



**Oklahoma Bar Association Administration of Justice Task Force Recommendation
Adopted by the Oklahoma Bar Association Board of Governors**

H.B. 1603

WHY H.B. 1603 IS UNCONSTITUTIONAL AND SHOULD BE OPPOSED

**I. H.B. 1603 Violates Article V, § 57 of the Oklahoma Constitutions – The
“Single Subject” Requirement**

Under Okla. Const., Art. V, § 57, “Every act of the legislature shall embrace but **one subject**, which shall be clearly expressed in its title” [emphasis added]. This 232-page bill is precisely the type of “log rolling” legislation that Article V, § 57 was meant to prevent.

Although the first clause in H.B. 1603 is entitled “An act relating to civil procedure,” only 26 of the 99 sections in the bill relate to civil procedure (Title 12). Among other things, the remaining sections create or amend civil immunity laws, thereby changing the substantive tort laws of the state, abolish joint and several liability; and create damage limitations. The provisions of H.B 1603 do not relate to one subject or to each other. For example:

- Section 23 changes the method of determining membership in class actions from “optout” to “opt-in” and changes the method by which attorney fees are calculated in class actions, while section 61 abolishes the collateral source rule.
- Section 14 changes the method by which prejudgment interest is calculated and the time at which it begins to accrue, while section 57 prohibits testimony in civil and administrative proceedings by anyone involved in the quality assessment and assurance activities relating to patient safety and quality of care in health care facilities;
- Section 24 creates a new civil statute governing motions for summary judgment while section 33 amends the substantive law to eliminate joint and several liability;
- Section 37 allows evidence of failure to use a child passenger restraint system to admissible in evidence while section 39 creates a new exemption from liability for the state and political subdivisions when a school district employee uses force to control and discipline a student or when a school district employee suspends a student;

- Section 35 imposes a \$300,000 non-economic damage cap for tort victim while Sections 9 and 78 impose a “certificate of merit” requirement in cases requiring expert testimony – a requirement previously found unconstitutional by the Oklahoma Supreme Court.

Most of H.B. 1603 has little or nothing to do with the subject expressed in the primary clause of its title. If anything, the title of the bill is misleading because it gives no notice that it changes the substantive rights and obligations of the people of this State. Most of the sections of H.B. 1603 are not germane to the central stated purpose of the bill – “civil procedure.” The only thing the provisions of H.B. 1603 have in common is that they seek to strip Oklahoma citizens of their constitutional rights and seek to strip our courts – the third branch of government – of their constitutionally mandated discretion. The bill violates Art. V, § 57 and is unconstitutional.

II. The Certificate of Merit Provisions in Sections 9 and 78 Deny Injured Oklahomans their Constitutional Right to Access to the Courts.

Section 9 of the bill requires a plaintiff to file a “certificate of merit” in any case where a party is required to use a “qualified expert” to prove liability. Although seemingly neutral on its face, this requirement will most often apply to bar the claims of medical malpractice victims since they almost always require expert testimony to meet their burden of proof. Section 78 of the bill restates the “affidavit of merit” requirement with respect to product liability suits.

The requirements of these two sections are virtually indistinguishable from those stricken down by the Oklahoma Supreme Court in *Zeier v. Zimmer*, 2006 OK 98, 152 P.3d 861. The Court held in *Zeier* that such a requirement created an unconstitutional monetary barrier to the access to courts guaranteed by the Oklahoma Constitution, Art. II, § 6. The Court further held that the certificate of merit requirement, which pertained solely to medical negligence actions, was an unconstitutional “special law” prohibited by Art. V, § 46 of the Oklahoma Constitution.

The certificate of merit requirements in this bill impose the same monetary burden decried by the Court in *Zeier*. They close the courthouse doors to those financially incapable of obtaining a pre-petition expert opinion by creating a fiscal barrier so unreasonable that it eliminates the constitutional right of access to justice. The “certificate of merit” requirement in Section 78 is a special law that benefits an easily identifiable sub-class of tort defendants. For that reason, it is also unconstitutional under Art. V, § 46. of the Oklahoma Constitution.

III. The Statute of Repose and Immunity Provisions Designed to Protect Special Interests Strip Injured Oklahomans of Their Constitutional Right to a Certain Remedy, Violate the Constitutional Prohibition on Retroactively Eliminating a Cause of Action, and are Unconstitutional as Special Laws.

Section 2 of H.B. 1603 creates a 10 year “statute of limitations” for product liability actions which is measured from the date of sale of the product – not from the

date that the victim of a product defect has his or her cause of action accrue and vest. It is therefore more accurate to characterize this provision as a substantive statute of repose. Section 60 of the Act explicitly seeks to impose an 8-year statute of repose upon “any action for damages based in tort.”

Sections 2 and 60 violate Okla. Const., Art. II, § 6. They deny access to the courts and the right to a certain remedy to at least two categories of injured persons: (1) those whose causes of action accrue and vest before the effective date of the Act, and (2) those whose causes of action accrue and vest shortly before the respective 10 and 8-year cut-off periods expire.

Sections 57 and 58, 63 through 65, and 66 through 69 create new immunities for various special interests, including food manufacturers and distributors, firearms manufacturers and distributors, and those involved in quality assessment and assurance committee proceedings. Section 39 creates a new liability exemption for the state and political subdivisions when school district employees use force to control and discipline a student or suspend a student.

Some of these immunities apply to claims already in existence as of the effective date of the new immunity statute. This violates the prohibition against destroying causes of action that have already accrued. Okla. Const., Art, V, §§ 52 and 54. Other provisions explicitly immunize firearms manufacturers from liability for wrongful death, a violation of Okla. Const. Art.23, § 7.

“[E]ven the most unrestrained legislature cannot deprive a plaintiff of vested interests.” *Rivas v. Parkland Manor*, 2000 OK 68, ¶ 22, 12 P.3d 452 [citations omitted; emphasis added]. Armed with a constitutionally protected cause of action against those who injured them, plaintiffs have a vested right to a certain remedy for their injuries under Art. II, § 6. Because the civil immunity provisions in this bill retroactively strip injured plaintiffs of these constitutional rights, they are unconstitutional.

Section 41 amends the “peer review statute” to immunize all “peer review information” from discovery, and declares all such information inadmissible at trial. It provides privileges and immunities to the health care profession which are unavailable to any other class of similarly situated tort defendant while concomitantly imposing burdens upon victims of medical negligence which are not borne by any other class of tort plaintiffs. Section 41 violates Art. 5, § 46 of the Oklahoma Constitution, which provides in pertinent part that “The Legislature shall not . . . pass any local or special law . . . [r]egulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts . . .” [emphasis added]. Sections 67-70 are likely also unconstitutional under the special legislation prohibition.

V. The Noneconomic Damage Cap in Section 35 Violates the Constitutional Right to a Jury Trial and the Right to Due Process

Section 35 of the Act creates a new cap of \$300,000 on noneconomic damages in tort actions. This limit on damages violates the right to a jury trial secured by Article II, § 19 of the Oklahoma Constitution. In Oklahoma “the issue of damages in a personal injury action is left to the jury's judgment after hearing all the evidence. The judgment of the jury is subject to correction by a court *only* if the jury were activated by prejudice or guilty of abuse and passionate exercise. Before a jury verdict can be set aside as excessive, it must strike mankind, at first blush, as being beyond all measure unreasonable and show the jury to have been activated by passion, partiality, prejudice or corruption.” *Dodson v. Henderson Properties, Inc.*, 1985 OK 71, 708 P.2d 1064, 1066 (citations omitted). “Were a trial court permitted unbridled prerogative to substitute its opinion for that of a jury, it would be tantamount to a partial abrogation of the right to trial by jury.” *Id.* at 1068. The same holds true for a legislature that substitutes its judgment for that of the jury in the exercise of its function as a fact finding body. *See Lakin v. Senco Products, Inc.*, 987 P.2d 463, *op. clarified*, 987 P.2d 476 (Or. 1999) (\$500,000 cap on noneconomic damages in personal injury and wrongful death actions violates jury trial right). By imposing an arbitrary limit on the amount of damages which can be determined by the jury in tort actions, HB 1603 violates Article II, § 19 of the Oklahoma Constitution.

The cap on noneconomic damages also violates the constitutional guarantees of due process of law, Art. II, § 7, and separation of powers, Art. IV, § 1; *Best v. Taylor Machine Works*, 689 N.E.2d 1057 (Ill. 1997) (\$500,000 cap on noneconomic damages was a legislative remittitur, in violation of the separation of powers doctrine); *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 721 (Wash. 1989), *op. amended*, 780 P.2d 260 (Wash. 1989) and the right to a certain remedy, Art. II, § 6. It further violates the constitutional prohibition on special legislation. Art. V, §§ 46 & 59; *Best*, 689 N.E.2d 1057.

Numerous state supreme courts have found, and objective empirical evidence published in peer-reviewed journals by neutral scholars confirms, that caps on non-economic damages discriminate between and among tort plaintiffs and tort defendants in numerous ways. Those studies show that the most severely injured are also the most affected by non-economic damage caps. Such caps also discriminate against children, women, the elderly, minorities and low wage earners. Studies confirming the discriminatory impact of non-economic damage caps have been performed by various types of researchers, including physicians from Harvard Medical School; social scientists at the RAND Institute for Civil Justice; and a law professor at the University of Buffalo. Among other things, those studies have found the following:

- Employment income is the basis for calculating most economic damage awards. Noneconomic damage caps discriminate against injured children because children have no income upon which to base a calculation.
- On average, women earn less than do men. In general, damage caps result in injured women receiving a lesser award of compensation than would a man with the same injury.

- One of the more significant injuries a woman can suffer is harm to reproductive capacity. However, that injury does not impact her earning capacity or entitle her to recover economic damages despite the devastating emotional impact that such a loss may cause.
- Caps discriminate against retired seniors, who often suffer neglect and abuse in nursing homes and other long-term care facilities, because they also have no employment income.
- Capping non-economic damage awards also disparately impacts minorities since they have lower incomes and work life expectancies, on average, than do whites.

Our State’s constitutional guarantee of “due process,” Art. II, Section 7, has been construed as equivalent to the 14th Amendment’s “equal protection” clause. *Ross v. Peters*, 1993 OK 8, 846 P.2d 1107, 1114, n. 29. The State is barred from unreasonably treating some people worse than it does other similarly situated people. Okla. Const., Art. V, §§ 46 and 59 prohibit the State from arbitrarily treating some classes better than other similarly situated classes. These sections of the Oklahoma Constitution prohibit the state from irrationally imposing unequal burdens on some groups and groundlessly bestowing special benefits, privileges, or immunities upon others. The \$300,000 damage cap contained in Section 35 of the Act does just that.

VI. Section 11 of the Act Directly Contravenes the Constitutionally Guaranteed Discretion of the Court to Direct Juries to Make Special Findings and Impermissibly Infringes Upon the Independence of the Judiciary. Section 32 Probably Does So as Well. It May Also Violate the Right to Trial by Jury.

In an effort to eliminate the discretion of the courts mandated by the Oklahoma Constitution, Section 11 of HB 1603 **requires** judges to direct the jury to make specific findings if any party requests them. Article VII, § 15 of the Oklahoma Constitution provides: “In all jury trials the jury shall return a general verdict, and no law in force nor any law hereafter enacted, shall require the court to direct the jury to make findings of particular questions of fact, but the court may, in its discretion, direct such special findings.” Since Article VII, § 15 specifically prohibits what Section 11 seeks to require, Section 11 is facially unconstitutional.

Section 32 allows various “future damages” in tort actions to be paid out in periodic payments if those damages exceed \$100,000. All tortfeasors can pay out the future “medical, health care, or custodial services” part of a judgment, without interest, over time. Health care providers receive a special dispensation to pay “future damages other than medical, health care or custodial services” by periodic payment. This section is unconstitutional for several reasons:

First, because the entire “future payments” provision is directed at only one subclass of plaintiffs – the most severely injured who have “future damages” of more than

\$100,000, and because a portion of that section is directed at a sub-class of that sub-class – plaintiffs who are victims of medical negligence, it is the type of special law prohibited by Okla. Const., Art. 5, § 46, which provides in pertinent part that “The Legislature shall not . . . pass any local or special law . . . [r]egulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts” [emphasis added].

Second, while Section 32 does not say how the Court is to determine the amount of the “future damages” which are subject to periodic payouts, jurors cannot be required to make that determination because the use of special verdict forms cannot be required. Okla. Const., Art. VII, § 15. Nor can the Court be required to make factual determinations regarding the amount of a plaintiff’s “future damages” since that would violate the right to trial by jury guaranteed by Okla. Const., Art. II, § 19 because the amount of damages a plaintiff is due has historically been a “fact” within the exclusive province of the jury to determine. *See Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 (2001) (“the measure of actual damages suffered . . . presents a question of historical or predicative fact” which constitute “a ‘fact’ ‘tried’ by the jury.”) (internal citations omitted); *Dimick v. Scheidt*, 293 U.S. 474, 486 (1935) (plaintiff is “entitled . . . to have a jury properly determine the question of liability and the . . . assessment of damages. Both are questions of fact”); *Day v. Wadsworth*, 54 U.S. 363, 371 (1852) (amount of damages “has always been left to the discretion of the jury”).

Section 32 is an unconstitutional special law. Both Section 11 and Section 32 violate Okla. Const., Art. 7, § 15 insofar as they require judges of this state to direct juries to make special finding of fact. Moreover, any requirement which seeks to require the judges of this state to make special findings pertaining to the amount of “future damages” suffered by an injured plaintiff violates the right to trial by jury guaranteed by Okla. Const., Art. II, § 19.

VII. Section 13 Violates both the State and Federal Constitution.

Section 13 tries to condition a plaintiff’s ability to re-file and prosecute a previously dismissed case upon the payment of costs of the previously dismissed action. Twenty-seven years ago, in *Moses v. Hoebel*, 1982 OK 26, 646 P.2d 601, the Oklahoma Supreme Court held that trial courts **could not** constitutionally stay or enjoin a subsequent action until the plaintiff complied with an order requiring the payment of costs in a previously dismissed action because that type of order violated the Open-Court-of-Justice Clause of the Oklahoma Constitution, Art. 2 § 6; the Interdiction-of-Sale-of-Justice Clause in Art. 2 § 6 of the Oklahoma Constitution; and the Equal Protection Clause of the 14th Amendment to the United States Constitution.

VIII. Sections 8, 10, 16, 22 and 24 Violate the Separation of Powers Clause and Unconstitutionally Interfere with the Independence of the Judiciary.

Section 8 allows an interlocutory appeal of a decision as to whether venue is proper, mandates the standard of review on appeal, and requires the appellate court to render judgment not less than 120 days after the appeal is perfected. Section 16 restates these requirements.

The Legislature cannot constitutionally require the judiciary to determine matters before it within a specified period of time. Deciding when to hear and decide controversies before it is inherently a power reserved to the judiciary under Okla. Const., Art. IV, § 1. See *Thomas v. State ex rel. Department of Public Safety*, 1993 OK CIV APP 78, 858 P.2d 113, 115. Any attempt to legislatively dictate time limits within which the judiciary must decide a matter is:

unconstitutional and void, it being an attempt by the legislature to usurp the powers conferred upon the judicial branch of the government and to limit or abolish the judicial discretion belonging to the courts and necessary for the proper administration of justice [*Atchison, T. & S.F. Ry. v. Long*, 1926 OK 963, 251 P.486 (court syllabus)].

Section 10 creates a new law stating that the Oklahoma Uniform Jury Instructions **shall** include an instruction notifying the jury as to that part of an award which is not subject to state or federal income tax and that any amount that the jury determines to be proper compensation for personal injury or wrongful death should not be increased or decreased by income tax considerations. This section invades the power of the judiciary guaranteed by Art. IV, § 1 because “the determination of the propriety of instructions to be given and the scope of argument of counsel are exclusively powers exercised by the Judicial department of government” See *Williams v. State*, 1969 OK CR 291, 461 P.2d 997. 1001-1002.

Section 22 requires entry of a pretrial order and dictates its contents. Section 24 creates a new summary judgment statute which “supersede[s] any court rules otherwise applicable to the subject matter of this section.” This section violates the separation of powers doctrine set forth in Okla. Const., Art IV, § 1 and interfere with the judiciary’s inherent power to manage its own affairs. See *State v. Brown*, 1993 OK CIV APP 82, 853 P.2d 793, 796, stating:

[I]t is universally settled decisional law that the judiciary possesses what is called certain **inherent power** which has been broadly defined as its “exclusive authority to manage its own affairs.” It “**includes power to make, and enforce, reasonable rules for orderly procedure before courts**” and when “**the legislature acts with regard to a matter over which courts have ultimate authority, and acts in a way to deprive courts of that authority, the legislative act is an unconstitutional abridgement of the principle of separation of powers.**” [citing *Petusky v. Cannon*, 1987 OK 74, 742 P.2d 1117, 1120 and *Puckett v. Cook*, 1978 OK 108, 586 P.2d 721, 723]

“[T]he judiciary has exclusive authority to manage its own affairs.” *Petusky v. Cannon*, 1987 OK 74, 742 P.2d 1117, 1120. “Jurisdiction includes power to hear and decide a justiciable controversy . . . [and] **the power to ‘hear’ a case includes power to make, and enforce, reasonable rules for orderly procedure before courts.**” *Puckett v. Cook*, 1978 OK 108, 586 P.2d 721, 723 [citation omitted; emphasis added]. Sections 22 and 24 directly and unconstitutionally usurp the Supreme Court’s inherent power “to make and enforce reasonable rules for orderly procedure before courts.” Instead, they seek to dictate what those rules must contain and how they are to be applied. They are, therefore, “an unconstitutional abridgement of the principle of separation of powers.” *Brown*, 853 P.2d at 796. They also infringe upon the general superintending and administrative powers over all inferior courts granted the Oklahoma Supreme Court by Okla. Const., Art. VII, §§ 4 and 6. *See Eberle v. Dyer Construction Co.*, 1979 OK 49, 598 P.2d 1189, 1192 (noting that the Supreme Court’s rule making power is conferred by both statute and by Art. VII, § 6 of the Okla. Const.). These sections further infringe upon the District Court’s “unlimited original jurisdiction of all justiciable matters, except as otherwise provided” by Article VII of the Oklahoma Constitution. *See Okla. Const., Art. 7, §7.*