.

K) **Tolling.** The statute of limitations for injury to a minor is tolled until one (1) year after the minor reaches the age of majority. OKLA. STAT. tit. 12 § 96.

L) **Wrongful death.** An action for wrongful death must be commenced within two (2) years. OKLA. STAT. tit. 12 § 1053 (2008).

Statutes of Repose

The statute of repose for a construction action, construction products liability and construction wrongful death is ten (10) years from the date of substantial completion or improvement. OKLA. STAT. tit. 12 § 109 (2008).

Venue

A) **Affordable Health Care Act.** The venue of actions brought pursuant to the Affordable Access to Health Care Act is proper in any county

> where the cause of action or any portion thereof arose; in any county in which any of the defendants reside, or in the case of a corporation, in a county in which it is situated or has its principal office or place of business; or in any county where a codefendant of such corporation may be sued.

OKLA. STAT. tit. 12 § 130 (2008).

B) **Various causes of action.** Venue is proper for the following causes in the county in which the subject of the action is situated:

> a. for the recovery of real property, or of any estate, or interest therein, or the determination in any form of any such right or interest,
>
> b. for the partition of real property,
>
> c. for the sale of real property under a mortgage, lien, or other encumbrance or charge, and
>
> d. to quiet title, to establish a trust in, remove a cloud on, set aside a conveyance of, or to enforce or set aside an agreement to convey real property. . . .

OKLA. STAT. tit. 12 § 131 (2008).

C) **Land, crops, and improvements.** For all damages to land, crops, or improvements, venue is proper in the county where the damage occurred. OKLA. STAT. tit. 12 § 131.

D) **Divided tracts.** Venue for real property which is an entire tract but is situated in two (2) or more counties, or if it consists of separate tracts but is situated in two or more counties, is in any county in which any tract, or part thereof, is situated. However, if the action is for the recovery or possession thereof, and the property is an entire tract situated in two or more counties, an action to recover possession thereof may be brought in either

county. If the real property consists of separate tracts in different counties, the possession of such tracts must be recovered by separate actions brought in the counties where such tracts are situated. OKLA. STAT. tit. 12 § 132 (2008).

E) **Recovery of fines.** OKLA. STAT. tit. 12 § 133 (2008):

> In action to recover of a fine, forfeiture or penalty imposed by statute, except when imposed for an offense committed on a river or other stream of water, road or other place which is the boundary of two or more counties, the cause of action shall be deemed to have arisen in each of said counties and may be brought in any county bordering on such river, watercourse, road or other place, and opposite to the place where the offense was committed.

F) **Public officer.** Venue is proper in an "action against a public officer for an act done by him in virtue, or under color, of his office, or for neglect of his official duties where the cause of action arose. OKLA. STAT. tit. 12 § 133.

G) **Bond.** Venue is proper in action on the "official bond or undertaking of a public officer" where the cause of action arose. OKLA. STAT. tit. 12 § 133.

H) **Corporations.** Actions against domestic corporations may be brought in the county in

> which it is situated, or has its principal office or place of business, or in which any of the principal officers thereof may reside, or be summoned, or in the county where the cause of action or some part thereof arose, or in any county where a codefendant of such corporation created by the laws of this state may properly be sued.

OKLA. STAT. tit. 12 § 134 (2008).

I) **Transportation companies.** Actions against any transportation or transmission company may be brought in the county

> where any person resides upon whom service of summons is authorized, or in the county where the cause of action, or some part thereof arose; or, in any county through which or into which the lines of road or any part of the structure of such company may be or passes; and the plaintiff may elect in which county he will bring the action.

OKLA. STAT. tit. 12 § 135 (2008).

J) **Foreign corporation.** An action against a foreign corporation or non-resident may be brought in any county in which there may be

> property of or debts owing to the defendant, or where the defendant may be found, or in any county where a codefendant may properly be sued. If the defendant is a foreign insurance company the action may be brought in any county where the cause of action or any part thereof arose, where the plaintiff resides or where such company has an agent.

OKLA. STAT. tit. 12 § 137 (2008).

NEGLIGENCE

Comparative Fault/Contributory Negligence

A) **Contributory Negligence.** In Oklahoma, a plaintiff must prove negligence by a preponderance of the evidence. Contributory negligence is defined as a plaintiff's act or omission amounting to want of ordinary care which is the proximate cause of the injury when the defendant was also negligent. *Sloan v. Anderson*, 18 P.2d 274 (Okla. 1932). In Oklahoma, the trial court must instruct a jury on all issues that are raised in the pleadings and supported by evidence. *Nail by and through Nail v. Oklahoma Child's Mem. Hosp.*, 710 P.2d 755, 758 (Okla. 1985); *see also Taliaferro v. Shahsavari*, 2006 OK 96, 154 P.3d at 1247. Under the theory of comparative negligence, a Plaintiff is barred from recovery if Plaintiff's negligence is greater then fifty percent (50%) and a Plaintiff can only collect if his negligence is fifty percent (50%) or less.

B) **Comparative fault.** Oklahoma courts follow a modified comparative fault scheme. *Smith v. Jenkins*, 873 P.2d 1044 (Okla. 1994). A defendant has the right to assert comparative negligence and negate damages when a plaintiff's negligence is greater than fifty percent (50%). A plaintiff can collect damages when he or she is fifty percent (50%) negligent or less. *Id.* If the facts of a case are such that there is more than one party that may be responsible for an accident, then comparative negligence allocates the responsibility for such an accident amongst the parties, dictating who will receive compensation for any losses suffered and the amount of compensation.

Exclusive Remedy – Workers' Compensation Protection

In Oklahoma, workers' compensation protections are governed by the Oklahoma Workers' Compensation Act. The Act allows the Court to have exclusive jurisdiction to determine claims for compensation, the liability for employers and insurers, and any right asserted under the Act. OKLA. STAT. tit. 85, § 4 (2008). The Act allows the Workers' Compensation Court to ensure an injured employee, employer and insurers fair and timely procedures for the informal and formal resolution of disputes.

A) **"Arising out of and in the course of employment."** In order for a claim to be compensable under the Act, an employee must allege that he sustained an accidental injury which "arises out of" and "in the course and scope of" the employee's employment. OKLA. STAT. tit. 85, § 13(a).

1) **"Arising out of."** The term "arises out of" refers to a causal connection between the injury and the risks incident to the employee's employment. *Thomas v. Keith Hensel Optical Labs,* 653 P.2d 201 (Okla. 1982).

2) **"In the course and scope of."** The term "in the course and scope of" refers to the time, place and circumstances under which the injury is sustained. *Id.*

3) **Time.** Time refers to an injury suffered by an employee during work hours. Time can be before or after regular working hours. *See American Management Systems, Inc. v. Burns*, 903 P.2d 288 (Okla. 1995).

B) **Exceptions.** Not every injury connected to and/or related to work falls under the umbrella of the exclusive remedy provision of the Act. There are injuries which are expressly excluded from the provisions of the Act, to include the following:

1) **Third parties.** "If [an employee] is injured or killed by the negligence or wrong of another not in the same employ, such injured worker shall, before any suit or claim under the Workers' Compensation Act, elect whether to take compensation under the Act, or to pursue his remedy against the third party." OKLA. STAT. tit. 85, § 44.

2) **Failure to secure.** An employee has a common law action under the penalty provision of OKLA. STAT. tit. 85, § 12 against an employer who fails to secure compensation in the manner prescribed under OKLA. STAT. tit. 85, § 61.

3) **Willful injury.** There are certain exceptions of the Act, found in OKLA. STAT. tit. 85, § 11, which is based on an employee's willful injury to self or another, failure to use a guard or protection furnished against the accident, substance abuse or horseplay.

4) **Non-accidental injuries.** Non-accidental injuries which the employer knew was certain or substantially certain to result from the employer's conduct are exempt. See *Parret v. UNICCO Service Company*, 127 P.3d 572 (Okla. 2005).

5) **Failure to pay.** OKLA. STAT. tit. 85, § 12 does not bar a common law tort action against a workers' compensation insurance carrier who will not pay an injured employee's award of compensation pursuant to a Workers' Compensation Court Order. See *Sizemore v. Continental Casualty Company*, 140 P.3d 247 (Okla. 2006).

6) **Willful injuries.** In some cases, "an employee who has been willfully injured by his employer may have a common law action for damages." *Robers v. Barclay*, 1962 OK 38, 369 P.2d 808, 809. The Act was designed provide an exclusive remedy for accidental injuries sustained during the course and scope of a employee's employment and was not designed to shield an employer from willful, intentional or violent conduct. *Thompson v. Madison Machinery Co.*, 684 P.2d 565 (Okla. Civ. App. 1984). The Oklahoma Supreme Court has found that

> the intent in willful and wanton misconduct is not an intent to cause the injury, it is an intent to do an act or failure to do an act in reckless disregard of the consequences an under such a circumstance that a reasonable man would know or have reason to know, that such conduct would be likely to result in a substantial harm to another.

Graham v. Keutchel, 847 P.2d 342 (Okla. 1993).

Substantial certainty test. In *Parret v. UNICCO Service Company*, the Supreme Court adopted the "substantial certainty" test. 127 P.3d 572 (Okla. 2005). The Court found that

> [i]n order for an employer's conduct to amount to an intentional tort, the employer's conduct must have desired to bring about the worker's injury, or acted with knowledge that such an injury was substantially certain, not merely likely, to result from the employer's conduct. Under the second part of the standard, the employer's conduct must have intended the act that caused the injury with knowledge that the injury was substantially certain to follow. The issue is not merely whether the injury was substantially certain to occur, but whether the employer knew it was substantially certain to occur. The employer' subjective appreciation of the substantial certainty of injury must be demonstrated. In most cases, however, it will be necessary to demonstrate the employer's subjective realization by circumstantial evidence. Thus, an employer's knowledge may be inferred from the employer's conduct and all the surrounding circumstances.

Id.

7) **Bad faith.** The Oklahoma Supreme Court in *Sizemore v. Continental Casualty Company,* held that a workers' compensation insurance carrier has a duty to deal fairly and act in good faith in paying an award, and the violation of this duty gives rise to a tort action. 140 P.3d 247 (Okla. 2006). The Court found that the penalty provisions in OKLA. STAT. tit. 85, § 42 were not intended to be the exclusive remedy for an insurance carrier's failure to pay an award. *Id.* The Court noted that the provision in § 42 gives incentive for prompt payment of an Order but does not provide a remedy for refusal to pay an Order. *Id.* As such, an injured employee has a common law tort action against a workers' compensation insurance carrier who does not pay an injured employee's award of compensation pursuant to a Workers' Compensation Court Order. *Id.*

Indemnification

A) Under OKLA. STAT. tit. 15, § 421 indemnity is defined as "a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person." "Indemnity is a specialized form of contract by which one person agrees to compensate another for loss or damage caused by the conduct of one of the parties (to the agreement) or of some other person." *Willie v. Geico Cas. Co.*, 2 P. 3d 888 (Okla. 2000). "The general rule of indemnity is that one without fault, who is forced to pay on behalf of another, is entitled to indemnification." *National Union Fire Ins. Co. v. A.A.R. Western Skyways, Inc.*, 784 P.2d 52, 54 (Okla. 1989). There are two types of indemnity, one which arises out of an express contractual agreement, and the other implied vicarious liability.

B) **Vicarious indemnity.** Vicarious liability arises in a situation where an employer is sued for the negligent conduct of an employee. "Noncontractual or equitable indemnity is similar to common-law contribution; one who is only constructively or vicariously obligated to pay damages because of another's tortuous conduct may recover the sum paid from the tortfeasor." *National Union Fire*, 784 P.2d at 54 (citations omitted).

C) **Contractual indemnity.** Indemnification clauses not favored, but they are enforceable when made "at arm's length without disparity of bargaining power and intent of the parties is manifestly plain and unequivocal." *See e.g., Colorado Mill & Elevator Co. v. Chicago,* 382 F. 2d 834 (10th Cir. 1967) (internal quotations omitted).

> To be enforceable, an agreement to indemnifying a party against his own negligence must meet three conditions: [1] the parties must express their intent to exculpate in unequivocally clear language; [2] the agreement must result from an arm's-length transaction between parties of equal bargaining power; and [3] the exculpation must not violate public policy.

Kinkead v. Western Atlas Intern., Inc., 894 P.2d 1123, 1127 (Okla. App. 1993) (citations omitted).

D) **Recovery of costs, expenses and attorney fees.** Under Oklahoma law, an indemnitee may ordinarily "recover its attorney's fees incurred in defending against the indemnified liability, but only so far as those expenses were incurred in good faith and in the exercise of reasonable judgment." *U.S. v. Hardage,* 985 F. 2d 1427 (10th Cir. 1993) (citing 15 Okla. Stat § 427 (1966)).

E) **Anti-indemnification statue.** Indemnity against an unlawful act is void. OKLA. STAT. tit. 85, § 422 (2008).

F) **Perfection of an Indemnity Clause.** Under Oklahoma law, the individual seeking indemnification has the burden of proof to establish the validity and knowledge of the indemnity clause by the party from whom indemnification is sought. According to Oklahoma Jurisprudence, one who is required either by law or contract to protect another from liability is

> bound by the result of the litigation to which such other is a party, provided the former had notice of such litigation and an opportunity to control its proceedings; and a judgment against a party indemnified is conclusive in a suit against the indemnitor only as to the facts therein established.

Missouri, K & T RY. Co. v. Ellis et al., 189 P. 363 (Okla. 1920). If the person indemnifying does not have "reasonable notice" of the action of proceedings against the person seeking indemnification, or is not allowed to control its defenses, then "…judgment against the latter is only presumptive evidence against the former." *Greene v. Circle Ins. Co.,* 557 P.2d 422, 423-424 (Okla. 1976). However, if the indemnitor has notice of the claim and refuses to defend, the indemnitee only has to show potential liability instead of actual liability. *Id.*

G) **Settlement.** "As a general rule, a party is entitled to indemnity where it settles a claim rather than taking it to judgment when it shows the indemnitor was legally liable and the settlement was reasonable and in good faith." *Caterpillar Inc. v. Trinity Industries, Inc.,* 134 P.3d 881, 885 (Okla. Civ. App. 2005).

Joint and Several Liability

A) **Contribution.** Under OKLA. STAT. tit. 12, § 832(A) (2008) contribution involves joint and several liability, where "two or more individuals become jointly or severally liable in tort for the same injury to person or for the same wrongful death." Contribution functions like reimbursement from non-paying parties. "This right of contribution exists only in favor of a tort-feasor who has paid more than the pro-rata share of the liability; the amount of total recovery is limited to the amount paid by the tort-feasor in excess of their pro-rata share." 12 OKLA. STAT. § 832(B). Furthermore, "[t]here is no right of contribution in favor of any tort-feasor who intentionally contributed to the injury or the wrongful death." OKLA. STAT. tit. 12, § 832(C). Moreover, joint liability means that two or more parties may share the accountability, or liability, for a tort. Several liability means one person's liability for a tort is separate and distinct from another person's liability, so the Plaintiff can sue one person without suing the others.

B) **Actions accruing after November 1, 2004.** The liability for damages caused by two or more tort-feasors is several only and a joint tortfeasor is liable only for the amount of damages allocated to that tortfeasor. However, if the plaintiff proves the defendant is more than 50% responsible for the plaintiff's injuries or the plaintiff proves the defendant acted willfully or wantonly or with reckless disregard and proximately caused the plaintiff's injuries, then joint and several liability applies and one tortfeasor can be liable for the entire sum. OKLA. STAT. tit. 23, § 15 (2008). This section does not indicate whether the Plaintiff must be free from negligence for several liability to apply.

C) **Actions accruing before November 1, 2004.** The plaintiff may choose from which tortfeasor to collect judgment (if more than one tortfeasor), provided both tortfeasors are negligent and the plaintiff is free from negligence. *Boyles v Oklahoma Natural Gas,* 619 P.2d 613 (Okla. 1980).

D) **Contributory negligence.** If the plaintiff has some percentage of contributory negligence, then joint tort-feasors are only responsible for their respective percentage, and the recovery will be diminished in proportion to the plaintiff's contributory negligence. *Laubach v. Morgan,* 588 P.2d 1071 (Okla. 1978).

E) **Contribution and indemnity.** Contribution does not impair the right of indemnity. OKLA. STAT. tit. 12, § 832(F). As a result, indemnity arises when there is a legal relationship between the parties, whereas contribution involves concurrent or joint tortfeasors, who owe the same duty of care to the injured party and have no legal relationship to one another. *National Union Fire Ins. Co. v. A.A.R. Western Skyways, Inc.*, 784 P.2d 52, 55 (Okla. 1989). The Supreme Court of Oklahoma has noted, that 12 OKLA. STAT. § 832 "…does not create a right of indemnity where none had previously

existed." *Id.* Further the Court stated, "…Oklahoma case law has always premised this right of indemnity on the understanding that a legal relationship exists between the parties." *Id.* at 54.

Strict Liability

A) **Ultrahazardous activity.** Oklahoma recognizes the common law principle that an individual who conducts an ultrahazardous or abnormally dangerous activity is strictly liable for injuries and damages directly caused by that individual's actions in conducting the ultrahazardous or abnormally dangerous activity. *Taylor v. Hesser*, 991 P.2d 35 (Okla. Civ. App. 1998).

1) **Restatments.** Oklahoma has adopted RESTATEMENT (SECOND) OF TORTS § 519, which explains that an individual who conducts an abnormally dangerous activity is strictly liable for the damage he or she causes, without regard to the degree of care taken by that individual. Section 519 also declares that "strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous." *Taylor*, 991 P.2d 35.

Oklahoma has also adopted RESTATEMENT (SECOND) OF TORTS § 520, which delineates the following factors that should be considered in determining whether an activity is ultrahazardous or abnormally dangerous:

> (a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes.

Taylor, 991 P.2d 35.

In Oklahoma, the decision of whether an activity is ultrahazardous or abnormally dangerous such that the actor is strictly liable for any resulting damages is made by the trial court. *See* Oklahoma Uniform Jury Instruction 13.1

B) **Manufacturers' product liability.** In Oklahoma, a seller of a product in a defective condition that is unreasonably dangerous is strictly liable for the personal injuries and property damages that are directly caused by defect in the product. *Kirkland v. General Motors Corp*., 521 P.2d 1353 (1974).

To prevail in a products liability action, a plaintiff must prove the following elements:

> First of all Plaintiff must prove that the product was the cause of the injury; the mere possibility that it might have caused the injury is not enough.
>
> Secondly, Plaintiff must prove that the defect existed in the product, if the action is against the manufacturer, at the time the product left the manufacturer's possession and control. If the action is against the retailer or supplier of the article, then the Plaintiff must prove that the article was defective at the time of sale for public use or consumption or at the time it left the retailer's possession and control.

> Thirdly, Plaintiff must prove that the defect made the article unreasonably dangerous to him or to his property as the term 'unreasonably dangerous' is above defined.

Id. (internal citations omitted).

1) **Standard.** For the product to be unreasonably dangerous, "[t]he article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *Id*.

2) "The defect on which a products liability action may be based may be a defect in the product's design or manufacture, or it may be an inadequate warning regarding the use of the product." *Holt v. Deere & Co*., 24 F.3d 1289 (10th Cir. 1994).

3) An action for strict liability under manufacturers' products liability may be brought against manufacturers of the defective product; processors, assemblers, and distributors of the defective product; and retailers of the defective product. *Fields v. Volkswagen of America, Inc.*, 555 P.2d 48.

4) **Affirmative defenses.** While the plaintiff's contributory negligence is not a defense to a product liability action, a plaintiff's abnormal use or misuse of the product is an affirmative defense.

> Generally when we speak of the defense of misuse or abnormal use of a product we are referring to cases where the method of using a product is not that which the maker intended or is a use that could not reasonably be anticipated by a manufacturer. A distinction must be made between use for an abnormal purpose and use for a proper purpose but in a careless manner (contributory negligence).

Fields, 555 P.2d 48.

Another affirmative defense in a products liability action is the voluntary assumption of the risk of a known defect. In order to establish this defense, the defendant must prove that the plaintiff was subjectively aware of the existence of the defect and resulting risk of injury. *Holt,* 24 F.3d 1289.

A manufacturer's compliance with the customs of the industry, or the state of the art, is not a complete defense to products liability; however, compliance with industry customs may be relevant to prove the feasibility of alternatives. *Smith v. Minster Mach. Co.*, 669 F.2d 628 (10th Cir. 1982).

C) **Learned intermediary.** A manufacturer of prescription drugs may be subject to strict liability for a defective and unreasonably dangerous product. However, some prescription drugs are deemed to be unavoidably unsafe in that they may cause

> certain side effects even though they have been carefully and properly manufactured . . . but they are not considered defective or unreasonably dangerous if they are accompanied by proper directions for use and adequate warnings concerning the potential side effects . . . [a] manufacturer of prescription drugs has a duty to warn only the prescribing physician, who acts as a learned intermediary between the manufacturer and the consumer because he is in the best position to evaluate the patient's needs, assess the benefits and risks of a particular therapy, and to supervise its use. [If prescription drugs

> are] properly labeled and carry the necessary instructions and warnings to fully apprise the physician of the proper procedures for use and the dangers involved, the manufacturer may reasonably assume that the physician will exercise an informed judgment in the best interest of the patient.

McKee v. Moore, 648 P.2d 21 (Okla. 1982).

1) **Exceptions.** There are two exceptions to the learned intermediary doctrine in Oklahoma. First, mass immunizations fall outside the ambit of the learned intermediary doctrine because there may not be physician-patient relationship and the drug is not administered as a prescription drug. Second, the learned intermediary doctrine will not apply when the Food and Drug Administration has issued a mandate that a warning be given directly to the consumer. *Edwards v. Basel Pharmaceuticals*, 1997 OK 22, 933 P.2d 298.

Willful and Wanton Conduct

Under Oklahoma law, actionable tortious conduct is separated into two types of conduct: (1) negligence, consisting of slight negligence, ordinary negligence, or gross negligence and (2) willful action that results in either intended or unintended harm, which is comprised of willful and wanton conduct and intentional conduct. An actor's conduct is willful and wanton if the actor was either aware, or did not care, that there was a substantial and unnecessary risk that his or her conduct would cause serious injury to others. Oklahoma Uniform Jury Instructions 9.17. In order for the conduct to be willful and wanton, it must have been unreasonable under the circumstances and there must have been a high probability that the conduct would cause serious harm to another person. "The intent in willful and wanton misconduct is not an intent to cause the injury; it is an intent to do an act-or the failure to do an act-in reckless disregard of the consequences and under such circumstances that a reasonable man would know, or have reason to know, that such conduct would be likely to result in substantial harm to another." Although a plaintiff's contributory negligence may be asserted as an affirmative defense in a negligence action, it is not a defense against willful and wanton conduct. *Graham v. Keuchel*, 1993 OK 6, 847 P.2d 342.

DISCOVERY

Electronic Discovery Rules

Electronic discovery commonly refers to the production of electronically stored information ("ESI") to the opposing side during litigation. In federal court litigation, discovery of ESI is governed by certain sections of FED. R. CIV. P. 26 (2008). Rule 26 specifically provides for the production of ESI. In Oklahoma state court litigation, the discovery rules are not as specific, but are generally broad enough to provide a mechanism for discovery of ESI. OKLA. STAT. tit. 12, § 3234 (2008) allows each party to require the opposing party to produce "documents" relevant to the litigation. Section 3234(A)(1), broadly defines the types of documents and objects that can be discovered to include "tape and video recordings, records *and other data compilations from which information can be obtained*, translated, if necessary, by respondent, through detection devices into reasonably usable form, ..." (emphasis added).

Expert Witnesses

The use of expert witnesses is governed by OKLA. STAT. tit. 12, § 3226(B)(3) (2008).

A) **Trial testimony.** Under Oklahoma law, disclosure of the identity of expert witnesses that are expected to testify at trial is not automatic as in federal court. However, each party may submit an interrogatory (written question) to any other party to the litigation asking for the name and address of each expert witness that will testify at trial. After the disclosure of the identity of each expert, the other party may take the deposition of the expert witness after giving a notice of the deposition to the expert witness and all other parties. Please note that Section 3226 requires that the expert witness be paid a "reasonable fee" for the expert's time spent in deposition.

B) **Forms of disclosure—reports required.** Each party may submit an interrogatory to any other party asking for a description of the testimony expected from each expert witness. Specifically, each party may require any other party to disclose:

1) The proposed testimony of each expert witness;

2) The facts and opinions to be discussed by the expert witness and a "summary of the grounds for each opinion;"

3) The qualifications of the expert witness, including a list of all publications authored by the expert witness in the last 10 years;

4) The compensation to be paid to the expert witness; and

5) A listing of each case in which the expert witness has testified at trial or in deposition in the last 4 years.

Additionally, section 3226(B)(3) states that "[i]f any documents are provided to such disclosed expert witnesses, the documents shall not be protected from disclosure by privilege or work product protection and they may be obtained through discovery." Thus, through the use of interrogatories and depositions, each party may discover the conclusions and general work product of each expert witness expected to testify at trial.

C) **Experts not expected to testify.** If an expert witness has been retained but is not expected to testify at trial, the facts and opinions known to the non-testifying expert are not automatically discoverable. Section 3226(B)(3)(b) provides that the facts and opinions of the non-testifying expert can be discovered by the other party only if the court finds that there are "exceptional circumstances" and the other party cannot obtain the facts and opinions by any other means.

D) **Rebuttal witnesses.** In general, the discovery rules applicable to expert witnesses also apply to rebuttal witnesses. If prior to trial one party has disclosed the identity and expected testimony of an expert witness, then case law has affirmed that the identify of

other "rebuttal witnesses" should also be disclosed prior to trial. This would then give the opposing party the opportunity to submit interrogatories or take a deposition to explore the testimony to be offered by the rebuttal witness.

Non Party Discovery

A) **Subpoenas.** The issuance of subpoenas are set out by OKLA. STAT. tit. 12, § 2004.1 (2008). A subpoena commands persons to allow the inspection of tangible things, documents, inspection of a premise, other things in their possession, custody or control, or to give testimony. Leave of court must be sought when the plaintiff seeks documentary evidence from any nonparty prior to the expiration of thirty (30) days after service of the summons and petition upon the defendant.

B) **Failure to obey.** The failure to obey a properly executed subpoena without adequate excuse may be deemed a contempt of court as prescribed by OKLA. STAT. tit. 12, § 2004.1(E).

C) **Issuance.** The issuance of subpoenas by mail is complete upon mailing. Service by commercial carrier is complete upon delivery to the commercial carrier, and service by electronic means is complete upon transmission. However, if the party serving the subpoena is notified that the copy or paper served was not received by the party served, then service is not adequate. OKLA. STAT. tit. 12, § 2005(B) (2008).

D) **Time requirements.** OKLA. STAT. tit. 12, § 2004.1(B)(1) requires that if the subpoena commands the production of documents, things, or the inspection of the premise from a nonparty before trial and does not require attendance of a witness, the subpoena shall state a specific date for inspection or viewing that is at least seven (7) days after that date of issuance of the subpoena, and copies of the subpoena, are served on the witness and all parties. The subpoena must contain the wording, "In order to allow objections to the production of documents and things to be filed, you should not produce them until the date specified in this subpoena, if an objection is filed, or until the court rules on the objection."

E) **Objections.** Any party may file an objection within fourteen (14) days after service of the subpoena, or prior to fourteen (14) days after production of material is designated. OKLA. STAT. tit. 12, § 2004.1(C)(2)(b).

F) **State subpoenas.** When subpoenas are issued on behalf of a state department, board, commission, or legislative committee, fees and mileage shall be paid to the witness at the conclusion of the testimony out of funds that are appropriated to the state department, board, commission, or legislative committee. OKLA. STAT. tit. 12, § 2004.1(B)(2).

G) **Undue burdens.** OKLA. STAT. tit. 12, § 2004.1(C)(1) states, "a party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena." There is a duty that requires the party issuing the subpoena to pay any undue expenses associated with

complying with the subpoena, because it is not the duty of nonparties to subsidize the cost of litigation. *Young v Macy*, 21 P.3d 44 (Okla. 2001).

Privileges

Only those privileges that are identified in the Oklahoma Statutes, the Oklahoma Constitution, or rules promulgated by the Supreme Court (generally found in case law), are recognized. OKLA. STAT. tit. 12, § 2501 (2008) sets forth:

> Except as otherwise provided by constitution, statute or rules promulgated by the Supreme Court, no person has a privilege to:
>
> 1. Refuse to be a witness;
>
> 2. Refuse to disclose any matter;
>
> 3. Refuse to produce any object or record; or
>
> 4. Prevent another from being a witness or disclosing any matter or producing any object or record.

A) **Attorney-client privilege.** Attorney-client privilege belongs to the client, not the lawyer. *In re Application of the Oklahoma Bar Association to Amend the Oklahoma Rules of Professional Conduct and to Amend Rule 1.4 of the Rules Governing Disciplinary Proceedings*, 171 P.3d 780 (Okla. 2007).

OKLA. STAT. tit. 12, § 2502 (2008) defines the roles in an attorney-client relationship and it establishes which types of communicates are privileged. It reads:

> A. As used in this section:
>
> 1. An "attorney" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation;
>
> 2. A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who consults an attorney with a view towards obtaining legal services or is rendered professional legal services by an attorney;
>
> 3. A "representative of an attorney" is one employed by the attorney to assist the attorney in the rendition of professional legal services;
>
> 4. A "representative of the client" is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client; and
>
> 5. A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

B. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

1. Between the client or a representative of the client and the client's attorney or a representative of the attorney;

2. Between the attorney and a representative of the attorney;

3. By the client or a representative of the client or the client's attorney or a representative of the attorney to an attorney or a representative of an attorney representing another party in a pending action and concerning a matter of common interest therein;

4. Between representatives of the client or between the client and a representative of the client; or

5. Among attorneys and their representatives representing the same client.

C. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the attorney or the attorney's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

D. There is no privilege under this rule:

1. If the services of the attorney were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

2. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

3. As to a communication relevant to an issue of breach of duty by the attorney to the client or by the client to the attorney;

4. As to a communication necessary for an attorney to defend in a legal proceeding an accusation that the attorney assisted the client in criminal or fraudulent conduct;

5. As to a communication relevant to an issue concerning an attested document to which the attorney is an attesting witness;

6. As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to an attorney retained or consulted in common, when offered in an action between or among any of the clients; or

7. As to a communication between a public officer or agency and its attorney unless the communication concerns a pending investigation, claim or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation or proceeding in the public interest.

B) **Statements**. In addition to statements made in the context of a privileged attorney-client communication, certain other statements generally are protected from disclosure.

1) **Physician-patient statements.** Under the Oklahoma law,

> a patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental or emotional condition, including alcohol or drug addiction, among the patient, the patient's physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

OKLA. STAT. tit. 12, § 2503(B) (2008).

2) **Spousal privilege.** Oklahoma recognizes privileges for statements made to one's spouse, including the right to prevent one's spouse from testifying as to any confidential communication between the accused and the spouse. OKLA. STAT. tit. 12, § 2504 (2008).

3) **Statements to clergy.** A religious privilege is recognized in OKLA. STAT. tit. 12, § 2505 (2008), which protects statements made to a cleric acting in his professional capacity.

4) **Others.** Statutory protection exists for statements made by a "deaf or hard-of-hearing person" to an interpreter, OKLA. STAT. tit. 12, § 2503.1 (2008); for statements made to a journalist that are related to "the source of published or unpublished information obtained in the gathering, receiving or processing of information for any medium of communication to the public," OKLA. STAT. tit. 12, § 2506 (2008); OKLA. STAT. tit. 12, § 2507 (2008).

C) **Work product privilege**. The mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation, are protected against disclosure. OKLA. STAT. tit. 12, § 3226(B)(2) (2008). In order to invoke the protection of the work product privilege, one must show that the materials sought to be protected were prepared "in anticipation of litigation . . . ." *Hall v. Goodwin,* 775 P.2d 291, 294 (Okla. 1989).

D) **Self critical analysis.** Oklahoma does not appear to recognize the so-called "self critical analysis" privilege *per se*. However, Oklahoma does recognize that protection should be afforded to "measures taken [after an event] which, if taken previously, would have made the event less likely to occur." Evidence of subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. OKLA. STAT. tit. 12, § 2407 (2008).

E) **Other considerations**. "A person upon whom a privilege against disclosure exists waives the privilege if the person or person's predecessor voluntarily discloses or

consents to disclosure of any significant part of the privileged matter." OKLA. STAT. tit. 12, § 2511 (2008).

Requests to Admit

A) A request for admission may only be served by a party, in writing, for purposes of pending actions only. OKLA. STAT. tit. 12, § 3236(A) (2008).

B) **Leave of court.** Requests for admissions may not be served by one party upon another party without leave of the court before service of the summons and petition. OKLA. STAT. tit. 12, § 3236(A).

C) **Requirements.** OKLA. STAT. tit. 12, § 3236(A) lists the requirements for request for admissions. The number of admissions is limited to thirty (30) for each party, unless authorized by the court. Both parties, with a written stipulation, can increase the number of admissions allowed. The request for admissions are assumed admitted unless the party which the admissions are directed serves answers or an objection.

D) **Effect of admission.** When a matter is admitted it is conclusively established unless the court on motion allows the amendment or withdrawal of the admission. OKLA. STAT. tit. 12, § 3236(B).

E) **Effect of refusal.** If any party refuses a request to admit, the genuineness of any documents, or the truth of any matters of fact, the party that proves the genuineness of the matter or document may apply to the court for an order requiring the other party to pay reasonable expenses incurred in making the proof. This would include reasonable attorney's fees. The court could find there were good reasons for the refusal to admit no attorney fees shall be levied.

Unique State Issues

Oklahoma's Open Records Act, OKLA. STAT. tit. 51, § 24A.1, *et seq*. (2008) addresses discovery of documents and information kept by a public entity. Among other protected documents, records of what transpired during meetings of a public body lawfully closed to the public (such as during executive sessions) is privileged from disclosure. OKLA. STAT. tit. 51, § 24A.5.1(b). Personal information within driver records is also privileged. OKLA. STAT. tit. 51, § 24A.5.1(c). Personnel records which relate to internal personnel investigations including examination and selection material for employment, hiring, appointment, promotion, demotion, discipline, or resignation are confidential, but not necessarily privileged. OKLA. STAT. tit. 51, § 24A.7(A)(1).

EVIDENCE, PROOFS & TRIAL ISSUES

Accident Reconstruction

An accident reconstructionist is an expert that investigates accidents such as automobile traffic collisions, plane crashes, and crane failures to determine the cause of the accident. In Oklahoma, the testimony of an expert is governed by OKLA. STAT. tit. 12, § 2702 (2008) (testimony by experts); OKLA. STAT. tit. 12, § 2703 (2008) (bases of opinion testimony by expert); OKLA. STAT. tit. 12, § 2704 (2008) (opinion on ultimate issue); and OKLA. STAT. tit. 12, § 2705 (2008) (disclosure of facts or data underlying expert opinion).

A) **Admissibility.** The test for admissibility of testimony or other evidence by an accident reconstructionist is usefulness, will the expert testimony assist the trier of fact. *Woods v Fruehauf Trailer Corp.,* 765 P.2d 770 (Okla. 1988).

Where the reliability of expert witness' testimony cannot be taken for granted or the expert evidence is novel, the court will consider four non-exhaustive factors to determine admissibility:

> (1) Can, or has, the expert's method been tested; (2) Has the expert's method been subjected to peer review and publication; (3) Is there a known or potential rate of error and the existence of standards controlling the method; and (4) Is there widespread acceptance of the method within the legal community.

Christian v Gray, 65 P.3d 591 (Okla. 2003).

Appeals

A) **When permitted.** OKLA. STAT. tit. 12, §§ 951-953 (2008) sets forward the appellate process. Section 951 states that an appeal can be made to the District Court once a judgment or final order is rendered by any tribunal board or officer exercising judicial functions and inferior in jurisdiction to the District Court. Proceedings for review of a judgment to the District Court must be commenced by filing a petition in the District Court of a county where the inferior tribunal board or officer rendered the original order within thirty days of the date that a copy of that judgment or final order is mailed to the parties as shown by the certificate of mailing attached to the final order.

Section 952 establishes the appellate jurisdiction of the Supreme Court. The Supreme Court has the right to reverse, vacate or modify judgments of the District Court for errors appearing on the record or based on the merits of the action. In order for the Supreme Court to reverse, vacate or modify a District Court order, the order must be either a final order or an order that discharges, vacates, modifies or refuses to vacate or modify a provisional remedy which affects the substantial rights of a party or any other order which affects the substantial part of the merits of the controversy where the trial judge certifies that an immediate appeal that materially advance the ultimate termination of the litigation. However, the Supreme Court can use discretion in determining whether or not to hear the appeal.

B) **Timing**. Appeals to the District Court must be filed within thirty days of the date of a copy of the judgment or final order is mailed to the appellate as shown by the certificate of mailing attached to the final order or judgment. OKLA. STAT. tit. 12, § 990.2 (2008) sets forth the timing guidelines for appeals to the Supreme Court. Under § 990.2(A), it is set forth that post trial motions for a new trial or judgment notwithstanding the verdict or to correct, modify, vacate or reconsider a judgment, decree or final order other than a motion that only involves cost or attorney's fees must be filed ten days after the judgment or final order is filed with the court clerk. The unsuccessful party on appeal may then appeal the order disposing of the motion within thirty days after that date that the order was filed.

Section 990(A) establishes that an appeal to the Supreme Court by the filing of a Petition for Error must be commenced by filing the Petition for Error with the Clerk of the Supreme Court within thirty day of the judgment decree or appealable order.

Biomechanical Testimony

Testimony by a biomechanical engineer is not admissible unless it is reliable. If the proposed evidence is novel, the court will consider four non-exhaustive factors to determine admissibility:

> (1) Can, or has, the expert's method been tested; (2) Has the expert's method been subjected to peer review and publication; (3) Is there a known or potential rate of error and the existence of standards controlling the method; and (4) Is there widespread acceptance of the method within the legal community.

Christian v Gray, 65 P.3d 591 (Okla. 2003).

Collateral Source Rule

Traditionally, a wrongdoer who commits a tort is liable for the whole loss caused by his actions. If the injured party receives compensation from a collateral source, wholly independent of and not in behalf of the wrongdoer, this compensation does not lessen the damages recoverable from the wrongdoer. *Denco Bus Lines v. Hargis*, 229 P.2d 560 (Okla. 1951); *Porter v. Manes*, 347 P.2d 210 (Okla. 1959). Under the collateral source rule, evidence of compensation from a collateral source may not be admitted. *Porter*, 347 P.2d 210.

This rule has required the exclusion of evidence about health insurance and workers' compensation benefits. See, respectively, *Nitzel v. Jackson*, 879 P.2d 1222 (Okla. 1994); *Witt v. Martin*, 672 P.2d 312, 316 (Okla. Civ. App. 1983).

In 2003, the legislature modified the collateral source rule in regard to medical liability cases. OKLA. STAT. tit. 12, § 1-1708.1D allows evidence of payment of medical bills unless the court finds that such payments are subject to subrogation or other right of recovery.

Convictions

A) **Impeachment.** OKLA. STAT. tit. 12, § 2609 (2008) allows evidence of prior convictions for one purpose: to attack the credibility of a witness. Evidence that a witness has been convicted of a crime may be admitted for purposes of impeachment pursuant to 12 OKLA. STAT. § 2609 if the court determines that the probative value of admitting the evidence outweighs its prejudicial effect and the crime was punishable by death or imprisonment in excess of one (1) year. If the conviction involved dishonesty or false statement, the conviction may be admitted regardless of the punishment. *See Banks v State*, 810 P.2d 1286 (Okla. 1991).

B) **Time limits.** Evidence of a conviction under Section 2609 is not admissible if a period of more than ten (10) years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is later, to the date of the witness's testimony. The 10 year period began to run from the date the witness was released from prison until the time at which the witness' credibility would need to be questioned, when the witness testified. *Three M Investments, Inc. v Ahrend Co.*, 827 P.2d 1324 (Okla. 1992).

C) **Municipal ordinance.** "[A] conviction for violation of a municipal ordinance is not a crime and may not be used to impeach the credibility of the witness, unless that violation constitutes an offense under the State law." *Mayes v State*, 560 P.2d 574 (Okla. 1976).

D) **Factors.** In ruling on the admissibility of prior convictions to impeach a witness, the court must consider: (1) their impeachment value; (2) the time of the convictions and the defendant's subsequent history; (3) the similarity between the prior and charged crimes; (4) the importance of the defendant's testimony; and (5) whether credibility is central to the trial. *Hooks v State*, 19 P.3d 294 (Okla. 2001).

E) **Inadmissibility.** Evidence of a conviction is not admissible if

> the conviction has been the subject of a pardon, annulment, certificate of rehabilitation or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one (1) year; or the conviction has been the subject of a pardon, annulment or other equivalent procedure based on a finding of innocence.

OKLA. STAT. tit. 12, § 2609(C)(1)-(2).

F) **Juvenile adjudications.** Evidence of juvenile adjudications is not admissible. However, the court in a criminal case may

> allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issues of guilt or innocence.

OKLA. STAT. tit. 12, § 2609(D).

G) **Evidence of the pendency of an appeal from conviction is admissible.** OKLA. STAT. tit. 12 § 2609(E). *Newcomb v State*, 213 P. 900 (Okla. 1923).

Day in the Life Video

A) A Day in the Life Video is demonstrative evidence usually offered to portray the impact of an injury on the daily activities of an individual. Authenticity or identification is a condition precedent to admission of A Day in the Life Video. OKLA. STAT. tit. 12, § 2901 (2008).

B) **Damages.** A Day in the Life Video is admissible on the issue of damages. *See Lee v Volkswagen of America, Inc.*, 688 P.2d 1283 (Okla. 1984). A Day in the Life Video may be excluded if the relevance is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise. OKLA. STAT. tit. 12, § 2403 (2008).

Dead Man's Statute

The Oklahoma Dead Man's Act has been repealed. The guide for establishing the competency of a witness is now OKLA. STAT. tit. 12, § 2601 (2008), which states that every person is competent to be a witness except as otherwise provided in the code. In order to determine whether or not a witness is competent to testify is a mixed question of law and fact to be determined by the trial court upon examination of the witness as cited in *See Harris v. State*, 261 P.2d 909 (1953).

Medical Bills

Generally, a plaintiff's medical bills are admissible as damages evidence regardless if the bills were paid partially or in full by an insurance company. Evidence of the existence of a collateral source or the receipt of benefits will be deemed inadmissible. Otherwise, the jury may use the evidence improperly to deny the plaintiff the full recovery to which he is entitled. OKLA. STAT. tit. 12, § 309 (2008) sets forth who should be considered a competent witness to identify medical bills at the time of trial in civil cases involving injury, disease or disability.

Offers of Judgment

The Oklahoma Legislature has recognized the benefits of Offers of Judgment as a means of expediting resolution of certain disputed matters:

> after a civil action is brought for the recovery of money as the result of a claim for personal injury, wrongful death, or pursuant to Chapter 21 of Title 25 or Section 5 of Title 85 of the Oklahoma Statutes, any defendant may file with the court, at any time more than ten (10) days prior to trial, an offer of judgment for a sum certain to any plaintiff with respect to the action or any claim or claims asserted in the action.

* * *

> B.1. After a civil action is brought for the recovery of money or property in an action other than for personal injury, wrongful death or pursuant to Chapter 21 of Title 25 or Section 5 of Title 85 of the Oklahoma Statutes, any defendant may file with the court, at any time more than ten (10) days prior to trial, an offer of judgment for a sum certain to any plaintiff with respect to the action or any claim or claims asserted in the action. An offer of judgment shall be deemed to include any costs and attorney fees otherwise recoverable unless it expressly provides otherwise.
>
> * * *
>
> D. Evidence of an offer of judgment or a counteroffer of judgment shall not be admissible in any action or proceeding for any purpose except in proceedings to enforce a settlement arising out of an offer of judgment or counteroffer of judgment or to determine reasonable attorneys fees and reasonable litigation costs under this section.

OKLA. STAT. tit. 12, § 1101.1 (2008).

Offers of Proof

Oklahoma recognizes the objection and offer of proof, OKLA. STAT. tit. 12, § 2104 (2008), as traditional techniques to establish the predicate for rulings on the admissibility of evidence in the trial court and for future assignments of error on rulings during appellate proceedings. When the trial court has excluded the evidence, the judge must be informed of the substance of the evidence by an offer of proof to enable the judge to rule on the objections. *Woods v. Fruehauf Trailer Corporation*, 765 P.2d 770 (Okla. 1988); *Simmons v. State*, 748 P.2d 996 (Okla. Crim. App. 1988). Statutory provisions allow that if the substance of the evidence is apparent within the context of the questions asked, a specific formal offer of proof may not be required to permit the party to request review of the ruling sustaining the objection.

Relationship to the Federal Rules of Evidence

The Oklahoma Evidence Code, Title 12 of the Oklahoma Statutes, as enacted by the State Legislature, bares some similarity to the Federal Rules of Evidence and in many cases is substantially the same. However the Legislature has frequently engaged in wording changes in the process of enactment.

Seat Belt and Helmet Use Admissibility

A) **Seat belts.** Pursuant to OKLA. STAT. tit. 12, § 12-417 (2008), every operator and front seat passenger of a passenger car operated in the State of Oklahoma must wear a properly adjusted and fastened safety seat belt system. OKLA. STAT. tit. 47, § 12-420 (2008) provides that the use or nonuse of seat belts cannot be evidence in any civil suit.

1) **Application.** In *Comer v. Preferred Risk Mutual Ins. Co.*, 991 P.2d 1006 (Okla. 1999), parents brought a civil action against the church and the driver of the vehicle when their teenage daughter was killed while riding in a church van without a seat belt. The Supreme Court was clear when it held the use or nonuse of a seat belt is not admissible into evidence in a civil action. "The Legislature in

clear, explicit and mandatory language prohibits the introduction of seat belt evidence in any civil lawsuit." *Id*. at 1014. The Court goes on to note that "unlike other states with broader statutes, § 12-420 is tightly drafted… it leaves no room for statutory construction." *Id*.

2) **Product liability exception.** It appears that the only instance in which evidence of the use or nonuse of child restraint systems or seat belts would be admissible is in a products liability action. In both *Bishop v. Takata Corp.*, 12 P.3d 459 (Okla. 2000), and *Clark v. Mazda Motor Corp.*, 68 P.3d 207 (Okla. 2003), the Supreme Court held that evidence regarding the use or nonuse of a seatbelt was admissible. To hold otherwise would severely limit the defense of such products liability claims by the corporation sued. However, the court, in both cases, makes it clear that such evidence is not admissible in other civil actions. "Section 12-420 expressly clarifies that the sole legal sanction for the failure to wear a seat belt is the fine imposed by the Act, and that a person will not be penalized in a civil proceeding, by connotations of fault, for choosing to refrain from wearing a seat belt." *Bishop*, 12 P.3d at 464. "In negligence cases, both parties are affected alike by the § 12-420 evidentiary bar. Neither is able to take advantage of the statute that requires seat belts to be fastened. The party plaintiff stands barred from showing compliance (by use its use of restraints) and the defendant from demonstrating the plaintiff's nonobservance." *Clark*, P.3d at 211.

B) **Helmets.** Pursuant to OKLA. STAT. tit. 12, § 12-609 (2008), no person under eighteen years of age shall operate or ride upon any motorcycle unless such person is properly wearing a crash helmet of a type which complies with standards established by 49 C.F.R. 571.218 (2008).

There is no Oklahoma statute directly stating whether the use or non-use of a helmet is admissible as evidence in a civil action. Moreover, it appears that Oklahoma Courts have yet to hear this issue.

Spoliation

A) Spoliation of evidence occurs when "evidence relevant to prospective civil litigation is destroyed, adversely affecting the ability of a litigant to prove his or her claim." *Manpower, Inc. v. Brawdy*, 62 P.3d 391, 392 (Okla. Civ. App. 2002), (citing *Patel v. OMH Medical Center, Inc.* 987 P.2d 1185, 1202 (Okla. 1999)). "If applicable, destruction of evidence without a satisfactory explanation gives rise to an inference unfavorable to the spoliator." *Manpower*, 62 P.3d at 392 (citing *Brown v. Hamid*, 856 S.W.2d 51, 57 (Mo. 1993)).

B) **Adverse presumption.** Oklahoma law has long recognized the "existence of an adverse presumption that follows 'the destruction or spoliation' of evidence." *Beverly v. Wal-Mart Stores, Inc.*, 3 P.3d 163 (Okla. Civ. App. 2000) (citing *Harrill v. Penn*, 273 P. 235 (Okla. 1927). "The presumption varies in weight with the nature of the conduct complained of… in a particular case, and likewise varies with the importance of the

evidence in question." *Beverly*, 3 P.3d 163. The court went on to note that this presumption arises "if it is shown that a person attempted to … suppress or destroy evidence." *Id*. The presumption, however, only arises in cases of "willful destruction [or] suppression." *Id*.

C) **Independent tort.** The Oklahoma Supreme Court has not recognized spoliation of evidence or a *prima facie* tort for acts constituting spoliation of evidence as actionable. *Patel,* 987 P.2d at 1202. "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." *Id*.

Subsequent Remedial Measures

A) **Standard.** Evidence of subsequent remedial measures, those measures taken "after an event, that if taken previously would have made the event less likely to occur, is not admissible to prove negligence or culpable conduct in connection with the event." OKLA. STAT. tit. 12, § 2407 (2008). Section 2407 does not, however, "require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment." *Id*.

B) **Application.** In discussing situations in which relevant evidence may be admissible in some instances and not admissible in others, the Oklahoma Supreme Court in *Hightower v. Kansas City Southern Railway Co.*, 70 P.3d 835, 853 n.32 (Okla. 2003), stated that "evidence of subsequent remedial measures is inadmissible to prove negligence or culpable conduct, but admissible when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment."

In *Juvenal v. Okeene Public Schools*, the Oklahoma Supreme Court held that OKLA. STAT. tit. 12 § 2407 "prohibits proof of repairs made subsequent to an accident if offered to prove negligence in connection with the accident" in regard to a child who fell from a school roof after touching an exposed electric wire. 878 P.2d 1026 (Okla. 1994) (superceded by statute on other grounds as stated in *Minie v. Hudson*, 934 P.2d 1082 (Okla. 1997). The Court further held that it was within the discretion of the trial court to exclude evidence of photographs of the electrical service taken after the fall to prove the electric service was raised after the subject incident. *Id*.

Use of Photographs

A) **Admissibility.** In general, photographs are admissible if they are relevant and their probative value is not outweighed by their prejudicial effect. OKLA. STAT. tit. 12, §§ 2402-03; *Lampkin v. State*, 808 P.2d 694 (Okla. 1991) (citing *Lamb v. State*, 767 P.2d 887 (Okla. 1988)). Admitting photographs into evidence is within the "sound discretion of the trial court and will be disturbed only upon a showing of abuse of discretion." *Id*. Although parties may argue that photographs are too gruesome and should not be

admissible, the "test for admissibility of photographs is not whether they are gruesome or inflammatory, but whether [their] probative value is substantially outweighed by the danger of unfair prejudice." *Lockett v. State*, 53 P.3d 418, 425 (Okla. 2002).

The Oklahoma Supreme Court has announced the well established rule that photographs are admissible into evidence

> when it is proven that they correctly show the objects surrounding the scene of the accident and that conditions are the same when the photographs were taken as when the accident occurred, but may not be used as a 'stage setting' for the purpose of re-enacting the accident or demonstrating a theory of how the accident occurred."

Montgomery Ward & Co. v. Curtis, 188 P.2d 199, 202-203 (Okla. 1947).

DAMAGES

Caps on Damages

A) **Personal injury.** There is no statutory limits on amount of recovery in personal injury actions.

B) **Medical malpractice.**

1) **Pregnancy and emergency care.** There is a "hard cap" of $300,000.00 on noneconomic damages in medical liability cases involving services for pregnancy, labor and delivery, and emergency care. This cap does not apply if the judge holds finds by clear and convincing evidence, before sending the case to the jury, that the defendant committed negligence. OKLA. STAT. tit. 63, § 1-1708.1F (2008).

2) **Other medical malpractice.** There is also a $300,000.00 cap on nonecomomic damages in medical malpractice cases other than those listed above unless the verdict is equal to at least one and on-half times the defendant's settlement offer, or if the judge and at least nine of the jurors make certain findings. Neither of these "caps" applies in wrongful death cases. OKLA. STAT. tit. 63, § 1-1708.1F-1(A).

3) **Noneconomic damages.** Noneconomic damages are defined as "only mental pain and suffering, inconvenience, mental anguish, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation." OKLA. STAT. tit. 63, § 1-1708.1F-1(C). The amount of the cap is to be adjusted annually for positive increases in the cost of living. OKLA. STAT. tit. 63, § 1-1708.1F-1(B).

Calculation of Damages

A) **Wrongful death of an adult.** Pursuant to OKLA. STAT. tit. 12, § 1053 (2008), the following are recoverable in action for the wrongful death of an adult:

1) Medical and burial expenses;
2) Loss of consortium and grief of surviving spouse,;
3) Mental pain and anguish suffered by decedent;
4) Pecuniary loss to survivors;
5) Grief and loss of companionship of children and parents of decedent; and
6) Punitive damages against the person proximately causing the wrongful death.

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B) **Wrongful death of a child.** Pursuant to OKLA. STAT. tit. 12, § 1055 (2008), the following are recoverable in action for the wrongful death of a child:

1) Medical and burial expenses;
2) Loss anticipate services and support;
3) Loss of companionship and love of the child;
4) Destruction of the parent child relationship; and
5) Loss of monies expended by parents or guardian in support, maintenance and education of such minor child in such amount as may be just.

C) **Economic and noneconomic damages.** Damages in the area of personal injury are generally divided up into two categories: economic damages, such as lost earnings, and non-economic damages, such as pain and suffering. Compensatory damages are the sum of economic and non-economic damages, designed to make the plaintiff whole. *See Lamfu v. GuideOne Ins. Co.*, 131 P.3d 712 (Okla. Civ. App. 2005). The *Oklahoma Uniform Jury Instructions* is also an effective resource that contains model jury instructions on damages.

Available Items of Personal Injury Damages

A) **Past medical bills.** A plaintiff may recover damages from past medical bills. Damages recovered by the plaintiff from the defendant are not decreased by the amount the plaintiff received from insurance proceeds, where the defendant did not contribute to the payment of the insurance premiums. Some courts, however, permit the Defendant to present the amount of the actual change for the medical treatment to be presented to the jury. *See generally Reed v. Scott*, 820 P.2d 445 (Okla. 1991).

B) **Future medical bills.** A plaintiff may recover damages for future medical bills. Plaintiff is entitled to recover as compensatory damages the reasonable expense of necessary medical care resulting from defendants' negligence, if proven. These damages will be converted to their present cash value (the sum of money needed now), which, when added to what that sum may reasonably be expected to earn in the future, will equal. *See generally Reed*, 820 P.2d 445.

C) **Loss of spousal consortium.** A spouse may receive damages for injury to a spouse in an amount of money which will reasonably and fairly compensate for the value of the loss of consortium that was sustained, and for the value of the loss of consortium that is reasonably certain to sustain in the future. *See generally Littlefield v. State Farm Fire & Casualty Ins. Co.*, 857 P.2d 65 (Okla. 1993).

D) **Loss of parental consortium.** A child may sue for the loss of parental consortium as a result of injury to the parent. Parental consortium is defined as the love, companionship, and guidance given by a parent to a minor child. Elements include (1) parent is entitled to recover damages from defendant for his injuries, (2) parent's injuries are permanent, (3) plaintiff was a minor or incapacitated dependant child of parent at the time the parent sustained injuries, (4) as a result of the injuries sustained b y the parent, the minor child sustained a loss of parental consortium. *See generally Heston v. People's Elec. Coop.*, 824 P.2d 1137 (Okla. 1992).

E) **Lost income, wages, earnings.** An injured party may recover for lost time even though he was paid his regular wage during incapacitation. Damages must be proven by evidence. *See generally Myers v. Lashley*, 44 P.3d 553 (Okla. 2002)

F) **Mental pain and suffering.** "[N]o recovery can be had for mental suffering which is not produced by, connected with or the result of physical suffering or injury to the person enduring the mental anguish." *Ellington v. Coca-Cola Bottling Co. of Tulsa,* 717 P.2d 109 (Okla. 1986).

G) **Hedonic damages.** Hedonic damages lawsuits arise when a plaintiff seeks compensation for "the loss of enjoyment of life." Oklahoma law does not recognize hedonic damages as a subject of recovery separate from (or even to be expressed separately from) those elements of damages, which are set forth under Oklahoma law either by statute or common law. *Anderson v. Hale,* 2002 WL 32026151 (W.D. Okla.)

Lost Opportunity Doctrine or Last Clear Chance Doctrine

To establish liability under doctrine it must be shown that the injured party was in a place of danger, that he was seen in such place of danger by the person charged with having injured him, and that the person who saw him thereafter fails to use ordinary care to avoid injuring him. *Kurn v. Casey*, 141 P.2d 1001 (Okla. 1943).

Mitigation

There is a common law duty for an injured party to exercise ordinary care to mitigate their damages. "The victim of a tort or contract violation may not stand idly by and permit preventable loss to increase. He has duty to use all reasonable means to arrest the loss. *Tulsa Municipal Airport Trust v. National Gypsum Co*., 551 P.2d 304 (Okla.Civ.App. 1976). In the case of personal injuries, the injured party must take ordinary care to obtain proper treatment. *Booth Tank Co. v. Symes,* 394 P.2d 493 (Okla. 1964)

Punitive Damages

A) **When may be brought.** Punitive damages may be brought in the following circumstances:

1) Defendant is guilty of reckless disregard for rights of others or insurer recklessly disregarded its duty to deal fairly and in good faith. The amount is limited to $100,000.00 or the amount of actual damages, whichever is greater, *see Lierly v. Tidewater Petroleum Corp.*, 139 P.3d 897 (Okla. 2006);

2) Defendant or insurer acted intentionally and with malice. The jury may award $500,000.00 or twice the amount of actual damages or the increased financial benefit derived by the defendant or insurer as a direct result of the conduct causing injury to the plaintiff and other persons or entities, whichever is greatest, *see id.*;

3) Defendant or insurer acted intentionally and with malice and the judge finds beyond a reasonable doubt that the defendant or insurer engaged in conduct life-threatening to humans, the jury may award any amount. *Badillo v. Mid Century Ins. Co.*, 121 P.3d 1080 (Okla. 2005).

B) **Burden of proof.** The burden of proof for punitive damages is clear and convincing evidence except as to engaging in conduct life-threatening to humans, which requires a finding beyond a reasonable doubt. *Badillo*, 121 P.3d 1080.

C) **Insurability of punitive damages.** An insurer may not indemnify the insured for punitive damages awarded against the insured unless awarded for the acts of one for whom the insured is legally responsible under the doctrine of respondeat superior. *Dayton-Hudson Corp. v. American Mutual Liab. Ins. Co.*, 621 P.2d 1155 (Okla. 1980).

Recovery and Pre- and Post-Judgment Interest

A) **Prejudgment interest.** "The rate shall be in effect until the end of the calendar year in which the suit resulting in judgment was filed or until the date judgment is filed, whichever first occurs." OKLA. STAT. tit. 12, § 727 (2008). OKLA. STAT. tit. 12, § 727.1 (2008):

> Beginning on January 1 of the next succeeding calendar year until the end of that calendar year, or until the date the judgment is filed, whichever first occurs, and for each succeeding calendar year thereafter, the prejudgment interest rate shall be the rate in effect for judgments rendered during each calendar year . . . . After the computation of all prejudgment interest has been completed, the total amount of prejudgment interest shall be added to the earlier of [1] the verdict is accepted by the trial court, or [2] the date the judgment is filed with the court clerk.

B) **Post-judgment interest.** OKLA. STAT. tit. 12, § 727:

> The postjudgment interest authorized by subsection A or subsection B of this section shall accrue from the earlier of the date the judgment is rendered as expressly stated in the judgment, or the date the judgment is filed with the court clerk, and shall initially accrue at the rate in effect for the calendar year during which the judgment is rendered until the end of the calendar year in which the judgment was rendered, or until the judgment is paid, whichever first occurs. Beginning on the first day of January of the next succeeding calendar year until the end of that calendar year, or until the judgment is paid, whichever first occurs, the judgment, together with postjudgment interest previously accrued, shall bear interest at the rate in effect for judgments rendered during that calendar year. For each succeeding calendar year, or part of a calendar year, during which a judgment remains unpaid, the judgment, together with postjudgment interest previously accrued, shall bear interest at the rate in effect for judgments rendered during that calendar year. A separate computation using the interest rate in effect for judgments shall be made for each calendar year, or part of a calendar year, during which the judgment remains unpaid in order to determine the total amount of interest for which the judgment debtor is liable. The postjudgment interest rate for each calendar year or part of a calendar year a judgment remains unpaid shall be multiplied by the original amount of the judgment, including any prejudgment interest, together with postjudgment interest previously accrued. Interest shall accrue on a judgment until the judgment is satisfied or released.

C) **Interest provisions.** If a contract provides an interest rate, that rate must be noted and used as long as the rate in the contract is not greater than the statutory rate. OKLA. STAT. tit. 12, §§ 727(D), 727.1(D)

D) **Insurers.** If an insurance company decides to vigorously defend the case and try it before a jury and post-judgment interest is incurred which, when combined with the adverse verdict, exceeds policy limits, then an insurance company in that position is liable to pay the prejudgment interest in excess of any policy limits. This same logic should apply for post trial interest in that if an insurance carrier makes the decision to appeal in the event of an adverse verdict, as opposed to paying the verdict, that company will have to bear the consequences of that decision and would owe post-judgment interest in excess of policy limits. *McDonald v. Schreiner,* 28 P.3d 574 (Okla. 2001)

E) **Interest on judgments rendered on or after January 1, 2000 and before January 1, 2005.** Both prejudgment and post-judgment interest shall be determined using a rate equal to the average United States Treasury Bill rate of the preceding calendar year as certified to the Administrative Director of the Courts by the State Treasurer on the first regular business day in January of each year, plus four percentage points. OKLA. STAT. tit. 12, § 727(I).

F) **Pre- and post-judgment interest against state or political subdivision**. Judgments against state or political subdivisions bear interest at a rate prescribed pursuant to §§ 727 or 727.1, but not to exceed ten percent. No judgment against the state or political subdivision shall exceed the total amount of liability pursuant to the Governmental Tort Claims Act. OKLA. STAT. tit. 12, § 727(B).

G) **Interest on judgments rendered on or after January 1, 2005.** Both prejudgment and post-judgment interest shall be determined using a rate equal to the average United States Treasury Bill rate of the preceding calendar year as certified to the Administrative

Director of the Courts by the State Treasurer on the first regular business day in January of each year, plus two percentage points. OKLA. STAT. tit. 12, § 727.1(I).

H) **Interest rates.** Judgments are no longer limited to having a ten percent rate for purposes of determining a prejudgment or postjudgment interest. According to OKLA. STAT. tit. 12, § 727(K), these are the interest rates from 1999 through 2008:

1999: 8.87%
2000: 8.73%
2001: 9.95%
2002: 7.48%
2003: 5.63%
2004: 5.01%
2005: 7.25%
2006: 9.25%
2007: 10.25%
2008: 9.25%

Recovery of Attorneys Fees

A) **Attorneys fees are recoverable as follows:**

1) to the prevailing party in any civil action to recover for labor or services rendered, or on an open account, a statement of account, account stated, note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, OKLA. STAT. tit. 12, § 936 (2008);

2) to the prevailing party in any civil action to enforce payment of or to collect upon a check, draft or similar bill of exchange drawn on a bank or otherwise, payment upon which said instrument has been refused because of insufficient funds or no account, upon proof during the trial that prior to the filing of the petition in the action demand for payment of the check, draft or similar bill of exchange had been made upon the defendant by registered or certified mail not less than ten (10) days prior to the filing of such suit, OKLA. STAT. tit. 12, § 937 (2008);

3) to prevailing plaintiff in any civil action to recover damages for the negligent or willful injury to property and any other incidental costs related to such action, OKLA. STAT. tit. 12, § 940 (2008);

4) to a plaintiff if verdict for Plaintiff is more than offered by Defendant in an Offer of Judgment or to Defendant if verdict for Plaintiff is less than Defendant's Offer of Judgment, *id.*; and

5) by the prevailing party in a first party action against insurer except in cases involving uninsured motorist coverage. OKLA. STAT. tit. 12, § 3629 (2008). The prevailing party is the insurer in cases where the judgment does not exceed the

written offer of settlement. In all other judgments the insured shall be the prevailing party.

Settlement Involving Minors

A) The trial court must approve the settlement of a case involving a child or incompetent person. A contract with a minor would, in general, be subject to disaffirmance. OKLA. STAT. tit. 15, § 19 (2008). However, a settlement agreement made with a guardian ad litem or next friend on behalf of a minor or incompetent will be binding, if it has been approved by the trial court with appropriate jurisdiction over the case. *Lambert v. Hill*, 73 P.2d 124, 127 (Okla. 1937) ("[T]he guardian ad litem may compromise or enter into agreements of satisfaction concerning the rights of the minor litigant with the consent and approval of the court having jurisdiction of the litigation.").

B) **Trusts.** If the settlement of a minor's claim exceeds $1,000.00 over a sufficient sum to cover medical bills and attorney fees, the settlement proceeds must be "deposited, by order of the trial court in one of a number of designated federally insured financial institutions or invested by a bank or trust company having trust powers under federal or state law." OKLA. STAT. tit. 12, § 83 (2008). Until the minor becomes eighteen years old, the trial court must supervise the disbursement of the settlement proceeds. *Id.*

C) **Review.** The trial court has a responsibility to conduct a hearing and review the settlement agreement in order to make a judicial determination that a proposed settlement is reasonable and in the best interests of the minor or incompetent person. *See Harjo v. Johnston*, 104 P.2d 985, 991 (1940).

Taxation of costs

A) Costs may be awarded in the following types of actions and circumstances.

1) **Motions.** The court in its discretion may award the "costs of motions, continuances, amendments and the like OKLA. STAT. tit. 12, § 927 (2008).

2) **Prevailing plaintiff.** Costs "shall be allowed of course to the plaintiff, upon a judgment in his favor, in actions for the recovery of money only, or for the recovery of specific real or personal property," unless otherwise provided by law. OKLA. STAT. tit. 12, § 928 (2008).

3) **Prevailing defendant.** Costs also "shall be allowed of course to any defendant upon a judgment in his favor" in actions for the recovery of money only, or for the recovery of specific real or personal property." OKLA. STAT. tit. 12, § 929 (2008).

4) **Equitable actions.** In actions other than for damages or for the recovery of specific property, the court may in its discretion "award and tax costs, and

apportion [them] between the parties on the same or adverse sides," as is "right and equitable." OKLA. STAT. tit. 12, § 930 (2008).

5) **Property.** Costs are recoverable in actions to recover damages for the negligent or willful injury to property. OKLA. STAT. tit. 12, § 940(A) (2008).

6) **Foreclosures.** Costs are recoverable in foreclosure actions. OKLA. STAT. tit. 12, § 686 (2008).

7) **Garnishments.** Costs are recoverable in garnishment actions. OKLA. STAT. tit. 12, § 1190(B) (2008).

8) **Mandamus.** Costs are recoverable in mandamus actions. OKLA. STAT. tit. 12, § 1460 (2008).

9) **Partitions.** Costs are recoverable in actions to effect a partition of real property. OKLA. STAT. tit. 12, § 1515 (2008).

10) **Disclaimed property.** Costs are recoverable in where the defendant disclaims having any title or interest in the land or other property which is the subject matter of the action. OKLA. STAT. tit. 12, § 926 (2008).

11) **Felon's damages.** Costs are recoverable in actions against a convicted felon for uninsured damages suffered by the victim. OKLA. STAT. tit. 12, § 142B (2008).

12) **Informer.** Costs are recoverable when an informer, under a penal statute, dismisses or fails in his or her suit or prosecution. OKLA. STAT. tit. 22, § 1274 (2008).

13) **Personal injury.** Costs are recoverable in actions for damages for personal injury:

> In any action for damages for personal injury except injury resulting in death, or in any action for damages to personal rights the court shall, subsequent to adjudication on the merits and upon motion of the prevailing party, determine whether a claim or defense asserted in the action by a nonprevailing party was asserted in bad faith, was not well grounded in fact, or was unwarranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

OKLA. STAT. tit. 23, § 103 (2008). *See also* OKLA. STAT. tit. 15, § 761.1(A) (2008) (applying same rule in the context of a private action for damages brought under the Oklahoma Consumer Protection Act).

14) **Condemnation.** Costs are recoverable in Condemnation proceedings. OKLA. STAT. tit. 27, § (2008).

15) **Inverse condemnation.** Costs are recoverable in inverse condemnation proceedings. OKLA. STAT. tit. 27, § 12 (2008); OKLA. STAT. tit. 28, § 152.3 (2008).

16) **Insurance claims.** Costs are recoverable in actions to recover on an unpaid claim of loss under an insurance contract. OKLA. STAT. tit. 36, § 3629(B) (2008).

17) **Lien.** Costs are recoverable in actions to determine a lien. OKLA. STAT. tit. 42, § 177 (2008); OKLA. STAT. tit. 42 § 207(E) (2008).

18) **Production Revenue Standards Act.** Costs are recoverable in proceedings brought to remedy a violation of the Production Revenue Standards Act. OKLA. STAT. tit. 52, § 570.14(C) (2008).

19) **Natural Gas Market Sharing Act.** Costs are recoverable in proceedings brought to remedy a violation of the Natural Gas Market Sharing Act. OKLA. STAT. tit. 52, § § 581.10(A) (2008).

20) **Oklahoma Governmental Tort Claims Act.** Costs are recoverable in actions brought under the Oklahoma Governmental Tort Claims Act. *Allison v. City of El Reno*, 894 P.2d 1133 (Okla. Ct. App. 1994).

21) **Criminal defendants.** Certain costs may also be taxed against a convicted criminal defendant. A convicted defendant who is financially able to pay such costs but refuses or neglects to do so may be imprisoned for such nonpayment. OKLA. STAT. tit. 22, § 983(A) (2008); OKLA. STAT. tit. 28, § 101 (2008).

22) **Juveniles.** Costs are recoverable in juvenile proceedings. OKLA. STAT. tit. 10, § 7302-5.4(D) (2008).

23) **State inmates.** Costs are recoverable in actions by an inmate in a state penal institution against the State of Oklahoma, a state agency, or political subdivision. OKLA. STAT. tit. 57, § 566(C) (2008).

Unique Damages Issues

A) **Negligent infliction of emotional distress.** "No recovery can be had for mental suffering which is not produced by, connected with or the result of physical suffering or injury to the person enduring the mental anguish." *Ellington v Coca-Cola Botling Co. of Tulsa,* 717 P.2d 109 (Okl. 1986) (internal quotations omitted). To recover for emotional distress a plaintiff must establish: (1) a duty on the part of the defendant to protect the plaintiff from injury; (2) a failure of the defendant to perform the duty; (3) a physical injury to the plaintiff resulting from the failure. *Kraszewski v. Baptist Medical*, 916 P.2d 241 (Okla. 1996).

B) **Intentional infliction of emotional distress.** Intentional infliction of emotional distress is an independent tort. To recover, a plaintiff must prove that: (1) defendant's actions in the setting in which they occurred were so extreme and outrageous as to go beyond all possible bounds of decency and would be considered atrocious and utterly intolerable in a civilized society; and (2) defendant intentionally or recklessly caused severe emotional distress to plaintiff beyond that which a reasonable person could be expected to endure. *Id.*

C) **Bystander theory of emotional distress.**

1) **Negligent infliction.** Oklahoma does not recognize a bystander theory of recovery for negligent infliction of emotional distress.

2) **Intentional infliction.** To recover for intentional infliction of emotional distress resulting from injury to another person: (1) plaintiff muse be directly, physically involved in the incident; (2) plaintiff must have been damaged from viewing injury to another; (3) family or other close personal relationship must exist between plaintiff and the injured party. *Kraszewski*, 916 P.2d 241.

D) **Hospital or physician lien.** If a hospital lien has been filed with the County Clerk, and the hospital or physician has sent notice of filing the lien to the alleged liable party, the any damages awarded must be set off to pay the applicable lien filed. Action of payment of lien must be brought within one year after the hospital/physician becomes aware of final judgment, settlement, or compromise of the claim asserted. OKLA. STAT. tit. 42, § 44 (2008).