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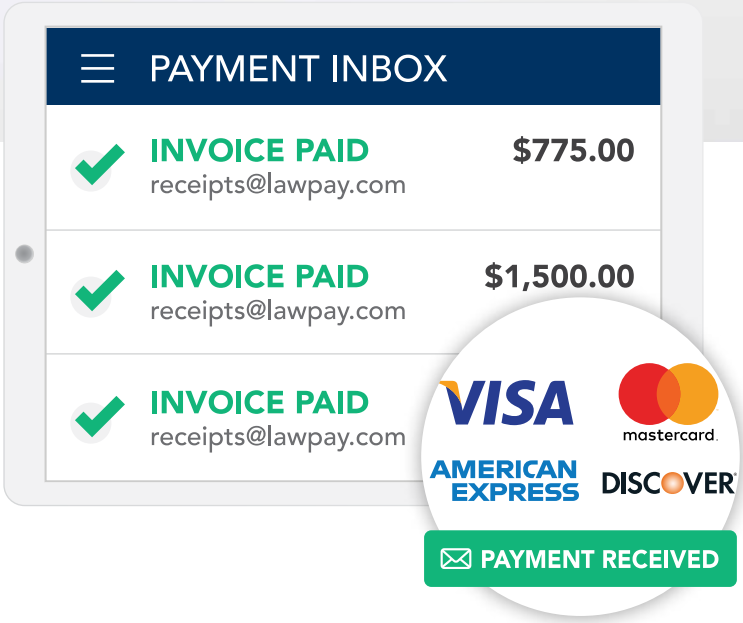

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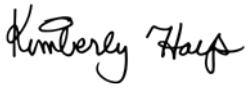
Make Yourself a Priority

THE PRACTICE OF LAW CAN BE ENERGIZING, challenging and stressful. Each day in the office we are faced with deadlines, managing client emotions and interacting with opposing counsel. At the same time we are seeking balance for our family time, outside interests and attempting to maintain our own physical and mental health. We are tethered to our phones and laptops 24/7. That can increase our stress and lead to a feeling of never getting off the "hamster wheel" of the practice of law. We accept the high-stress atmosphere as a cost of doing business in the legal profession.

Attorneys need a reminder to stop and take care of ourselves. How can we perform our best on behalf of our clients if we are not at our personal best? A good example of the importance of prioritizing yourself in order to help others can be heard during the flight safety instructions before aircraft takeoff. The flight attendants share with us the very important life lesson – take care of yourself first so you are then able to help the people around you who depend on you.

The speech is recited each time before takeoff. "If the airplane loses pressure, an oxygen mask will drop from the ceiling. Always put *your* mask on *first* before helping others." The act of putting your mask on first can take many different forms for attorneys, such as turning off the electronic devices in the evening, exercising or reaching out for help in dealing with a mental health concern.

It is an unfortunate reality that our chosen profession has a high occurrence of depression, substance abuse and anxiety. "Lawyers are 3.6 times as likely to be depressed as people in other jobs, while the landmark 2016 American Bar Association and Hazelden Betty Ford Foundation study found that 28 percent of licensed, employed lawyers suffer with depression. The study also showed that 19 percent have symptoms of anxiety and 21 percent are problem drinkers."[1]



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- The OBA offers all bar members up to six hours of free short-term, problem-focused or crisis counseling. The service is strictly confidential. For help with stress, depression or addiction, call the 24/7 Lawyers Helping Lawyers hotline at 800-364-7886 to be referred to a counselor in your area.
- If an attorney cannot afford the needed treatment, he or she may qualify for a grant from the Lawyers Helping Lawyers Foundation to help pay for treatment or medication.
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- Information regarding a lawyer is often received from the lawyer personally or from family, friends, partners or even clients. If you fear another lawyer has become impaired and you want to get confidential help to determine whether a problem exists and/or to get help for that problem, call the LHL hotline or confidentially email onelife@plexusgroupe.com.
- All calls to the LHL hotline are confidential and are handled by a counseling/mental health service, which reports numbers of those utilizing services but no names.
- LHL hosts a monthly meeting led by a LHL Committee member. The small group discussions are intended to give group leaders and participants the opportunity to ask questions, provide support and share information with fellow bar members to improve their lives – professionally and personally.

To see more information about what LHL offers, visit www.okbar.org/LHL.

The OBA LHL program offers lawyers the tools to "put on their own oxygen masks first." A special thank you to the hard-working attorney members of the Lawyers Helping Lawyers Assistance Program.

ENDNOTE

1. Dina Roth Port, "Lawyers weigh in: Why is there a depression epidemic in the profession?" *ABA Journal*, May 11, 2018.

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Dilly, Dilly and Liability, Really

The Expansion of Dram-Shop Liability to Off-Premises Consumption

By Jake Pipinich

ON OCT. 24, 2017, THE OKLAHOMA SUPREME COURT decided *Boyle v. ASAP Energy, Inc.*[1] and held that "Oklahoma recognizes a cause of action when a commercial vendor of alcohol sells alcohol to a noticeably intoxicated person for consumption off the premises…"[2] This decision significantly broadened the traditional rule for dram-shop liability first established in *Brigance v. Velvet Dove Restaurant*[3] which held that "one who sells intoxicating beverages for on the premises consumption has a duty to exercise reasonable care not to sell liquor to a noticeably intoxicated person."[4]

This change in the law could have far reaching and significant implications for owners or operators of businesses that sell alcoholic beverages for off-premises consumption. Such businesses are now potentially liable for injuries/damages to third persons who are injured post-sale. Alternatively, even absent liability for such injuries, dispositive motions, such as motions for summary judgment, will be less likely to be successful, causing such vendors significant additional exposure to litigation expense for claims that previously would have been resolved via either a motion for summary judgment or motion to dismiss.

DRAM-SHOP LIABILITY BEFORE *BOYLE V. ASAP ENERGY*

"At common law a tavern owner who furnishes alcoholic beverages to another is not civilly liable for a third person's injuries that are caused by the acts of an intoxicated patron."[5]

> Such rule is principally based upon concepts of causation that, as a matter of law, it is not the *sale* of liquor by the tavern owner, but the voluntary *consumption* by the intoxicated person, which is the proximate cause of resulting injuries, so that the tavern owner is therefore not liable for negligence in selling liquor.[6]

In 1959, the Oklahoma Legislature enacted the Oklahoma Alcoholic Beverage Control Act,[7] which repealed earlier provisions pertaining to dram-shop liability[8] and laws, or parts of laws, that conflicted with the act.[9] The new statute[10] made it illegal to "[s]ell, deliver or knowingly furnish alcoholic beverages to an intoxicated person."[11] In *Brigance*, the Oklahoma Supreme Court determined that, in light of the language of §537, "the application of the old common law rule of a tavern owner's nonliability in today's automotive society is unrealistic, inconstant with modern tort theories and is a complete anachronism within today's society."[12] In combining the general duty of reasonable care and the criminal statute, the Oklahoma Supreme Court abrogated the traditional rule and created a cause of action for dram-shop liability against a vendor for *on-premises consumption*.

After *Brigance*, the Oklahoma Supreme Court decided *Tomlinson v. Love's Country Stores, Inc.*,[13] where liability was allowed to potentially attach to *off-premises sales* where the sale was to a person under 21 years old in violation of Oklahoma law.[14] Important to the *Tomlinson* case was the fact that the petition alleged defendant "knew that the minors intended to drink the beer while driving or riding in a motor vehicle."[15] Approximately one year later, the Oklahoma

Supreme Court decided *Mansfield v. Circle K. Corp.*[16] In *Mansfield*, the court held "[t]he statutory proscription against the sale of beer to a minor is not limited to on-the-premises consumption."[17] Thus, the issue of sales to minors for off-premises consumption appeared to be settled law by 1994. However, the question remained undecided whether liability could attach to sales to an allegedly visibly intoxicated adult for off-premises consumption. In *Boyle v. ASAP Energy, Inc.*, the Oklahoma Supreme Court appears to have provided the response to that question.

HOW *BOYLE* CHANGED THE LAW

In *Boyle*, it was alleged that the defendant "consumed alcohol and caused a vehicular homicide and permanent injuries to two additional people [having] started drinking alcohol in the morning, and between 8:30 a.m. and 5:00 p.m. [having] consumed 18-21 beers, 3-4 shots of vodka, and 2 'sips of moonshine.'"[18] Apparently the defendant had drank much of the day at a golf tournament and later "drove himself to a Fast Lane convenience store in Clinton at approximately 5:17 p.m., and with a credit card bought a 9-pack of low-point Miller Lite beer."[19] Then at "approximately 11:00 p.m. and *five to six hours after* the Fast Lane sale, [defendant] was driving his vehicle, a pickup truck, and ran a four-way stop at a high rate of speed and collided with another vehicle resulting in the death of Pamela Crain and allegedly permanently injuring Ashley Haas and Shannon Keeves."[20] "Empty beer cans, allegedly Miller Lite cans, were observed on the roadway near [defendant's] truck at the scene of the collision."[21] "[Defendant's] blood was drawn at approximately 11:45 p.m., and he had a blood alcohol content of 0.29g% (0.29 gm/100 ml)."[22]

There was some ambiguity as to whether proper training or implementation of training had been provided to employees of Fast Lane relating to the sale of alcohol. "Plaintiffs' expert witness, a toxicologist, concluded 1) [Defendant's] blood alcohol content was 0.33g% (0.33 gm/100 ml) at the time of the sale and 2) [Defendant] showed gross [visible] signs of intoxication at the time of the sale."[23] The clerk who sold the beer to the defendant at Fast Lane did not have an independent recollection of the transaction.

The Oklahoma Supreme Court began its analysis of the issue presented – namely whether to extend dram-shop liability to vendors of alcohol for off-premises consumption for customers over the age of majority – with a review of a case from outside Oklahoma. In *Flores v. Exprezit! Stores 98-Georgia, LLC.*, the Georgia Supreme Court determined "[i]f a convenience store sells alcohol to such a customer, it is foreseeable that the customer will drive while intoxicated and injure an innocent third party."[24] With that interpretation, the Oklahoma Supreme Court went through the analysis it had applied in previous cases and determined that "vendor liability for selling alcohol to minors and intoxicated persons was derived from the statutory duties placed on vendors of alcohol and the sale of alcoholic beverages for profit."[25] In reversing the trial court's grant of summary judgment, the Oklahoma Supreme Court reasoned, "[w]e do not view a *Brigance* action against Fast Lane as establishing a completely new liability in Oklahoma as argued by defendant. Again, Fast Lane had a statutory duty not to sell low-point beer to an intoxicated person pursuant to a statute."[26] "[T]aken together [these statutes and cases] serve as guides for a commercial vendor of alcohol easily predicting this Court's holding that a statutory duty prohibiting sale to an intoxicated adult with its similar associated common law duty would be applied to an off-premises consumption."[27] "Thus, [w]e hold that Oklahoma recognizes a cause of action when a commercial vendor of alcohol sells alcohol to a noticeably intoxicated person for consumption off the premises."[28]

The Oklahoma Supreme Court began its analysis of the issue presented – namely whether to extend dram-shop liability to vendors of alcohol for off-premises consumption for customers over the age of majority – with a review of a case from outside Oklahoma.

CONCLUSION

While it is true that previous cases had allowed the potential for tort liability for the illegal sale of alcohol to a minor, the *Boyle v. ASAP Energy, Inc*. case is certainly an expansion of dram-shop type liability into sales to adults for off-premises consumption. Naturally, issues will emerge not only with the typical question of the appearance and demeanor of the patron – but now with the added question of whether the purchased alcohol was consumed, when it was consumed and its effect (if any) on the intoxication that caused the alleged accident.

It is of note that Justice Wyrick's dissenting opinion also indicates that the relevant statutes at issue[29] "only prohibit 'knowingly' or 'knowingly, willfully and wantonly' selling to an intoxicated person, a far narrower duty than the duty not to sell to those who are noticeably intoxicated."[30] In any event, this is at least somewhat uncharted territory for vendors and businesses on the business end of these transactions – especially in light of the recent proliferation of curbside delivery, self-checkout and home delivery services, all of which might be subject to this new rule and its potential consequences. Practitioners in this area should carefully familiarize themselves with this opinion and advise their clients (on either side of the case) about the holding in *Boyle*, its extension of the doctrine of dram-shop liability and its likely effect on current and anticipated lawsuits.

ABOUT THE AUTHOR

Jake Pipinich is an attorney with Pierce Couch Hendrickson Baysinger & Green LLP. Mr. Pipinich's practice centers on defending companies and businesses against various tort or negligence type of claims.

ENDNOTES

1. 2017 OK 82, 408 P.3d 183.
2. *Id.* at 194-95 (¶33).
3. 1986 OK 41, 725 P.2d 300.
4. *Id.* at 304 (¶17).
5. *Id.* at 301 (¶8).
6. *Id.* (emphasis in original).
7. 37 O.S. §501, *et seq.*
8. 37 O.S. §§1-7 and 9-131.
9. *Brigance*, 725 P.2d at 301 (¶5).
10. 37 O.S. §537.
11. *Id.* at 304 (¶18).
12. *Id.* at 304 (¶15).
13. 1993 OK 83, 854 P.2d 910.
14. *Id.* at 912 (¶23).
15. *Id.* at 911.
16. 1994 OK 80, 877 P.2d 1130.
17. *Id.* at 1131 (¶16).
18. *Boyle*, 408 P. 3d at ¶8.
19. *Id.* at ¶10.
20. *Id.* at ¶13.
21. *Id.* at ¶14.
22. *Id.*
23. *Id.* at ¶18.
24. *Flores v. Exprezit! Stores 98-Georgia, LLC*., 713 S.E.2d 368, 371 (Ga. 2011).
25. *Boyle* 408 P.2d at ¶28.
26. *Id.* at ¶32.
27. *Id.*
28. *Id.* at ¶33.
29. 37 O.S. §§247 and 537.
30. *Boyle*, Wyrick, J., dissenting opinion at ¶7.

The Unique Problems of a Tort Within a Tort

Charting a Way Forward for an Uncertain Area of Oklahoma Law

By Mbilike M. Mwafulirwa

THIS ARTICLE EXAMINES AN IMPORTANT QUESTION OF TORT LAW – specifically, it asks who within our system of Oklahoma jurisprudence has the power to determine the value of a tort claim with personal injury undertones. For the run-of-the-mill meritorious civil case on the jury trial docket, the answer is straightforward – the jury.[1]

The same question, however, becomes more complicated and nuanced in legal malpractice tort claims. Legal malpractice claims are unique torts in that they present the dilemma of the "case within a case,"[2] where the measure of damages is determined by the value of the underlying claim lost due to attorney error.[3] To put that into perspective, if an attorney, for instance, misses the statute of limitations on a client's workers' compensation claim, in the subsequent malpractice suit, the measure of damages is the value of the lost recovery proximately caused by the malpractice.[4]

What is the rule when, for example, an attorney misses the statute of limitations in a motor vehicle personal injury action in which the tortfeasor's liability policy limit is only $25,000 but the client's bills and damages exceed the policy amounts? Can the defendant attorney simply tender the policy limits and then ask the court[5] to limit the plaintiff's damages to that amount? Or is there a requirement in Oklahoma that a plaintiff prove first that he would have collected more than the policy limits before the attorney is required to pay damages in excess of the liability limits? Finally, who should determine these questions? The judge or the jury?

Thus far, Oklahoma does not have published cases addressing these issues *in this specific context*. What follows is a survey of the *general corpus* of relevant law and the competing policy concerns in an attempt to chart a way forward on these issues.

SETTING THE STAGE – A TORT WITHIN A TORT

Recall our operative hypothetical for this analysis: client is involved in a vehicle collision in which a third-party is at fault. To prosecute his tort claim, client retains an attorney. After failing to resolve the claim with the third-party's insurer through negotiations, the attorney should ordinarily file a lawsuit, but through neglect he misses the statute of limitations. Meanwhile, the client's bills and damages have exceeded the third-party liability policy limits ($25,000). After discovering the attorney's negligence and despite his active and malicious concealment of the error, the client files suit. To add to the twist, the third-party is no longer traceable; as such, it is unclear what, if any, assets the third-party has available to pay a judgment. Still, the client demands damages in excess of the third-party's policy limits from the attorney because, in his view, the measure of damages is the value of the lost recovery caused by the malpractice. Among the attorney's defenses is that under the circumstances – where it is unclear that more than the policy limits would have been recovered in the

underlying suit – the client is not entitled to more than $25,000 unless he proves he would have been able to collect more.

THE LEGAL LANDSCAPE OF THE LEGAL MALPRACTICE TORT

A legal malpractice claim is a tort subject to all the usual negligence rules.[6] Like every other negligence claim, the existence of duty is the threshold requirement in a legal malpractice case; without it, there can be no claim.[7] Duty in a legal malpractice case is imposed, as a matter of law, when there is an attorney-client relationship.[8] In addition to the existence of duty, a plaintiff must also prove a breach of that duty (with facts clearly depicting the negligence alleged), a causal link between the attorney's negligence and the damages suffered, and finally, it must be shown that but for the lawyer's negligent conduct, the underlying claim/defense would have succeeded.[9]

COMPETING VISIONS OF THE LEGAL MALPRACTICE DAMAGES MODEL

From the factual controversy presented in the hypothetical, client feels entitled to demand compensation in excess of the third-party's policy limits from attorney because, in his view, the measure of damages is the value of the lost recovery caused by the malpractice.[10] In fact, the client's damages claim in this case is not only for medical bills paid[11] but also for pain and suffering and possibly punitive damages.[12] Indeed, from the previous recitation of the elements of a legal malpractice tort claim in Oklahoma,[13] the client would appear to stand on solid ground in asking for all damages proximately caused by his former attorney's legal malpractice because the Oklahoma Supreme Court has never expressly adopted a collectibility rule – *i.e.*, a requirement that the amount of damages in a legal malpractice case be limited to those that could have been collected after judgment.[14] Against this background and in the absence of a specific legal rule from the Legislature or the Oklahoma Supreme Court to the contrary, it would be entirely reasonable for the client to expect the default rule for negligence claims to apply: that the jury would determine the value of his claim, especially one (such as his) where pain and suffering are principally at issue.[15]

As expected, the defendant lawyer would counter the client's position in favor of a collectibility rule. The usual starting point for any party contesting the amount of tort damages is the rule that an award may not be based on speculation or conjecture.[16] Defendant lawyer would likely further support his position by arguing that the Oklahoma Supreme Court has held that a plaintiff must prove the damages that he would have recovered but for the negligence.[17] However, is this the same as having to prove the amounts the client would have collected from a subsequent judgment? Defendant attorney would most likely argue so, citing a number of jurisdictions that have taken that position.[18] Those jurisdictions hold that a plaintiff must not be permitted to recover a windfall from the defendant attorney.[19] In those jurisdictions, proving collectibility is part of proximate cause and damages.[20]

However, not all jurisdictions agree. Some of the cases cut the other way in favor of the plaintiff's position.[21] Those jurisdictions initially hold that their *prima facie* requirements for legal malpractice do not contain a collectibility requirement.[22] In turn, those jurisdictions place the burden of proving collectibility on a defendant, in part, because the legal malpractice action is often brought years after the original tort due to the attorney's wrongdoing.[23] This lapse of time, those jurisdictions reason, presents unique problems for the prospective plaintiff: 1) the passage of time militates against a collectibility burden because – as the hypothetical in this case shows – the original tortfeasor's solvency might change to insolvency during the pendency of the litigation;[24] 2) in today's litigation landscape where settlement is the norm, the attorney defendant's error costs the plaintiff the possibility of an early compromise;[25] and 3) the defendant attorney's fault often means that subsequent trial counsel has to seek after stale evidence.[26] Finally, those courts also recognize the intrinsic value of a judgment for assignment and marketability purposes.[27] Yet still, other courts, in addition to these factors, consider collectibility as an avoidance defense that a defendant bears the burden of proof.[28]

WHICH WAY SHOULD OKLAHOMA COME OUT AND WHY?

We begin with the established principles. The "case within a case"[29] analytical model ensures that generally no party in a subsequent legal malpractice lawsuit may gain an advantage it would not have had in the original suit.[30] In *Bloustine v. Fagan*, for example, an attorney missed the deadline for perfecting an appeal with the Oklahoma Supreme Court in a divorce proceeding.[31] During the subsequent malpractice action, the trial court, in place of the jury, determined that the appellant's appeal would not have been successful.[32] The Oklahoma Court of Appeals affirmed because 1) both factual and legal issues in a divorce proceeding are decided exclusively by a judge, not a jury;

As such, the same model of trial – where the jury ultimately determines the value of a tort claim without regard to the defendant's solvency – should carry through in a legal malpractice suit; otherwise it would be unfair and impermissible to "make a change in the law's allocation of responsibility between judge and jury in the underlying action *when that action is revisited in legal malpractice actions* and thereby distort the `suit within a suit' analytic model."

2) any appeal from those issues is decided by an appellate court; and 3) as such, it would have been legal error for a lay jury to decide those appellate issues in a subsequent malpractice action.[33] Indeed, as that court noted:

> We see no reason why a malpractice plaintiff should be able to bootstrap his way into having a lay jury decide the merits of the underlying `suit within a suit' *when, by statute or other rule of law, only an expert judge could have made the underlying decision. It is illogical, in effect, to make a change in the law's allocation of responsibility between judge and jury in the underlying action when that action is revisited in legal malpractice actions and thereby distort the `suit within a suit' analytic model.*[34]

In the same way, it could be argued that it is illogical to upset the "suit within a suit" model in favor of a collectibility rule under these circumstances. In the underlying tort claim, if the client presented evidence of pain and suffering (which on these facts he would be able to as his condition was medically catalogued in the medical records), the quantum of those damages would not be subject to mathematical exactitude nor be limited by the defendant's solvency; rather the jury would have exclusive discretion in fixing the appropriate amount.[35] As such, the same model of trial – where the jury ultimately determines the value of a tort claim without regard to the defendant's solvency – should carry through in a legal malpractice suit; otherwise it would be unfair and impermissible to "make a change in the law's allocation of responsibility between judge and jury in the underlying action *when that action is revisited in legal malpractice actions* and thereby distort the `suit within a suit' analytic model."[36] Furthermore, in the underlying action, the jury would have assessed the value of plaintiff's personal injury action without regard to the $25,000 policy limits because in Oklahoma injecting the existence or terms of a policy of insurance is generally grounds for a mistrial.[37]

Likewise in the malpractice action, the jury should determine the value of the claim without regard to any policy of insurance or its limits.[38] Additionally, if the amount of damages had exceeded the policy limits, the plaintiff would have had an *opportunity* to pursue the deficit from the tortfeasor.[39] When a tort claim against a third-party tortfeasor is lost due to an attorney's negligence, the client loses the opportunity to collect the full measure of his damages.[40] In the subsequent malpractice action, the client's claim should be pursued and evaluated on the same terms as it would have been if the underlying action had been properly filed and prosecuted.[41] That, in turn, brings us to the all-important question: what is the value of the client's lost opportunity?

From the preceding analysis, this should be a question for the fact finder. In this state, the jury ordinarily determines the value

of a claim and its various incidents.[42] The jury is well suited to make this valuation because, historically, ascertaining uncertain factual questions is what juries do.[43] For example, what's one person's pain and suffering worth? What about the value of a wrongfully ended life? What is that worth? As noted, historically, juries have routinely placed values on these uncertain variables.[44] Moreover, like other jury damages evaluations, the courts retain the power to evaluate the jury's damages award for excessiveness.[45]

Could this question ever become one for the judge? It can, depending on the procedural posture of the case. Suppose a jury trial case is in its pretrial posture, could this question – of the value of the lost opportunity to recover from the original tortfeasor – ever become one for the judge? Probably yes. In Oklahoma, summary judgment (partial or full) settles only questions of law.[46] A question becomes one of law when there are no disputed material factual questions[47] or if the undisputed facts invite only a single inference.[48] Only then should the question be presented to the judge at the pretrial stage.[49]

In the specific context of this problem, the undisputed facts would have to show the client could not have possibly collected against the original tortfeasor in the underlying tort claim for the issue to be decided at summary judgment.[50]

Who should have the burden of proof? Neither Oklahoma statutes nor case law address this issue. As noted, the Oklahoma *prima facie* elements of a legal malpractice claim do not expressly contain a collectibility element, nor do they address the burden of proof on the issue.[51] The default rule under the Oklahoma Pleading Code is that a party asserting an "avoidance" must raise it as an affirmative defense.[52] An "avoidance" under the Oklahoma Pleading Code means an assertion that, if proven, defeats a claim even if all the allegations in the petition are true.[53] In other words, if, for example, a party asserts that regardless of whether liability was established against him, he should not have to pay (some or all) the damages because plaintiff failed to mitigate his losses, that is an avoidance that must be pled and proved affirmatively.[54] In similar fashion, when a defendant raises the collectibility issue, he in essence asserts that, notwithstanding his legal error, plaintiff is not entitled to (some or all) the damages claimed because he could not have collected in the underlying claim.[55] In doing so, the defendant is understood as seeking a reduction or elimination of damages.[56] Under those circumstances, Oklahoma law generally places the burden of pleading and proving the reduction or elimination of damages on the party claiming it.[57]

Public policy and fairness also play a part in determining the burden of proof.[58] An important aspect of fairness and policy requires a court to ensure that a plaintiff will not be unfairly surprised by a later assertion of a defense.[59] If a matter is already set out within the four corners of a petition, there is generally no need for that issue to be affirmatively pleaded again by a defendant,[60] but if a matter is not embraced within the petition and a defendant wants it addressed, he must raise it as an issue and prove it.[61] As previously noted, in Oklahoma, the *prima facie* elements of a legal malpractice action do not contain a collectibility element.[62] So it follows, likewise, if a defendant wants to raise collectibility, he should raise and prove it.[63]

Against this background, a judge could not categorically summarily determine noncollectibility. As the hypothetical shows, there would likely be factual questions regarding the third-party tortfeasor's ability to pay because; 1) the third-party tortfeasor is no longer available and even then, it is not clear that he does not have assets and 2) nor is it beyond contention that he has no ability to pay any portion of a judgment. Viewing the facts in the light most favorable to client – the party resisting summary judgment[64] – the record does not unequivocally support a single

inference of noncollectibility; it is possible to also infer collectibility. Thus, it follows, that probably summary judgment could not be granted on this record.[65]

FACTUAL QUESTIONS ON COLLECTIBILITY SHOULD BE LEFT TO THE JURY

Under Okla. Const. Art. 2 §19, the right to trial by jury is inviolate.[66] That right "cannot be *annulled, obstructed, impaired, or restricted by* legislative or *judicial action*."[67] Based on this constitutional imperative, juries decide factual questions while those of law are for the court.[68] Viewed in this vein, in addition to what was noted before, the measure of damages in a personal injury action is generally exclusively within the province of the jury.[69] To the extent that a court were to withdraw that question from the jury and determine it itself, especially if there were disputed factual questions, that would be an impermissible exercise of judicial power.[70]

The fact that other jurisdictions possibly permit judges to withdraw this determination from the jury is unavailing. Our constitutional traditions are different. As the Oklahoma Supreme Court has stated: "[T]he Oklahoma constitution *is a unique document*…[s]ome *of its provisions are unlike those in the constitutions of any state*, and some are more detailed and restrictive than those of other states."[71] Thus, to unwittingly import other jurisdictions' practices here would surely run afoul of our constitution, especially in the specific context outlined in this essay.[72]

Because Oklahoma law permits judges (without juries) to fix the amount of financial responsibility *in certain* actions without offending the right to a jury trial does not carry the day here. In family proceedings and workers' compensation claims, for example, judges (without juries) can fix the amount of financial recovery.[73] The comparison of those instances to the situation at hand here is inept. The right to a jury trial under Okla. Const. Art. 2 §19 is understood and applied as it existed at common law in the several American territories.[74] Against that backdrop, the domestic relations cases should be considered; those proceedings are equitable in nature,[75] such that there is generally no right to a jury trial, so the judge is the fact finder.[76] The flaw of the comparison between a domestic relations case to the situation at hand should be readily apparent. The comparison to workers' compensation claims is likewise wrong. Workers' compensation claims must be understood within the context of the grand bargain between employers and employees under which the Legislature, in exercise of its police powers, took away an injured worker's tort claim and the employer's common law tort defenses and merged them into a single "statutory indemnity fixed and certain." [77] It is the combination of the police powers and the existence of the grand bargain that ensures that the Legislature's handiwork passes constitutional muster.[78] No such similar considerations apply here.

CONCLUSION

The tort-within-a-tort case model invites complexity. A single case is challenging enough and the added layer of the prior case adds to the challenge, especially when the mode of trial itself in the subsequent case is at issue, as well as the appropriate measure of damages. A run-of-the-mill personal injury malpractice claim with no collectibility concerns is more straightforward: the jury simply decides the damages. Not so in a personal injury claim where the right to collect is questionable. The law is unclear. Unless a different rule is promulgated, the fallback answer should be as it is in most civil cases – the jury should decide.

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ENDNOTES

1. *See* Okla. Const. art. 2 §19 (there is a right to a jury trial in civil cases over $1,500); Okla. Stat. Tit. 12 §590 (When "either party is entitled to recover money of the adverse party *the jury, in their verdict, must assess the amount of recovery.*") (emphasis added); *Y&Y Cab Co. v. Smith*, 1955 OK 319, ¶21, 289 P.2d 964, 967 ("There can be no absolute standard to measure damages for personal injuries and a wide latitude of discretion is necessarily left to the good sense and discretion of the jury which fixes the award.").
2. *Nicholas v. Morgan*, 2002 OK 88, ¶14, 58 P.3d 775, 781.
3. *Id.* (citing *Allred v. Rabon*, 1977 OK 216, 572 P.2d 979).
4. *See id.*
5. Possibly through the mechanism of offer of judgment and partial summary judgment, Rule 13 Rules of Oklahoma District Court Rules, the attorney could request the trial court to limit damages. *See, e.g.*, *Reams v. Tulsa Cable Television, Inc.*, 1979 OK 171, ¶3, 604 P.2d 373, 374 ("partial summary judgment is explicitly authorized by Rule 13."); Okla. Stat. Tit. 12 §1101 (Oklahoma law for written offer(s) of judgment).
6. *Collins v. Wanner*, 1963 OK 127, ¶18, 382 P.2d 105, 108 (citations omitted).
7. *Norton v. Hughes*, 2000 OK 32, ¶11, 5 P.3d 588, 591; *Trinity Baptist Church v. Brotherhood Mut. Ins. Servs., LLC*, 2014 OK 106, ¶21, 341 P.3d 75, 82.
8. *See Funnell v. Jones*, 1985 OK 73, ¶6, 737 P.2d 105, 108.
9. *Manley v. Brown*, 1999 OK 79, ¶8, 989 P.2d 448, 452.
10. *See Nicholas*, 2002 OK 88, ¶14, 58 P.3d at 781; *Denco Bus Lines v. Hargis*, 1951 OK 11, ¶26, 229 P.2d 560, 564 ("[U]pon commission of a tort it is the duty of the wrongdoer to answer for the damages wrought by his wrongful act *and that is measured by the whole loss so caused*.") (emphasis added).
11. Under Okla. Stat. Tit. 12 §3009.1 actual damages for medical bills in personal injury claims are limited to the amounts paid, not incurred. *See Lee v. Bueno*, 2016 OK 97, ¶1, 381 P.3d 736, 739.
12. *See* discussion of claimed damages in hypothetical, *supra*.
13. *Manley*, 1999 OK 79, ¶8, 989 P.2d at 452.
14. *See id.*
15. When pain and suffering at issue in a personal injury lawsuit, the jury usually takes center stage as the final arbiters of the value of these claims. *See, e.g.*, *Smith*, 1955 OK 319,

¶21, 289 P.2d at 967 ("There can be no absolute standard to measure damages for personal injuries and a wide latitude of discretion is necessarily left to the good sense and discretion of the jury which fixes the award.").

16. *Cities Service Co. v. Gulf Oil Corp.*, 1999 OK 14, ¶38, 980 P.2d 116, 134.

17. *See Nicholas*, 2002 OK 88, ¶14, 58 P.3d at 781.

18. *See* Michael P. Cross, et al., "Your Place or Mine?: The Burden of Proving Collectibility of an Underlying Judgment in a Legal Malpractice Action", 91 *Denv. U. L. Rev.* 53, 57 (2014) (collecting cases).

19. *Id.*

20. *Id.* (citing *McKenna v. Forsyth & Forsyth*, 720 N.Y.S.2d 654, 658 (N.Y. App. Div. 2001)). Interestingly, in Oklahoma, proximate cause in negligence actions "is generally a fact question for the jury." *Fargo v. Hays-Kuehn*, 2015 OK 56, ¶16, 352 P.3d 1223, 1228.

21. Michael P. Cross, et al., "Your Place or Mine?", *supra* note 18, at 58 (collecting cases).

22. *Id.*

23. *Smith v. Haden*, 868 F.Supp. 1, 2 (D.D.C. 1994); *Hoppe v. Ranzini*, 385 A.2d 913, 919 (N.J. App. Div. 1978).

24. *See Hoppe*, 385 A.2d at 919.

25. *Smith*, 868 F.Supp. at 2.

26. Michael P. Cross, et al., "Your Place or Mine?*", supra* note 18, at 59 n. 40 (quoting *Jenkins v. St. Paul Fire & Marine Ins. Co.*, 422 So.2d 1109, n.2 (La. 1982)).

27. *Id.* at 59 n. 42 (citations omitted); *see also Hoppe*, 385 A.2d at 919.

28. *See Jourdain v. Dineen*, 527 A.2d 1304, 1306 (Me. 1987).

29. *Nicholas*, 2002 OK 88, ¶14, 58 P.3d at 781.

30. *See Bloustine v. Fagin*, 1996 OK CIV APP 122, ¶¶3-5, 928 P.2d 964, 965. *But see Carbis Sales, Inc. v. Eisenberg*, 935 A.2d 1236, 1249 (N.J. App. Div. 2007) (noting that a flexible approach is needed for cases in which the malpractice plaintiff was the defendant in the initial case because to require him to fully act like a plaintiff when he was originally a defendant is "awkward and impracticable.").

31. *Bloustine*, 1996 OK CIV APP 122, ¶¶1-3, 928 P.2d at 965.

32. *Id.*

33. *Id.*

34. *Id.* ¶5, 928 P.2d at 965 (emphasis added) (quoting *Harline v. Barker*, 912 P.2d 433, 440 (Utah 1996)).

35. *Smith*, 1955 OK 319, ¶21, 289 P.2d at 967; *Yellow Cab Op. Co. v. Spelce*, 1936 OK 597, ¶0, Syllabus by the Court, 61 P.2d 672, 672 ("There can be no absolute standard to measure damages for personal injuries and a wide latitude of discretion is necessarily left to the good sense and discretion of the jury which fixes the award.").

36. *Bloustine*, 1996 OK CIV APP 122, ¶5, 928 P.2d at 965 (emphasis added).

37. *Redman v. McDaniel*, 1958 OK 276, ¶16, 333 P.2d 500, 503.

38. *Cf. Bloustine*, 1996 OK CIV APP 122, ¶5, 928 P.2d at 965 (quoting *Harline,* 912 P.2d at 440).

39. *See* Okla. Stat. Tit. 47 §7-103(3); Okla. Stat. Tit. 23 §3 ("Any person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages."); *see also id.* §§61, 61.1, 68.1.

40. *Nicholas*, 2002 OK 88, ¶14, 58 P.3d at 781.

41. *Cf. Bloustine*, 1996 OK CIV APP 122, ¶5, 928 P.2d at 965 (quoting *Harline,* 912 P.2d at 440).

42. *See* Okla. Stat. Tit. 12 §590 (When "either party is entitled to recover money of the adverse party *the jury, in their verdict, must assess the amount of recovery.*") (emphasis added).

43. *Pearson v. Hope Lumber & Supply Co.*, 1991 OK 112, ¶4, 820 P.2d 443, 444 (questions of law are for the court, while those of fact are for the jury).

44. *See, e.g.*, *Smith*, 1955 OK 319, ¶21, 289 P.2d at 967; *Yellow Cab Op. Co. v. Spelce*, 1936 OK 597, ¶0, Syllabus by the Court, 61 P.2d at 672 ("There can be no absolute standard to measure damages for personal injuries and a wide latitude of discretion is necessarily left to the good sense and discretion of the jury which fixes the award.").

45. *Estrada v. Port City Prop., Inc.*, 2011 OK 30, ¶35, 258 P.3d 495, 508.

46. *Horton v. Norton*, 2015 OK 6, ¶8, 345 P.3d 357, 360 ("Summary judgment settles only questions of law.").

47. *See In re King*, 1970 OK 181, ¶15, 476 P.2d 72, 74; *see also Miller v. Bourne*, 1953 OK ¶0, 256 P.2d 431, 431 ("If there is no controversy over the facts, or if the facts are conceded, then it becomes a pure question of law for the court…").

48. *See Jackson v. Jones*, 1995 OK 131, ¶5, 907 P.2d 1067, 1071.

49. *See, e.g., Horton*, 2015 OK 6, ¶8, 345 P.3d at 360 ("Summary judgment settles only questions of law.").

50. *See, e.g., id.*

51. *See Manley*, 1999 OK 79, ¶8, 989 P.2d at 452.

52. *See* Okla. Stat. Tit. 12 §2008(c)(20) (a party asserting an "avoidance" must raise it as an affirmative defense).

53. *Craft v. Bates*, 1962 OK 122, ¶5, 372 P.2d 10, 12 (citations omitted) ("The general rule of pleading is that defenses which assume or admit the original cause of action alleged but are based upon subsequent facts or transactions which go to qualify or defeat it, must be pleaded."); *see also Black's Law Dictionary* 482 (9th ed. 2009) (An affirmative defense is a "[d]efendant's facts and arguments that, if true, *will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true.*") (emphasis added).

54. *Cons. Cut Stone Co. v. Seidenbach*, 1937 OK 701, ¶32, 75 P.2d 442, 451.

55. *See* Michael P. Cross, et al., "Your Place or Mine?", *supra* note 18, at 58-59.

56. *Id.*

57. *Cities Servs. Co. v. Gulf Oil Corp.*, 1999 OK 14, ¶38, 980 P.2d 116, 134 ("Inherent in the delineated probative process is the requirement that a defendant ascribe value to the matters offered in reduction."); *Pine v. Bradley*, 1940 OK 174, ¶6, 101 P.2d 799, 801 ("The duty of pleading and the proof necessary on each is the same substantially.").

58. Because §2008 (c) is "identical" to Fed. R. Civ. P. 8(c), federal law is very instructive. *See* Okla. Adv. Cmt. Notes to §2008 (c). In that regard, federal cases make clear that public policy and fairness are important considerations. *See* 5 Wright & Miller Fed. Prac. & Proc. Civ. §1271 (April 2017 Update) ("[R]esort often must be had to considerations of policy, fairness and in some cases probability.").

59. *In re Zagg Inc. Shareholder Deriv. Act.*, 826 F.3d 1222, 1231 (10th Cir. 2016).

60. 5 Wright & Miller Fed. Prac. & Proc. Civ. §1271 n. 78; *In re Zagg*, 826 F.3d at 1231.

61. 5 Wright & Miller Fed. Prac. & Proc. Civ. §1271; *Colton v. Huntleigh USA Corp.*, 2005 OK 46, ¶10, 121 P.3d 1070, 1073 ("The burden of proof as to any particular facts rests upon the party asserting such fact.").

62. *See Manley*, 1999 OK 79, ¶8, 989 P.2d at 452.

63. 5 Wright & Miller Fed. Prac. & Proc. Civ. §1271; *Colton*, 2005 OK 46, ¶10, 121 P.3d at 1073 ("The burden of proof as to any particular facts rests upon the party asserting such fact.").

64. *Fargo*, 2015 OK 56, ¶12, 352 P.3d at 1227.

65. *Iglehart v. Bd. of Cnty. Comm'rs of Rogers Cnty.,* 2002 OK 76, ¶9, 60 P.3d 497, 501 ("[T]o avoid trial for negligence, defendants *must establish through unchallenged evidentiary materials that*, even when viewed in a light most favorable to plaintiffs, *no disputed fact exist as to any material issues* and that the law favors defendants.") (emphasis added).

66. *Seymour v. Swart*, 1985 OK 9, ¶5, 695 P.2d 509, 511.

67. *Id.* (emphasis added).

68. *Pearson,* 1991 OK 112, ¶4, 820 P.2d at 444.

69. *See* Okla. Stat. Tit. 12 §590; *Smith*, 1955 OK 319, ¶21, 289 P.2d at 967.

70. *Seymour*, 1985 OK 9, ¶5, 695 P.2d at 511.

71. *Wall v. Marouk*, 2013 OK 36, ¶4, 302 P.3d 775, 779.

72. *Seymour*, 1985 OK 9, ¶5, 695 P.2d at 511(a court cannot intrude on the jury's fact-finding role).

73. *See, e.g.*, Okla. Stat. Tit. 43 §§114-120;129 (child support); *Henley v. Henley*, 1967 OK 115, ¶7, 428 P.2d 258, 260 (alimony); Okla. Stat. Tit. 85A §§45-46 (workers' compensation).

74. *Hamil v. Walker*, 1979 OK 172, ¶3, 604 P.2d 377, 378.

75. *See* Harvey D. Ellis, Jr., Clyde A. Muchmore, 5 Okla. Prac. App. Prac. §15:110 (December 2017 update) ("Domestic relations cases are of equitable cognizance…") (citations omitted).

76. *In re Bank of Earlsboro*, 1964 OK 97, ¶4, 391 P.2d 887, 888.

77. *Gibby v. Hobby Lobby Stores, Inc.*, 2017 OK 78, ¶9, 404 P.3d 44, 47.

78. *Id.* This essay does not discuss any limitations placed on damages by the Legislature because the collectibility rule is not statutorily enacted, so that discussion is beside the point here.

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Statutory Contribution in the Era of Several Liability

By Randall E. Long

THE LEGISLATURE'S ABOLITION OF JOINT AND SEVERAL LIABILITY for fault-based actions has been one of the most significant "tort reform" measures in Oklahoma.[1] Prior to the 2011 amendment of Title 23, Section 15, a tortfeasor remained jointly and severally liable for all damages caused by multiple tortfeasors where the plaintiff was fault-free, the tortfeasor's percentage of fault exceeded 50 percent, the tortfeasor was guilty of reckless or willful and wanton misconduct or the plaintiff sued on the state's behalf.[2] The 2011 amendment[3] makes at-fault tortfeasors liable for the amount of harm they cause, and only that amount, regardless of the fault of others. Gone are the days where a negligent tortfeasor can be forced to pay for the damages caused by another whose concurrent negligence also harmed the victim.[4]

Right or wrong, the 2011 abolition of joint and several liability was a sea change in the law. However, some members of the bench and bar see an additional consequence: the end of statutory contribution among tortfeasors. This article explores the potential viability of contribution under Title 12, Section 832 in the wake of joint and several liability's demise.

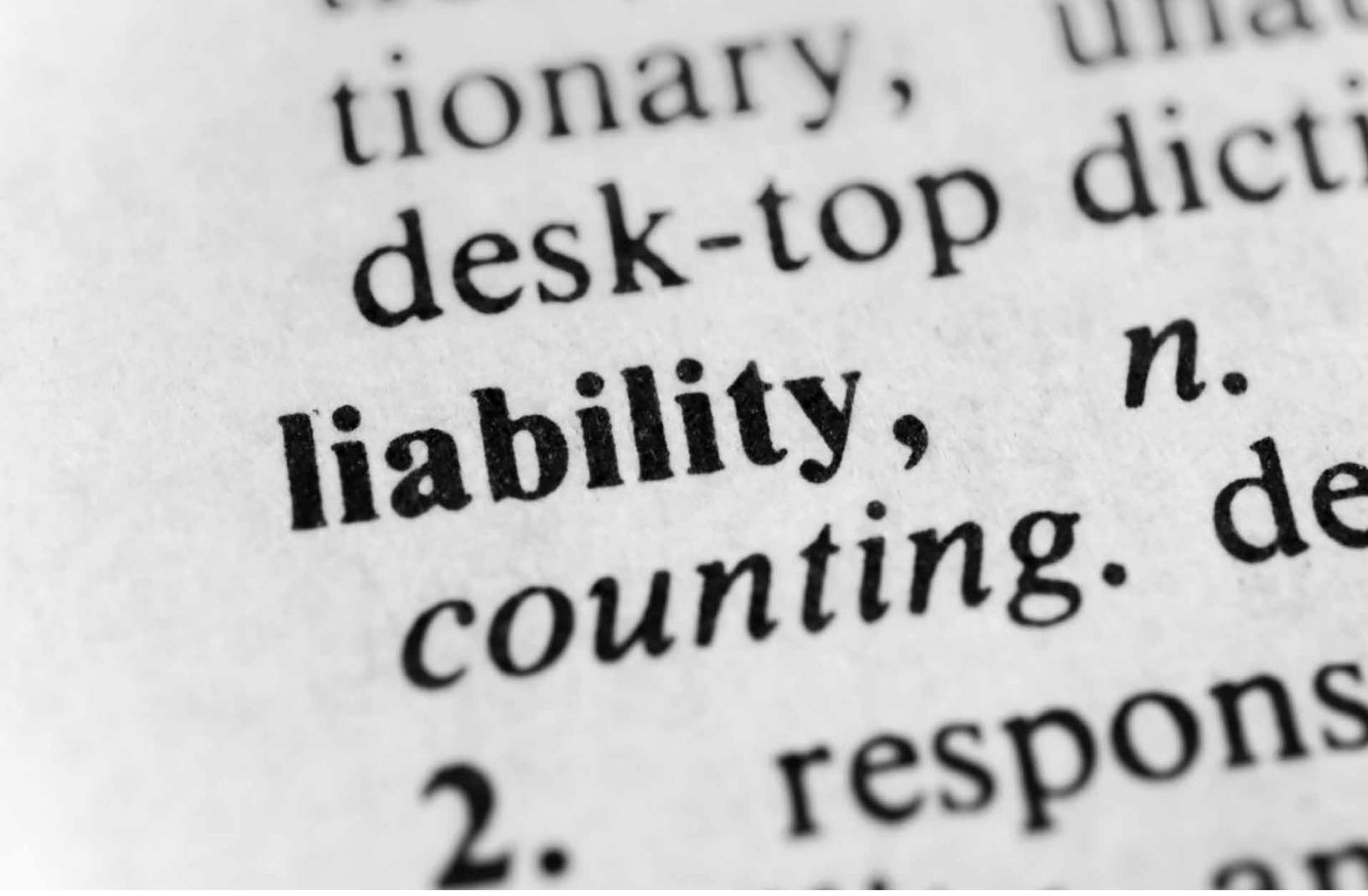
THE HISTORY OF JOINT AND SEVERAL LIABILITY AND CONTRIBUTION IN OKLAHOMA

At common law, if the negligence of concurrent tortfeasors caused a "single and indivisible injury," each was said to be "jointly and severally liable," *i.e.*, individually liable for the total amount of damages, regardless of percentage of fault.[5] To make matters worse for tortfeasors, there existed no right of contribution among them to share the loss in the event of payment.[6] This seemingly harsh rule was mitigated by the doctrine of contributory negligence, which allowed tortfeasors to evade liability altogether by proving that the plaintiff was also negligent, even if only slightly.[7]

The equitable balance began to shift in 1973 when the Legislature enacted statutes that replaced the contributory negligence doctrine with a codified system of modified comparative negligence.[8] But Oklahoma remained silent on contribution even as other states had begun to adopt some version of the Uniform Contribution Among Tortfeasors Act (UCATA). In 1978, the Oklahoma Supreme Court in *Laubach v. Morgan* questioned the soundness of joint and several liability under the new comparative fault scheme.[9] Noting the inequity of joint and several liability in the absence of contribution, the *Laubach* court saw two options: 1) allow comparative contribution or 2) abolish joint and several liability. The court chose the latter.

Even after *Laubach*'s abolition of joint and several liability and its pronouncement that "there will be no need for added litigation by defendants seeking contribution,"[10] the Legislature enacted Title 12, Section 832, which provides that "[w]hen two or more persons become jointly or severally liable in tort for the same injury … there is a right of contribution among them," and that the right of contribution exists for a tortfeasor "who was paid more than [its] pro rata share of the common liability," with recovery being limited to the amount in excess of that *pro rata* share.[11]

Two years later, the Oklahoma Supreme Court clarified that



Laubach is limited to the "comparative negligence context," and that joint and several liability remains the rule where the plaintiff is fault-free.[12] This dichotomy remained unaltered until 2004, when the Legislature enacted Title 23, Section 15, which codified *Boyles*' holding, and also expanded joint and several liability to actions where the tortfeasor's fault exceeds 50 percent, or where the tortfeasor was guilty of reckless or willful and wanton conduct. These conditions were commonplace in negligence actions, making joint and several liability the general rule rather than the exception. In 2011, the Legislature amended Section 15 by removing the three exceptions and mandating several liability in actions based on fault.

Despite these vagaries, the statutory provisions granting the right of contribution have remained unaltered. The question is whether those changes affect the viability of contribution as a remedy despite the statute remaining on the books. There are valid arguments for and against the continued recognition of contribution, but the balance favors survival.

THE ARGUMENT AGAINST CONTRIBUTION

The argument against the viability of contribution is simple and grounded in the principles of several liability. Section 832 provides for contribution, but only to the extent a tortfeasor pays more than its *pro rata* share of the common liability. In this context, "*pro rata*" is interpreted to mean "proportionate, as based on one's degree of fault."[13] Under several liability, a tortfeasor is liable "only for the amount of damages allocated to that tortfeasor," *i.e.*, the liability is defined by the tortfeasor's proportion of comparative fault.[14] If a tortfeasor's liability is limited to its percentage of fault, it will never be compelled to pay more than its *pro rata* share. Thus, the statutory basis for contribution would be absent. Some unreported Oklahoma federal court decisions and appellate cases from other states have adopted this rationale to hold that contribution is not available to a tortfeasor who is not jointly and severally liable with another tortfeasor for the same injury.[15]

Laubach lends support to this argument as well. One of the justifications for abolishing joint and several liability rather than adopting common law contribution was that once several liability controls, "there will be no need for added litigation by defendants seeking contribution."[16] More pointedly, without joint and several liability,

"no problem of contribution arises, because no defendant has a basis upon which to seek contribution from a co-defendant."[17] After all, subsections (A) and (B) of Section 832 had the objective of "overcoming and abolishing" the rule against tortfeasor contribution.[18]

THE BASES FOR CONTINUED RECOGNITION OF CONTRIBUTION

The arguments in favor of contribution are based in statutory interpretation and the lingering potential for joint and several liability in limited situations.

Statutory Interpretation Favors the Recognition of Contribution

There is no indication the Legislature intended to repeal the contribution statute through its amendment of Section 15.[19] Courts avoid finding repeal by implication unless irreconcilable conflicts exist.[20] Repeal is usually recognized only by express terms. The Legislature chose to leave Section 832 alone during the two decades following *Boyles* and its codification of several liability in 2004. Section 832 remains unaltered even though the comparative fault and several liability statutes have changed multiple times.

Like Oklahoma, Arkansas also recognized joint and several liability and statutory contribution under the UCATA. In 2003, the Arkansas General Assembly passed a tort reform measure that made several liability the rule. The Arkansas Supreme Court held that the legislative abrogation of joint and several liability worked as an implied repeal of contribution under the UCATA.[21] Almost immediately following that ruling, the General Assembly passed a law that "clarified that a claim for contribution pursuant to the UCATA still exists" after the repeal of joint and several liability.[22] The story of Arkansas' UCATA contribution illustrates the hazard of implied repeal.

Moreover, the Oklahoma contribution statute was enacted when several liability was the law. *Laubach*'s abrogation of joint and several liability *predated* the passage of Section 832. After passage of Section 832, the Oklahoma Supreme Court noted the right of contribution does not affect the status of several liability under *Laubach*, which was dictated by the comparative negligence statute.[23] Thus, it cannot be concluded with any certainty that Section 832 was passed solely because of a common law rule that was already vanquished.

Most importantly, the statutory provisions providing for contribution do not speak of joint and several liability. Rather, Section 832(A) simply states that a right of contribution may exist between persons who are "jointly *or* severally liable in tort for the same injury." The Legislature chose to use a disjunctive phrase to describe the factual basis for the right of contribution. The Legislature would have used the conjunction "and" if it intended for joint and several liability to be a factual requirement for contribution. Under Oklahoma's version of the UCATA, a tortfeasor seeking contribution must show either joint liability or several liability in order to recover from another tortfeasor. In other states where their versions of the UCATA use the same disjunctive phrase, courts have found the statutory language to support a continuing right of contribution even after joint and several liability had been abolished.[24]

Joint and Several Liability Still Exists in Some Instances

Assuming that joint and several liability is a prerequisite to contribution, there remain circumstances where the common law rule might still apply. Section 832 applies where persons are "liable in tort." The statute does not use the terms "negligence" or "fault." While negligence may be at the forefront of tort law, there are many varieties of torts, *e.g.*, battery, intentional infliction of emotional distress, trespass, conversion and so on. A "tort" is simply a civil wrong, outside of contract, for which the court will provide a damages remedy.[25] Oklahoma recognizes that a product manufacturer may be held strictly liable for damages caused by its defective product. A manufacturer whose defective product causes harm may be liable under tort law.[26]

Courts construing Section 832 have held that contribution is not limited to negligent tortfeasors.[27]

Assuming that joint and several liability is a prerequisite to contribution, there remain circumstances where the common law rule might still apply.

Rather, all that is required is liability in tort. The 10th Circuit Court of Appeals has held that a product manufacturer, found to be strictly liable in tort, falls within the ambit of Section 832 for purposes of assessing contribution.[28] Courts in other states have likewise recognized that a strictly liable tortfeasor may be entitled to contribution from a negligent one.[29]

While Section 832 applies to the broad spectrum of torts, Section 15 is specifically limited to actions "based on fault and not arising out of contract." Any action *not* based on fault would presumably fall outside the statute's reach. The question, then, is whether a product liability action is based on "fault" for purposes of Section 15's abrogation of joint and several liability. "Fault" certainly encompasses negligence. Even the note to the OUJI "white" verdict form assumes that Section 15's reference to a defendant's allocation of damages is the equivalent of the percentage of negligence assigned to that defendant. However, given the 2011 amendment, "fault" may also include conduct that is reckless or willful and wanton.[30] Although the boundaries of "fault" may ebb and flow depending on the circumstances, it does *not* encompass strict liability, which means liability without fault.[31] Manufacturer's product liability is a "no-fault tort concept,"[32] to which comparative negligence principles do not apply.[33]

Given that strict product liability likely falls outside Section 15, a product manufacturer may still be subject to the rule of joint and several liability. The Oklahoma Supreme Court has recognized that a defective product may combine with a third party's active negligence to produce a single, indivisible injury. Under these circumstances, the manufacturer and third party are "concurrent tortfeasors," and the manufacturer is jointly and severally liable for the entire damages.[34] Because joint and several liability still exists against a product manufacturer, policy reasons still exist to recognize a right of contribution in that circumstance.[35]

Section 15 also specifically excludes actions made by or on behalf of the state. This exception shows legislative intent to place the risk of an insolvent tortfeasor on the defendants rather than the state. Where the state or one of its political subdivisions is the party injured by the negligence of multiple persons, the common law rule of joint and several liability still applies. Those tortfeasors have the potential right of contribution among them to spread the loss.

A Tortfeasor May Still Pay More Than Its Pro Rata Share

A tortfeasor may still be able to satisfy Section 832's prerequisites for contribution. Under the current version of Section 15, a negligent tortfeasor may not be compelled by law to pay more than its proportionate share of the damages. However, that does not mean overpayment is impossible.

Contribution may be based on a pretrial settlement payment. Judgment against one tortfeasor is not a prerequisite to contribution. Section 832(D) expressly recognizes a right of contribution may be based upon a good faith settlement so long as the release discharges the tortfeasor against whom contribution is sought.[36] It is possible for a tortfeasor to overpay in settlement under a several liability scheme because fault has yet to be apportioned. That overpayment would give rise to a right of contribution under the UCATA.[37]

There are many reasons why a tortfeasor may pay more than its *pro rata* share to settle a case even under a several liability scheme. The defendant may seek to avoid bad publicity. Ongoing litigation expense may outweigh the overall settlement cost. The suit may just be a nuisance. Section 832 allows a tortfeasor to consider these costs and settle in order to "buy its peace."[38] The 2011 amendment to Section 15 does not change these considerations. Settlement with the injured party is one of the UCATA's principle objectives. Recognition of settlement-based contribution furthers the goal of making injured parties whole without unnecessary delay. It also allows the at-fault parties to allocate the loss among them without involving the injured party. There is no reason to believe the Legislature intended to cast aside these public policy goals.

Overpayment after judgment is also possible because a judgment against a single defendant may not apportion fault among all responsible parties. For example, where a fault-free plaintiff sues a single defendant, a jury cannot permissibly apportion fault without a ghost tortfeasor on the verdict form.[39] Comparative fault only applies where the negligence of multiple parties is at issue. If there remains a tortfeasor whose identity or role is unknown at the time of trial, the jury will simply be asked to find whether the sole defendant was negligent and determine the amount of damages caused by that conduct. The same result would be obtained if the defendant chooses to go head-to-head with the plaintiff instead of naming a ghost tortfeasor. No recognized rule in Oklahoma requires absent tortfeasors be listed on the verdict form in order for the defendant to later seek contribution for the loss. In such cases, the defendant would be forced to pay the entire damage award even though there remains another tortfeasor who shares a common liability. In other words, the defendant would pay more than its *pro rata* share

thereby allowing it the right of contribution. Recognition of contribution in this context furthers the UCATA's equitable goals.

The 2011 amendment to Title 23, Section 15 will continue to have broad and profound consequences for tort plaintiffs and defendants alike. Overpayment and contribution are less likely to occur under several liability, but it may be too soon to proclaim the downfall of statutory contribution.

ABOUT THE AUTHOR

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ENDNOTES

1. The author would like to thank Austin Jackson and Cheyenne Meckle, whose research proved invaluable.

2. *See* 23 O.S. §15 as enacted in 2004, and in effect until 2011 despite the 2009 amendment, which was found to be unconstitutionally enacted through legislative log-rolling. *See Douglas v. Cox Ret. Props.*, 2013 OK 37, ¶12, 302 P.3d 789, 794.

3. The amended statute provides in relevant part, "[i]n any civil action based on fault and not arising out of contract, the liability for damages caused by two or more persons shall be several only and a joint tortfeasor shall be liable only for the amount of damages allocated to that tortfeasor."

4. The state-plaintiff exception still exists.

5. *Laubach v. Morgan*, 1978 OK 5, ¶11, 588 P.2d 1071, 1073-74.

6. *Nat'l Trailer Convoy, Inc. v. Okla. Turnpike Auth.,* 1967 OK 15, 434 P.2d 238, 239 (First Syllabus) (at common law joint tortfeasors, as a general rule, have no right of contribution among themselves).

7. *Laubach*, 1978 OK 5, ¶15, 588 P.2d at 1074 ("Under the common law system of contributory negligence, a plaintiff who was guilty of even slight negligence, could recover nothing.").

8. *See* 23 O.S. §11 (repealed in 1979 and replaced by 23 O.S. §13 and 23 O.S. §14); 23 O.S. §12.; *Laubach*, 1978 OK 5, ¶4.

9. *Id.* at ¶11.

10. *Id.* at ¶19.

11. 12 O.S. §832(A) and (B).

12. *Boyles v. Okla. Nat. Gas Co.*, 1980 OK 163, ¶¶9-10, 619 P.2d 613, 616-17.

13. *Nat'l Union Fire Ins. Co. v. A.A.R. W. Skyways, Inc.*, 1989 OK 157, ¶23, 784 P.2d 52, 57.

14. *Laubach*, 1978 OK 5, ¶19. *See also* OUJI 9.33, Comments ("This Instruction assumes that the 'amount of damages allocated to that tortfeasor' in 23 O.S. §15 refers to the percentage of negligence determined by the jury.").

15. *See Loos v. Saint-Gobain Abrasives, Inc.*, 2016 U.S. Dist. LEXIS 127179, at *17 (W.D. Okla. Sept. 19, 2016); *Stokes v. Lake Raider, Inc.*, 2014 U.S. Dist. LEXIS 177675, at *5-7 (E.D. Okla. Dec. 29, 2014); *Prof'l Asset Mgmt. v. Penn Square Bank, N.A.*, 1984 U.S. Dist. LEXIS 15230, at *28 (W.D. Okla. July 5, 1984); *Mortg. Contracting Servs., LLC v. J & S Prop. Servs. LLC*, 2018 U.S. Dist. LEXIS 109967 (M.D. Fla. July 2, 2018); *St. Vincent Infirmary Med. Ctr. v. Shelton*, 2013 Ark. 38, ¶¶6-10, 425 S.W.3d 761, 766-67 (superseded by statute); *Pierce v. Shannon*, 2000 ND 54, 607 N.W.2d 878; *Kottler v. State*, 136 Wash. 2d 437, 963 P.2d 834 (1998); *Neil v. Kavena*, 859 P.2d 203, 205 (Ariz. Ct. App. 1993).

16. *Laubach*, 1978 OK 5, ¶19.

17. *Laubach*, 1978 OK 5, ¶16.

18. *Moss v. City of Okla. City*, 1995 OK 52, ¶10, 897 P.2d 280, 284.

19. In some states, joint and several liability and contribution were expressly repealed at the same time. *See, e.g., Benner v. Wichman*, 874 P.2d 949, 955 (Alaska 1994); *Nat'l Serv. Indus. v. B.W. Norton Mfg. Co.*, 937 P.2d 551, 554-55 (Utah Ct. App. 1997).

20. *CompSource Mut. Ins. Co. v. State*, 2018 OK 54, ¶34, ___ P.3d ___ (citing *Fent v. Henry*, 2011 OK 10, ¶11, 257 P.3d 984, 991).

21. *See St. Vincent Infirmary Med. Ctr. v. Shelton*, 425 S.W.3d 761, 766-67 (Ark. 2013).

22. *See J-McDaniel Constr. Co. v. Dale E. Peters Plumbing Ltd.*, 436 S.W.3d 458, 465-66 (Ark. 2014).

23. *Berry v. Empire Indem. Ins. Co.*, 1981 OK 106, ¶¶8-10, 634 P.2d 718, 719-20.

24. *See, e.g., Reed v. Malone's Mech., Inc.*, 854 F. Supp. 2d 636, 642 (W.D. Ark. 2012); *Gerling Konzern Allgemeine Versicherungs AG v. Lawson*, 693 N.W.2d 149, 155-58 (Mich. 2005); *Int'l Paper Co. v. TCR Nw. 1993, Inc.*, 2003 U.S. Dist. LEXIS 25510, at *18-19 (D. Or. Jan. 15, 2003); *Graber v. Westaway*, 809 P.2d 1126, 1127-29 (Colo. Ct. App. 1991).

25. *Cruse v. Bd. of Cnty. Comm'rs*, 1995 OK 143, ¶34 n.36, 910 P.2d 998, 1010; *Lincoln Bank & Tr. Co. v. Neustadt*, 1996 OK CIV APP 10, ¶12, 917 P.2d 1005, 1008.

26. *Moss v. Polyco, Inc.*, 1974 OK 53, ¶7, 522 P.2d 622, 625; *Kirkland v. GMC*, 1974 OK 52, ¶24, 521 P.2d 1353, 1361.

27. *See N. Am. Specialty Ins. Co. v. Britt Paulk Ins. Agency, Inc.*, 511 F. Supp. 2d 1099, 1105 (E.D. Okla. 2007); *Southcrest, L.L.C. v. Bovis Lend Lease, Inc.*, 2011 U.S. Dist. LEXIS 116102, at *9 (N.D. Okla. Oct. 6, 2011); *Cf. In re Jones*, 804 F.2d 1133, 1139-43 (10th Cir. 1986) (finding UCATA's settlement reduction provisions applicable to product liability and negligent tortfeasors).

28. *Parker v. O'Rion Indus., Inc.*, 769 F.2d 647, 648-49 (10th Cir. 1985).

29. *Svetz v. Land Tool Co.*, 513 A.2d 403 (Pa. Super. 1986) (product liability); *Wallace v. Strassel*, 479 So. 2d 231 (Fla. Dist. Ct. App. 1985) (strict dog owner liability); *Petersen v. Tolstow*, 445 A.2d 84 (N.J. Super. 1982) (same); *Aalco Mfg. Co. v. City of Espanola*, 618 P.2d 1230 (N.M. 1980) (product liability).

30. Prior to the 2011 amendment, §15 provided that several liability did not apply to a tortfeasor guilty of reckless or willful conduct, which makes sense because it cannot be compared to negligence to assess percentages of fault. *See Graham v. Keuchel*, 1993 OK 6, ¶¶49-52, 847 P.2d 342, 362-63. But, the 2011 amendment deleted the exception for recklessness and willful conduct. It is reasonable to conclude that the Legislature intended for reckless and willful tortfeasors to enjoy the benefit of several liability.

31. *Gilmore v. St. Anthony Hosp.*, 1973 OK 131, ¶8, 516 P.2d 248, 251; *Okla. ex rel. Dep't of Highways v. Ray I. Jones Serv. Co.*, 1970 OK 141, ¶11, 475 P.2d 139, 142.

32. *Coleman v. Hertz Corp*, 1975 OK CIV APP 5, ¶20, 534 P.2d 940, 944.

33. *Kirkland*, 1974 OK 52, ¶47.

34. *Johnson v. Ford Motor Co.*, 2002 OK 24, ¶14, 45 P.3d 86, 91-92.

35. While it may be difficult to apportion percentages of *fault* between a negligent tortfeasor and one that is strictly liable, a jury should not have trouble apportioning damages among them. *See id.; Parker*, 769 F.2d at 648-49.

36. *See also Barringer v. Baptist Healthcare*, 2001 OK 29, ¶¶7-9, 22 P.3d 695, 698-99.

37. *See Gerling*, 693 N.W.2d at 152-54 (repeal of joint and several liability does not affect right of contribution based on settlement).

38. *Price v. Sw. Bell Tel. Co.*, 1991 OK 50, ¶¶17-25, 812 P.2d 1355, 1359-61.

39. *See Nault v. Bd. of Cnty. Comm'rs*, 2013 OK CIV APP 1, ¶16, 294 P.3d 461, 465.

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Civil Liability of Parking Valets and Their Employers Under Oklahoma Law

By Kyle Persaud

ON OCT. 8, 2012, THYCE COLYN WAS SEVERELY INJURED when a car driven by a parking valet collided with Mr. Colyn when he was riding his bicycle. The court ruled the valet's employer, Standard Parking, was fully liable, and a jury awarded Mr. Colyn over $38 million.[1]

Valet parking can increase customer satisfaction. A Vanderbilt University Medical Center survey found that customer satisfaction improved after the facility instituted valet parking. Informally, patient compliments about the parking further confirmed the survey results. The positive feedback from patients, in turn, raised morale among the employees and enabled the staff to provide better services than before.[2] This article analyzes the potential liability that parking valets, and the valets' employers, can incur under Oklahoma law.

STANDARD OF CARE FOR VALETS

Valet liability falls under the law of *bailment*. Bailment occurs when one person gives property to another to keep, for the benefit of the person giving the property. The person giving the property is called the *bailor*. The person receiving and keeping the property is called the *bailee*.[3] Thus, in the context of a parking valet, the vehicle's owner is the bailor, and the parking valet is the bailee.

Okla. Stat. Tit. 15 §459 says that the duties and liabilities of a bailee are subject to the general laws of the state. One "general law" of the state of Oklahoma, regarding care of property, is the law of *negligence*. To prove negligence, a plaintiff must prove:

- A person owed a duty of care to the plaintiff,
- The person owing the duty of care violated that duty and
- The violation of the duty caused harm.[4]

The first element listed above, "duty of care," is important here. Although the duties of a bailee are subject to the general law of the state, Oklahoma has enacted laws defining the duty of care a bailee owes. This level of care depends on whether a bailee is a "gratuitous bailee" or a "bailee for hire."

A gratuitous bailee is a bailee who receives no consideration or payment for acting as a bailee.[5] If a bailee is not a gratuitous bailee, then he is a bailee for hire.[6]

A gratuitous bailee must use "slight care" for the preservation of the thing bailed.[7] A bailee for hire must use "at least ordinary care" for the preservation of the thing bailed.[8] Thus, if a valet is not paid, the valet would only have to use "slight care" to preserve the vehicles. However, if a valet is paid, then the valet would have to use "at least ordinary care" to preserve the vehicles.

If a valet is a volunteer for a non-profit or charitable organization, the liability of a valet would be limited by Okla. Stat. Tit. 76 §31(A), which reads:

A. Any volunteer shall be immune from liability in a civil action on the basis of any act or omission of the volunteer resulting in damage or injury if:

1. The volunteer was acting in good faith and within the scope of the volunteer's official functions and duties for a charitable organization or not-for-profit corporation; and

2. The damage or injury was not caused by gross negligence or willful and wanton misconduct by the volunteer.

If a valet is acting in good faith, within the scope of his official functions and duties for a charitable or nonprofit organization and the damage to an automobile is not caused by gross negligence or willful and wanton misconduct, then the valet would not be personally liable.

Note that a "gratuitous bailee" is not the same as a bailee who volunteers for a charitable or nonprofit organization. A gratuitous bailee is *any* bailee who receives no payment or consideration for acting as a bailee. This would include any unpaid valet – whether the valet was providing services to a charitable organization or to some other entity. A bailee volunteer for a charitable or nonprofit organization would, of course, also be a gratuitous bailee. However, if a gratuitous bailee acts as a bailee for any person or entity other than a nonprofit or charitable organization, the gratuitous bailee is not entitled to the same immunity from liability, which the law provides to a volunteer for a charitable or nonprofit organization.

This means that the valet could potentially be liable for any loss or injury to a vehicle from the moment the vehicle was entrusted to the valet until the vehicle was returned to its owner.

LIABILITY OF A VALET FOR DAMAGE TO AN AUTOMOBILE

If a valet breached the duty of care he owed to preserve a vehicle and his breach of the duty caused harm to the vehicle, then the valet would be liable to the owner of the vehicle.

Okla. Stat. Tit. 12 §458 reads:

> If a thing is lost or injured during its deposit, and the bailee refuse to inform the bailor of the circumstances under which the loss or injury occurred, so far as he has information concerning them, or willfully misrepresents the circumstances to him, the bailee shall be presumed to have willfully, or by gross negligence, permitted the loss or injury to occur.

If a vehicle was lost or injured "during its deposit" and the valet did not inform the bailor how the loss or injury occurred or misrepresented the circumstances of the vehicle's injury or loss, the valet will be presumed to have acted willfully or with gross negligence. The valet would then be liable. Note also the words "during its deposit." This means that the valet could potentially be liable for any loss or injury to a vehicle from the moment the vehicle was entrusted to the valet until the vehicle was returned to its owner. This statute would be relevant if the valet is a volunteer for a nonprofit because, as noted previously, Okla. Stat. Tit. 76 §31(A) does not immunize a nonprofit volunteer valet from liability if the valet acted with gross negligence.

Okla. Stat. Tit. 15 §456 reads:

> A bailee is liable for any damage happening to the thing bailed during his wrongful use thereof, unless such damage must inevitably have happened, though the property had not been thus used.

If the valet wrongfully uses a vehicle, then the valet would be liable.

Also, there is Okla. Stat. Tit. 15 §460:

> The liabilities of a bailee for negligence shall not exceed the amount which he is informed by the bailor, or has reason to suppose, the thing bailed is worth.

Thus, the valet would only be liable for the amount that the bailor informed the valet the vehicle was worth or for the amount the valet had "reason to suppose" the vehicle was worth.

LIABILITY OF A VALET FOR ANY INJURY CAUSED BY THE VALET'S DRIVING

In *Dirickson v. Mings*[9] the court held:

> Concerning duty of care, a driver of a motor vehicle must, at all times, use that degree of care which is reasonable and prudent under the circumstances. ... Therefore, a failure to exercise that degree of care which results in injury to another is actionable negligence.

Thus, if a valet is driving a vehicle and does not use the degree of care which is reasonable and prudent under the circumstances and any harm results (through a collision or otherwise), the valet would be liable to the person who suffered harm.

LIABILITY OF A CORPORATION FOR ANY ACTIONS OF A VALET

Oklahoma has long recognized the law of *respondeat superior*. Respondeat superior is the doctrine that an employer is liable for the negligence of an employee if the employee's tortious act was committed in the course of employment and within the employee's authority.[10] If a valet is a paid employee of a corporation, the corporation is liable for the valet's negligence.

A nonprofit corporation is also liable for a valet's negligence, even if the valet is a volunteer. Okla. Stat. Tit. 76 §31(B) reads,

> In any civil action against a charitable organization or not-for-profit corporation for damages based upon the conduct of a volunteer, the doctrine of respondeat superior shall apply, notwithstanding the immunity granted to the volunteer in subsection A of this section.

The language "notwithstanding the immunity granted to the volunteer in subsection A of this section" makes clear that, even if the valet is not personally liable, the nonprofit could still be liable for the valet's conduct.[11] This means if the valet is a volunteer of a nonprofit corporation, the nonprofit would still be liable for a valet's negligence, just as a corporation would be liable for a valet's negligence if he or she is an employee.

A further theory, under which a corporation could be liable for the conduct of a parking valet, is *negligent entrustment*:

> Negligent entrustment of an automobile occurs when the automobile is supplied, directly or through a third person, for the use of another whom the supplier knows, or should know, because of youth, inexperience, or otherwise, is likely to use it in a manner involving unreasonable risk of bodily harm to others, with liability for the harm caused thereby.[12]

If a corporation knew that a valet had a "propensity for becoming intoxicated," this knowledge would be sufficient to result in liability to the corporation for negligent entrustment.[13] Under this doctrine, if a corporation knew that a valet was likely to use an automobile in a risky manner, the corporation could be liable for negligent entrustment.

CONCLUSION

The care that a valet must use to avoid liability depends on whether or not the valet is paid. If the valet is paid, the valet must use "at least ordinary care" of the automobile. If the valet is unpaid, the valet must use "slight care." If the valet is acting in good faith within the scope of the valet's duties as a volunteer for a nonprofit organization, the valet personally would be shielded from liability unless the valet acted with gross negligence or wanton or willful misconduct. If a vehicle is lost or injured during the vehicle's deposit and the valet does not inform the owner of the circumstances of the loss or injury, the valet would be presumed to have acted with gross negligence. A valet can also be liable if the valet wrongfully uses a vehicle and any damage results, or if the valet in driving a vehicle does not use the degree of care that is reasonable and prudent under the circumstances. A corporation, including a nonprofit corporation, can be liable for the negligence committed by a valet in the course of the valet's employment. The corporation can be liable for the valet's negligence even if the valet is personally immune from liability. To obtain the benefits of valet parking, a corporation must also take adequate steps to avoid the liability that occurred when Standard Parking's valet struck Thyce Colyn.

ABOUT THE AUTHOR

Kyle Persaud received his B.A. from Oklahoma Wesleyan University and his J.D. from the TU College of Law. He is currently a solo practitioner in Bartlesville where he practices civil, family and probate law.

ENDNOTES

1. Christine Barcia, "Bicyclist Struck by Valet Driver Allegedly Taking Short Cut", *National Law Journal* 17 (May 2017); Mike Lindblom, "Bicyclist Severely Injured in Crash with Parking Valet Is Awarded $38M," *Seattle Times* www.seattletimes.com/seattle-news/transportation/bicyclist-severely-injured-by-valet-in-crash-awarded-38m/ (Dec. 15, 2016).
2. Jason Bucher, "Patient Satisfaction Increases with Valet Parking," *Parking: The Magazine of Parking Management and Operations 12* (August 2015).
3. Okla. Stat. Tit. 15 §442.
4. *Loper v. Austin*, 1979 OK 84, ¶9, 596 P.2d 544, 546.
5. Okla. Stat. Tit. 15 §461.
6. Okla. Stat. Tit. 15 §465.
7. Okla. Stat. Tit. 15 §463.
8. Okla. Stat. Tit. 15 §466.
9. 1996 OK 2, ¶7, 910 P.2d 1015, 1018.
10. *Baker v. St. Francis Hosp.,* 2005 OK 36, ¶10, 126 P.3d 602, 605.
11. *See also* Hooper by and through *Hooper v. Clements Food Co.*, 1985 OK 6, ¶9, 694 P.2d 943, 945 (holding that, even if an employee is not personally liable for negligence, the employer can still be found liable).
12. *Sheffer v. Carolina Forge Co., LLC,* 2013 OK 48, ¶12, 306 P.3d 544, 548.
13. *Id.* (quoting *Nat'l Trailer Convoy, Inc. v. Saul*, 1962 OK 181, ¶10, 375 P.2d 922, 928-29).

Is the GTCA's Cap on Inverse Condemnation Awards Constitutional?

By T.P. "Lynn" Howell

EFFECTIVE APRIL 21, 2014, THE OKLAHOMA LEGISLATURE extended the Governmental Tort Claims Act (GTCA) to cover inverse condemnation actions. It did this by expanding the definition of "tort" in 51 O.S. 2011 §152, which is now defined as:

> **a legal wrong, independent of contract, involving violation of a duty imposed by general law, statute, the Constitution of the State of Oklahoma, or otherwise, resulting in a loss to any person, association or corporation as the proximate result of an act or omission of a political subdivision or the state or an employee acting within the scope of employment.[1]**

The statute formerly did not contain the underlined language. Ironically, adding that reference to the Constitution may not have been constitutional.

BACKGROUND

The concept of "inverse condemnation"[2] had been developed by other states and the United States Supreme Court well before Oklahoma became a state. For example, in the 1884 case of *United States v. Great Falls Mfg. Co.*,[3] the U.S. Supreme Court ruled that a landowner was entitled to be compensated by the government for a taking caused by a dam. In the 1865 case of *Soulard v. City of St. Louis*,[4] the Missouri Supreme Court held that a landowner was entitled to be compensated for a taking caused by street construction.

These holdings derived from the constitutional rule that the government shall not take private property without fairly compensating the owner. The Fifth Amendment to the United States Constitution states in relevant part that "private property [shall not] be taken for public use, without just compensation." The U.S. Supreme Court has noted "this limitation on the exercise of the right of eminent domain is so essentially a part of American constitutional law that it is believed that no State is now without it."[5]

Following these precedents, courts in Oklahoma had recognized that landowners had the right to be compensated for "takings" of their property even before the Oklahoma Constitution was enacted.[6] Normally, the government takes property it needs by means of an action in eminent domain, but where the government has not brought such a proceeding, the landowner can file an action for compensation that has come to be known as "inverse condemnation."[7]

INVERSE CONDEMNATION ACTIONS BEFORE THE 2014 GTCA AMENDMENT

Before 2014, courts in Oklahoma had held that a condemnation claim is not a tort. "Ordinarily, condemnation proceedings do not involve a tort and are not civil actions at law or suits in equity, but rather are special statutory proceedings for the purpose of ascertaining the compensation to be paid for the property proposed to be appropriated."[8] The classification as nontorts applied to both regular and inverse condemnation claims.[9] "Condemnation proceedings, including inverse

condemnation, do not involve a tort, and are not, strictly speaking, civil actions or suits."[10]

For that reason, before 2014, in at least two decisions the Oklahoma Court of Civil Appeals had held that claims for inverse condemnation were not subject to the GTCA.[11] The Oklahoma Supreme Court had apparently not addressed the issue, but the logic – that the GTCA does not apply to a traditionally nontort claim – was sound. Courts in other states had ruled similarly.[12]

We do not know if the Legislature was specifically addressing these precedents regarding inverse condemnation claims when it amended the GTCA or if it was attempting to limit other constitution-based claims against the government, such as civil rights actions, but the effect was the same because a landowner's right to bring a claim for inverse condemnation is derived directly from the Oklahoma Constitution. Article 2, Section 24 reads in pertinent part as follows:

> Private property shall not be taken or damaged for public use without just compensation...

It has long been recognized that this constitutional provision is the antecedent of a property owner's right to be compensated for the taking of his or her property, whether that is through a regular condemnation proceeding or an inverse condemnation action.[13] The Oklahoma Supreme Court therefore has held this constitutional provision is "self-executing," in that it needs no statutory enactment to be effective – it is *independent* of statute. "It is now well settled that the guaranty of section 24, article 2, of our Constitution is self-executing."[14]

It is also well settled that a constitutional right, as opposed to a statutory right, cannot be abrogated or infringed by a legislative enactment. "Where it is proposed by a statute to deny, modify, or diminish a right or immunity secured to the people by an explicit constitutional provision, the presumption is against the validity of the statute, and the courts should enforce the constitutional provision."[15]

The most obvious effect of applying the GTCA to inverse condemnation actions is that the GTCA limits the amount a person can recover from the government in a suit under its provisions to $25,000.

THE IMPACT OF THE GTCA ON INVERSE CONDEMNATION CLAIMS

The most obvious effect of applying the GTCA to inverse condemnation actions is that the GTCA limits the amount a person can recover from the government in a suit under its provisions to $25,000. That directly conflicts with Article 2, Section 24 of the Oklahoma Constitution, quoted above, which provides that a landowner shall receive "*just compensation*" for his or her property. The recent amendment to the statutory definition of "tort" in the GTCA therefore diminishes a constitutional right.

Other courts have addressed similar statutes. In *Heughs Land, LLC v. Holladay City*,[16] the city of Holladay, Utah, denied the request of Heughs Land, a developer, for approval of a subdivision plat. The developer sought review of that decision by filing a case in the district court, calling the city's ruling a "taking" without compensation.[17] The court dismissed the case based on the developer's failure to comply with the Utah Governmental Immunity Act (UGIA). As does Oklahoma's GTCA, the UGIA requires a claimant to first give notice to the governmental entity and then jump through a number of other hoops in order to establish its claim.[18]

The developer argued on appeal that its "right to recovery under the Utah Constitution may not be modified or restricted by the UGIA because article I, section 22 of the constitution [providing for just compensation for property taken by the government] is self-executing."[19] The Utah Court of Appeals *agreed*, noting that "if a statutory enactment contravenes any provision of the constitution, the latter governs."[20]

Other states have made consonant rulings – that a governmental tort claims act cannot infringe upon the constitutional right to be compensated for a governmental taking. In *Greenway v. Borough of Paramus*,[21] the New Jersey Supreme Court held that New Jersey's Tort Claims Act did "not apply to inverse condemnation claims" because "statutes cannot abrogate constitutional rights."[22] In *Moore Real Estate, Inc. v. Porter County Drainage Bd.*,[23] the Indiana Court of Appeals ruled that a government agency "may not use a state statute,

the tort claims act, to trump the constitutional rights" of a landowner to recover in an inverse condemnation action.[24] In *Electro-Jet Tool Mfg. Co. v. City of Albuquerque*,[25] the New Mexico Supreme Court held that "legislation such as the Tort Claims Act cannot override a constitutional guarantee like that contained in Article II, Section 20," granting the right to recover just compensation for property taken by the government.[26]

CONCLUSION

Limiting a person's right to fair compensation for a governmental taking of his property by subjecting that right to the provisions of the GTCA is unconstitutional. The Legislature should not be able to cap the damages for the taking of a landowner's property at $25,000 when the land may actually be worth far more.

ABOUT THE AUTHOR

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ENDNOTES

1. 51 O.S. 2014 §152(14).
2. Although not the term: *see* n. 7.
3. 112 U.S. 645 (1884).
4. 36 Mo. 546 (1865).
5. *Pumpelly v. Green Bay & Mississippi Canal Co.,* 80 U.S. 166, 177 (1871).
6. *See, e.g., Southern Kansas Ry. Co. v. City of Oklahoma City*, 1902 OK 63, 69 P. 1050 (relying on the U.S. Fifth Amendment); *City of Oklahoma City v. McMaster*, 1903 OK 25, 73 P. 1012 (same).
7. The term appears to have been used for the first time with its present meaning by the Supreme Court of California in *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.*, 45 P.2d 972 (Cal. 1935). It was first used in Oklahoma in *Henthorn v. Oklahoma City*, 1969 OK 76, 453 P.2d 1013. Previously the Oklahoma Supreme Court had used the term "reverse condemnation" for the same concept. *See, e.g., Crowl v. Tidnam*, 1947 OK 112, 181 P.2d 549.
8. *Curtis v. WFEC R.R. Co.*, 2000 OK 26, ¶13, 1 P.3d 996. *See also Oklahoma City v. Wells*, 1939 OK 62, ¶34, 91 P.2d 1077.
9. *Vaughn v. City of Muskogee*, 2015 OK CIV APP 76, ¶5, 359 P.3d 192.
10. *Perry v. Grand River Dam Authority*, 2015 OK CIV APP 12, ¶27, 344 P.3d 1.
11. *Barton v. City of Midwest City*, 2011 OK CIV APP 71, ¶24, 257 P.3d 422; *Material Service Corp. v. Rogers County Comm'rs*, 2006 OK CIV APP 52, ¶7, 136 P.3d 1063.
12. *See, e.g., Greenway Development Co. v. Borough of Paramus*, 750 A.2d 764, 770 (N.J. 2000) "inverse condemnation is not a tort or an 'injury' within the meaning of the TCA"); *Odello Bros. v. County of Monterey*, 63 Cal.App.4th 778, 785-86, 73 Cal.Rptr.2d 903 (Ct. App. 1998) (California's Tort Claims Act was inapplicable to actions for inverse condemnation because such actions do not sound in tort).
13. *Stedman v. State Highway Commission*, 1935 OK 1028, ¶24, 50 P.2d 657 (a plaintiff is "entitled to maintain the action [for compensation] under the eminent domain provision of the Constitution of the state"). *See also Calmat of Arizona v. State ex rel. Miller*, 859 P.2d 1323, 1325 (Ariz. 1993) (the authority to bring an inverse condemnation suit "stems directly" from the constitutional provision that private property should not be taken without just compensation).
14. *Atchison, T. & S. F. Ry. Co. v. Terminal Oil Mill Co.*, 1937 OK 349, ¶11, 71 P.2d 617. *See also Wohl v. City of Missoula*, 300 P.3d 1119, 1136 (Mont. 2013) (a landowner's right to bring an inverse condemnation action derives from the "self-executing character" of the takings clause of the Montana Constitution); *Greenway Development Co. v. Borough of Paramus*, 750 A.2d 764, 770 (N.J. 2000) (the constitutional prohibition against taking property without just compensation is self-executing); *Dishman v. Nebraska Public Power District*, 482 N.W.2d 580, 582 (Neb. 1992) ("the constitutional provision which prohibits the state from taking or damaging property without just compensation…[is] self-executing").
15. *Matter of Conservatorship of Goodman*, 1988 OK CIV APP 16, ¶11, 766 P.2d 1010; *see also Baccus v. Banks*, 1947 OK 322, 192 P.2d 683.
16. 113 P.3d 1024 (Utah 2005).
17. *Id.* at 1025.
18. 113 P.3d at 1026.
19. *Id.*
20. *Id.*, quoting *Colman v. Utah State Land Board*, 795 P.2d 622, 630 (Utah 1990).
21. 750 A.2d 764 at 770.
22. Quoting *Lerman v. City of Portland*, 675 F.Supp. 11, 15 (D. Me. 1987).
23. 578 N.E.2d 380 (Ind. Ct. App. 1991).
24. *Id.* at 381.
25. 845 P.2d 770 (N.M. 1992).
26. *Id.* at 777.

Tort Litigation for the Rising Prison Population

By Andrew M. Casey

In June of this year, studies revealed that Oklahoma now leads the planet with the world's highest incarceration rate of 1,079 per 100,000 people.[1] The study identifies Oklahoma's incarceration rate far above the national average and considerably exceeding other stable democracies in the world.[2] Approximately 28,000 Oklahomans reside inside state and private prisons alongside an additional 8,900 in local jails.[3] An additional 28,000 citizens are outside prison but under the supervision of the Department of Corrections.[4]

Some trends regarding the incarcerated are alarming; for instance, Oklahoma incarcerates more women per capita than any other state.[5] Incarceration rates in Oklahoma continue to climb despite the fact that over the last 20 years, the violent crime rate and property crime rate have both dropped significantly.[6] The explanation for the still rising incarceration rate over the same course of time involves drug possession offenses.[7] Further, the length of the prison stay for nonviolent offenses is 80-100 percent longer than the national average and sentences for drug offenses twice the length of national averages.[8]

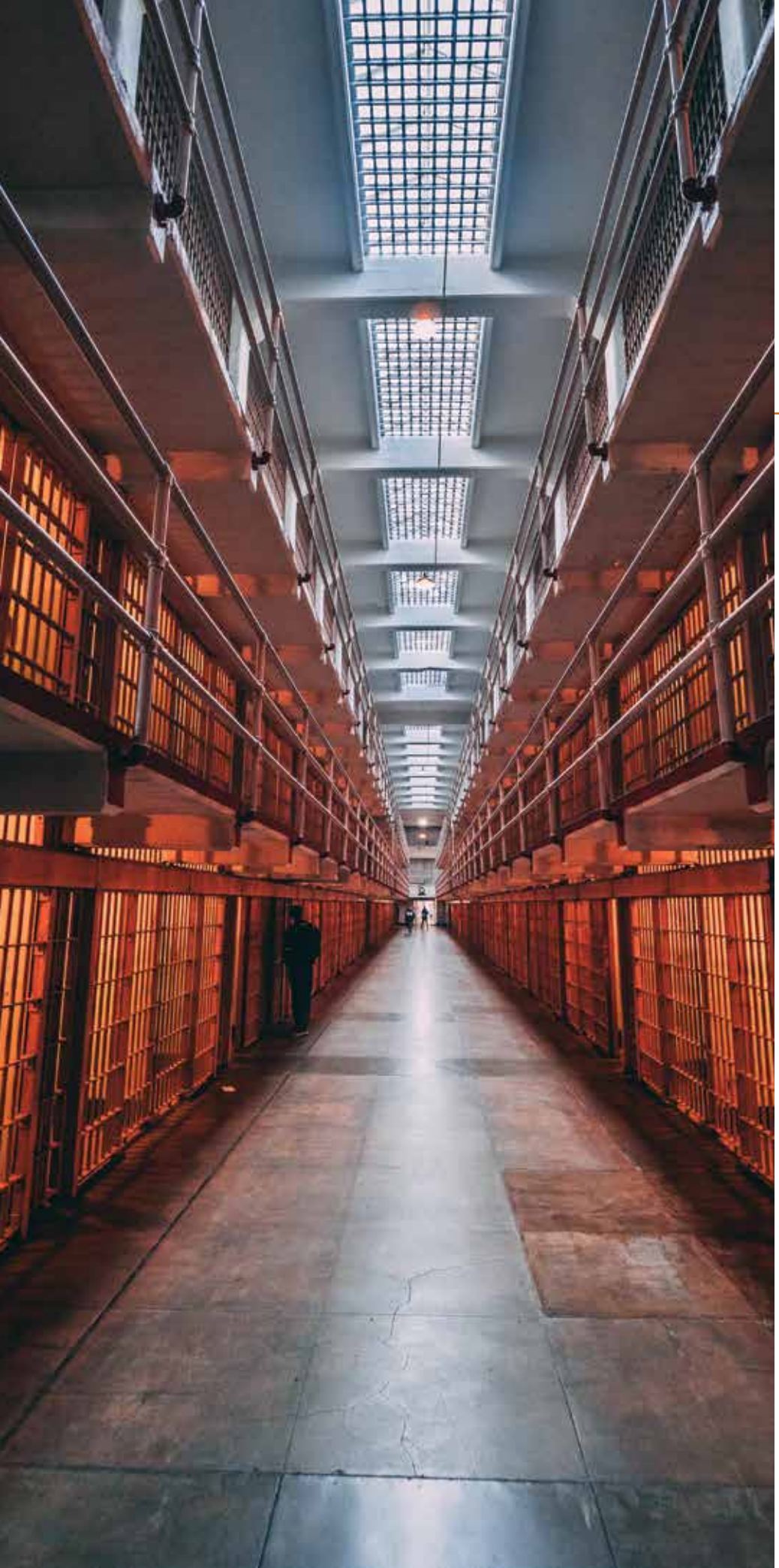
OKLAHOMA'S UNDERFUNDING OF ITS CONSTITUTIONAL PROMISE

On average across the United States, it costs $33,274 per year to house an individual inmate; however, Oklahoma only spends $16,497 per year, ranking third from the bottom by narrowly outspending Alabama and Louisiana.[9] In 2017, Joe Allbaugh, director of the Department of Corrections, declared that the Department of Corrections operates over its capacity and needed over $1 billion more than its current $612 million budget allows.[10] Allbaugh indicated that "When you think about one in 80 Oklahomans is incarcerated or under supervision, you know somebody who's in prison, or you love somebody who is ... [q]uestion is, how we are going to address it?"[11]

The unspoken reality from these concerns is that Oklahoma contributes less than half the national average on the following necessary objectives: 1) adequate levels of security; 2) program and administrative staff to run facilities; 3) food and programming for the incarcerated citizens; 4) infrastructure maintenance and upkeep; and 5) health care for the rising inmate population. Expressing concern over this troubling truth, Allbaugh said to reporters in a December 2017 article that "[w]e are not a listing ship ... We are a sinking ship."[12] In his closing thought to the article, Allbaugh noted that "if the state doesn't demonstrate that they can handle their prison population in a safe and humane way, what are inmates supposed to do? They're going to sue."[13] Due to Oklahoma's prisons holding the sixth highest mortality rate (second highest in accidental deaths and homicides),[14] and due to the dramatically higher amount of deaths in county jails, the number of suits likely will keep rising.

THE STATUTORY BLOCKADE OF THE COURTHOUSE

While Allbaugh's conclusion may be true, the actual process of successfully accessing the courthouse against an Oklahoma prison or jail remains fraught with hurdles and hazards. For instance, Title 12 Okla. Stat. §95 requires that "[a]ll actions filed by an inmate or by a person based upon facts that occurred while the person was an inmate in ... custody ... shall be



commenced within one (1) year after the cause of action shall have accrued."[15] Additionally, the Oklahoma Governmental Tort Claims Act (OGTCA) exempts from liability any claim based upon the "[p]rovision, equipping, operation or maintenance of any prison, jail or correctional facility, or injuries resulting from the parole or escape of a prisoner or injuries by a prisoner to any other prisoner."[16] Further, even though private prisons are hard-pressed to prove immunity under the OGTCA, suing a private prison contractor still requires notice under OGTCA.[17] Title 57 also mandates exhaustion of administrative and statutory remedies before filing pleadings.[18] Failure to do so may result in dismissal with prejudice.[19]

The statutory exemption for §155(25) is "all inclusive for tort claims."[20] Courts have held that §155(25) immunizes prisons and jails from a wide array of inmates' tort claims, including claims for personal injuries from other inmate's negligent operation of a chain saw,[21] a slip and fall injury,[22] failure to provide medical treatment,[23] negligence by prison guards in their removal of a prisoner's handcuffs and leg irons[24] and using strip searches and assault and battery.[25] Due to the broad-reaching language of the *Medina* decision,[26] the terms

"provision," "equipping," "operation" and "maintenance" encompass most every situation a state law claim could be founded upon in a jail or prison making jails and prisons functionally off limits to lawsuits under state common or statutory law. Unfortunately for those injured in jails or prisons, the remaining remedies are limited.

UNEASY ALTERNATIVES AND UNSETTLED LAW

A plaintiff may still individually maintain a claim against an individual tortfeasor so long as they allege the act was done outside the scope of employment.[27] Doing so drastically affects liability under *respondeat superior* and, in some situations, kneecaps the most likely possibility for a solvent defendant. Regardless, proving the alleged conduct to be "outside the scope of employment" is easier said than done with prisons and jails. The Oklahoma Supreme Court noted that governmental employees such as police officers (whether on duty or off duty) may be acting within the scope of their employment even during conduct such as striking arrestees, physically and verbally attacking customers of a private business, causing a car accident or injuring detainees/arrestees, thus subjecting their employers to liability.[28] With the goal of immunity in mind, it does not seem difficult for a defendant to claim that their ill-advised acts were in the scope of their employment.

That leaves only two realistic options for plaintiffs: pursuing a federal claim under 42 U.S.C §1983 and/or a state constitutional claim under *Bosh v. Cherokee Cty. Bldg. Auth.*, 2013 OK 9. Both scenarios remain overwrought with their own sets of practical limitations.

For §1983 claims, a municipality cannot be held liable under §1983 on a *respondeat superior* theory.[29] Instead, proving municipal liability requires a showing that the chosen

policy would have inevitably led to constitutional injury. Additionally, compared to simple negligence claims, many §1983 causes of action require evidence of "deliberate indifference" to a known constitutional right.[30] "Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action."[31] Deliberate indifference can be satisfied by evidence showing that the defendant "knowingly created a substantial risk of constitutional injury."[32] Should a plaintiff survive that feat, evading dismissal under qualified immunity remains a complex and difficult hurdle of its own. Suffice it to say, §1983 will not become easier for plaintiffs to navigate. The only hope aside §1983 for citizens in prison remains pursuing a state constitutional claim.

Bosh torts have an entirely different complexity: uncertainty. The genesis for a claim under the Oklahoma Constitution began gaining traction in the 2002 Oklahoma Supreme Court case, *Washington v. Barry.*[33] There, the Oklahoma Supreme Court established that a prisoner in a penal institution has the right to recover for the use of excessive force by prison employees if the "force applied was so excessive that it violated the prisoner's right to be protected from the infliction of 'cruel and unusual punishments' under the state and federal constitutions."[34]

Thereafter, the Court of Civil Appeals crafted two opinions regarding inmates and the Oklahoma Constitution. First, in *Bryson v. Oklahoma County ex rel. Oklahoma County Det. Ctr.*,[35] the Oklahoma Court of Civil Appeals sensibly determined that if prisoners had a constitutional right to be free from excessive force under Okla. Const. Art. II, §9 so too did pretrial detainees. The court identified the source of that right as Okla. Const., Art. II, §30.[36] Second, in *Edelen v. Bd. of Comm'rs of Bryan Cty,*[37] the Oklahoma Civil Court of Appeals extended this analysis to denial of medical care claims under Art. II, §9.[38] In *Edelen,* an inmate awaiting transfer to the Oklahoma Department of Corrections became

sick and later slipped on the floor thereafter breaking his elbow due to a leaking sewer system that overflowed into his cell floor.[39] The inmate filed a claim under the OGTCA, was denied and subsequently filed suit based on Okla. Const. Art. 2, §9 for denial of medical care as a "cruel and unusual punishment." The District Court dismissed the Oklahoma Constitutional claim under 12(b)(6) grounds and the Court of Civil Appeals reversed and indicated that "relief is possible' based on these allegations" after applying federal due process analysis to the state constitution.[40]

The Oklahoma Supreme Court only addressed one of these decisions in the *Bosh* case: *Bryson v. Oklahoma County.* In *Bosh,* the Supreme Court of Oklahoma addressed the beating of a pretrial detainee by jail employees that resulted in spinal fractures. Under the OGTCA, no liability existed yet the assault and battery by jail officers clearly violated Okla. Const., Art. II, §30. The Supreme Court held that the Oklahoma Constitution therein recognized a private cause of action for damages for excessive force under Art. II, §30.[41]

After *Bosh,* the most substantial decision covering the limits of the *Bosh* holding came in *Perry v. City of Norman*,[42] where the Oklahoma Supreme Court explained that a "*Bosh* claim" is limited to those circumstances where a cause of action under the OGTCA is unavailable. After, the Oklahoma Court of Civil Appeals developed two significant published and precedential case law interpreting the *Bosh* decision further. In *GJA v. Oklahoma Dep't of Human Servs.*,[43] the Court of Civil Appeals Division IV found that *Bosh* is not to be limited to its facts and specific holdings and stands for the proposition that the Supreme Court recognizes a broader scope of actionable claims based upon violations of constitutional rights.[44] The *GJA* decision heavily influenced a Division II decision in *Deal v. Brooks*.[45] There, the court reversed a summary judgment dismissal of a claim against DHS under Art. II, §7, Oklahoma's due process clause. The court there recognized a private cause of action against DHS on behalf of children in state custody when DHS employees make placement decisions in conscious disregard of known safety risks for the child.[46] The court in *Deal* indicated it is now "established precedent" that Oklahoma refuses to "construe the OGTCA as providing blanket immunity" where doing so would render a citizen's constitutional protections as "ineffective" or a "nullity."[47]

Federal courts have been split about how far the *Bosh* holding can reach. Some have favorably applied *Bosh* in numerous contexts besides excessive force in prisons and jails.[48] Other courts have expressed reluctance to extending *Bosh* beyond its holding.[49] Without further guidance from the Oklahoma Supreme Court, some of these courts will remain reluctant and unwilling to recognize an expanded *Bosh* claim.[50] Unfortunately, this split leaves a great uncertainty for plaintiffs in jail settings searching solutions to the injuries they sustain. Currently, plaintiffs only sure private cause of action for an Oklahoma constitutional violation lies with a claim of excessive force.

If correctional officers know of an imminent attack on an inmate and do nothing (or even conspicuously aid an attacker), then a plaintiff's constitutional right to be free from cruel and unusual punishment in the form of inhumane conditions has been violated and Art. II, §9 will be rendered a nullity under the OGTCA. If more pretrial detainees continue to die from not receiving medicine and medical attention, then a plaintiff's right to be free from cruel and unusual punishment in the form of denied medical care under Art. II, §7 will become ineffective due to a legislative enactment.

CONCLUSION

The Oklahoma Supreme Court's courageous decision in *Bosh* provided a logical limit to all-inclusive prohibition for tort claims against jails and prisons in the context of excessive force. Unfortunately, it is not just beatings that our prisoners have to fear. As a reminder, many of the people suffering from these constitutionally offensive injuries are nonviolent offenders forced to serve sentences higher than the national average. Many members of the bar, myself included, know these citizens as more than just our clients. They are often our family, friends, neighbors and colleagues. Surviving Oklahoma's justice system involves far more

Without further guidance from the Oklahoma Supreme Court, some of these courts will remain reluctant and unwilling to recognize an expanded *Bosh* claim.

hazards and now more than any other time in our state's history those family members, friends and neighbors under incarceration need more protection for their constitutional rights. As time goes on, we can only hope for more clarity and certainty in the form of those protections or (more simply) for the hope that the Legislature will sensibly rewind its exemption from liability for prisons and jails.

ABOUT THE AUTHOR

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17. Title 57 Okla. Stat. §566.4.
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20. *Gibson v. Copeland*, 13 P.3d 989, 992 (Okla.App.2000) (*citing Medina v. State*, 871 P.2d 1379 (Okla 1993)).
21. *Purvey v. State,* 905 P.2d 770 (Okla.1995).
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24. *Washington v. Barry,* 55 P.3d 1036 (Okla.2002).
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31. *Bd. Of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 410 (1997).
32. *Dodds v. Richardson*, 614 F.3d 1185, 1195 (10th Cir. 2010).
33. 2002 OK 45, 55 P.3d 1036.
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38. *Edelen* holds precedential value, is released for publication, and the Oklahoma Supreme Court denied *certiorari* on Oct. 24, 2011.
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Protecting the Settlement Recovery: Planning Options for Settlement Recipients and Their Attorneys

By John M. Wylie, Joseph W. Tombs and Greg Maxwell

PERSONAL INJURY ATTORNEYS OFTEN FEEL A DESIRE to focus on their next case once the present case settles, but the financial decisions arising at the end of a case can affect the client for years into the future and are generally too much for the client to handle alone. Additionally, missing the opportunity to help with the financial, lien resolution and government entitlement (Medicaid, SSI, Medicare and SSDI) issues arising in personal injury settlements can result in unsatisfied clients, malpractice claims and ethics violations.[1] These risks are not merely academic. In *State ex rel. Oklahoma Bar Assn. v. Friesen*, an Oklahoma attorney was disbarred for mishandling and failing to properly establish a structured settlement on behalf of a client.[2]

Most personal injury settlement recipients want to be responsible with their settlement funds but do not necessarily have the skills for the task. When a client is asked, "What is the most important thing you'd like to accomplish with this settlement money?" the answer is almost always sensible and responsible. It may be to pay back loans, replace lost future income, fund future medical expenses, upgrade living conditions or ensure their family's medical and future educational needs are paid. Given the opportunity, most personal injury victims will create a plan to use their funds to better their lives. Unfortunately, some are not given that opportunity and consequently squander their tort recoveries.[3]

A few simple steps to educate a client taken shortly before and after settlement will ensure the client is equipped to make informed decisions and protected from predators. If a settlement involves a significant amount of money and the attorney does not know what to do, it may be preferable for the plaintiff's attorney to refer this process to competent outside counsel.

DISSIPATION RISK

For most settlement recipients, dissipation is the greatest risk to their future financial security. In this context, "dissipation" means the net settlement recovery does not last as long as it should. Most clients are financial novices. A financial novice who suddenly has more money on hand than at any other time in life can easily dissipate those funds through a combination of impulsive spending, poor investment choices and well-intentioned gifts and loans to family and friends.

Dissipation risk can be mitigated but not without effort. Many personal injury victims need constraints placed on their access to settlement funds to avoid dissipation. These constraints should last until the recipients are ready to manage the funds themselves. It may be in the client's best interest to make settlement funds less easy to access immediately. The decision to place some, or all, of a

settlement into a situation that is more secure but relatively inaccessible should be made with a client's input and not unilaterally for them by the attorney.

The world is a dangerous place for an injury victim with a settlement, and not all "predators" are acting from ill will. It may be difficult for associates of the client to understand that the client's settlement is meant to last for a lifetime of expenses. Even well-meaning family and friends may ask for loans, propose speculative business ventures or offer commission-loaded investments. Financially unsophisticated settlement holders may be lured into casinos, shopping malls and car lots carefully designed to induce wanton and frivolous spending. Money earmarked for replacing future income or paying future medical costs all too often gets wasted in these ways.

For clients who choose to structure a portion of their settlement, perhaps the most dangerous predators are the annuity factoring companies. These companies offer to purchase future payments from an annuity or structured settlements at a heavily discounted rate. They advertise incessantly in an effort to tempt structured settlement recipients with the allure of "cash now." In some unique circumstances, a factoring transaction truly may be needed. However, many injury victims who desperately need the guaranteed future payments succumb to the endless solicitation and are left destitute.

Section 5891 was added to the Internal Revenue Code in an effort to protect structured settlement recipients from these companies.[4] This code provision requires a judge to approve proposed factoring transactions after considering the best interests of the annuity payee and the payee's dependents.[5] Oklahoma's procedure for approval of a proposed factoring transaction of structured settlement payments are found in the Structured Settlement Protection Act of 2001.[6] The IRS penalty for unapproved factoring transactions is a 40 percent federal tax imposed on the factoring company.[7] This legislation is a very positive development, but it does not solve the underlying problem. If an annuity payee is intent on factoring future payments, a way can usually be found to do it. Even though the procedure requires a finding that the sale is in the best interests of the client/seller, most judges have little reason to find otherwise in

the face of crowded dockets, an earnest seller and an even more anxious buyer.

ALLOCATING THE SETTLEMENT – LIQUID VERSUS SECURED

Proper allocation of settlement proceeds is critical for the client. A client's recovery may take several forms including cash, managed investment accounts, structured future payments, settlement trusts or some blend of each. Each of these options has distinct advantages and disadvantages, and since no case and client are the same, no single settlement solution is right in all circumstances. Each case requires planning to fit the abilities, needs, goals and special circumstances of each client. In addition, attorneys must keep in mind that in many cases the settlement allocation chosen will need to pass muster with a judge who is often asked to approve the terms of a settlement for minors or adults whose ability to make decisions may be impaired.

Ranked from most to least liquid (and therefore least to most secure), the four options are cash, managed investment accounts, settlements trusts and structured settlement annuities.

Cash

Cash is the most widely used settlement option for most clients for obvious reasons – cash spends. Cash is extremely liquid and is ideal for meeting an immediate need or goal of the client. It is often used to pay down debt, purchase new cars or homes and meet the immediate needs many injury victims face upon settling a personal injury case. This liquidity is the biggest advantage of cash, but it is also its greatest disadvantage. Cash in the hands of many injured clients will most likely be dissipated quickly because it can be spent on a client's whim, often leaving the family without future income or money to pay ongoing medical expenses.

Managed Investment Accounts

A managed investment account is only slightly less liquid than cash and only slightly more secure. Therefore, the dissipation risk is essentially the same. The client can request the funds at any time. It only takes a phone call to the investment advisor to turn the account into cash. This requirement may be enough to help a financially savvy client curb the trend toward dissipation but will do little to protect a financial novice. However, an investment advisor may be a helpful educator and coach who may be able to curtail some potentially poor decisions.

Settlement Trusts

Settlement trusts allow clients some flexibility and liquidity while also providing a level of dissipation protection. Settlement trusts can be drafted to allow payments to be made for education expenses, medical expenses and provide the client with monthly income. They can also allow for some percentage of the trust corpus to be used for discretionary spending. This gives clients some freedom and flexibility without allowing them to dissipate the entire principal amount. A settlement trust may allow the beneficiary time to gain financial discipline and establish a budget, while still allowing for some flexibility and future contingencies to be paid.

Trusts are not a silver bullet for all clients, however. Trust principal is not guaranteed because the funds are placed in an investment portfolio that fluctuates and can lose value. Corporate trustees often have hefty trustee fees and management expenses that will decrease the net return of the trust portfolio. Additionally, most trust departments at major banks have little experience dealing with the unique needs of injury victims.

It is often the case that a client will have ongoing medical expenses. Government programs such as Medicare and SSI require means testing that often considers income and assets. If care is not exercised in establishing the trust, a client may be required to expend most, or all, of their settlement proceeds before becoming eligible for services under those programs. An attorney should strive to preserve both the client's settlement principal and the client's ability to take advantage of any applicable government programs in crafting a settlement trust.

Structured Settlement Annuities

Structured settlement annuities provide injured clients with guaranteed, tax-exempt future payments. At the outset, the payment structure is extremely flexible and can be designed to fund future goals (*i.e.* college or retirement) or can be used to provide lifelong income. Seriously injured clients seeking a lifetime payment can also benefit from a "rated age," which serves to increase the payout per premium dollar. For many clients, structured settlement annuities provide much needed dissipation protection, guaranteed income and financial stability.

However, they are not without their drawbacks. While structured settlement annuities are flexible in design, they are impossible to change once established. A structured settlement may have a value of hundreds of thousands of dollars, but the client will only be able to access the scheduled disbursements. A client with a large amount of inaccessible money can easily become frustrated. This can increase the risk that a client will feel a need to sell future payments, usually at a dramatically discounted return for the client.

To know the right mix of cash, future payments and trusts for each client, it is imperative your client is educated about the pros and cons of each option before settlement.

Also, annuity payments are guaranteed by the annuity companies that offer them, and thus are only as solid as the company backing them. While the risk of annuity company insolvency is usually small, it is not zero. Most annuity companies in the structured settlement market are rated A+ or better with AM Best. An attorney should verify the financial security of the company servicing any proffered structured settlement annuity.

A skilled settlement-planning attorney may be helpful in creating custom solutions that merge some of the benefits of one or more of the four options. For example, a structured settlement annuity can pay directly into a trust, allowing settlement money to grow tax-free inside the annuity while taking advantage of the liquidity of a trust. Structuring into a trust also makes it impossible for the client to factor the future payments because the trust, not the injured client, is the payee of the annuity.

PROPER SETTLEMENT PLANNING AND EDUCATION

Some attorneys try to meet their professional obligation for securing competent financial advice to clients by simply offering them a chance to use a structured settlement. While a structured settlement can be an ideal tool in some situations, it is not a panacea, nor is it the only option available. Allocating the settlement may involve the use of a structured settlement, but real settlement planning involves a more comprehensive approach.

Recent lawsuits against plaintiff attorneys reveal that a plaintiff's attorney should inform their client of the option to structure their recovery.[8] Also, a plaintiff's attorney should not rely on defense attorneys to control the structured settlement process.[9] An attorney may attempt to argue by retaining a structured settlement broker and documenting the client was informed of a structured settlement option that they have done all that is required of them, but this approach likely falls short of meeting the attorney's professional duty to be an advisor.[10]

To know the right mix of cash, future payments and trusts for each client, it is imperative your client is educated about the pros and cons of each option before settlement. It is also important that you understand your client's unique situation and circumstances. Presettlement planning allows clients to consider their unique post-settlement needs and goals before the stresses and pressures of mediation. In addition, a presettlement financial plan allows the client to have meaningful input regarding the form the settlement ultimately takes. Proper presettlement planning creates client ownership or "buy-in" in the result. This can greatly reduce the risk that a client will prematurely dissipate their settlement recovery because liquidity issues – future cash needs and contingency plans have been discussed and preplanned.[11]

Early in the settlement process, before mediation or arbitration, the client needs to be educated – ideally by an independent settlement planner or attorney.[12] This presettlement meeting separates the planning from the stress of mediation, resulting in better decisions. It is in everyone's best interest if the client has only one decision to make at mediation – should the case be settled for the amount offered? However, clients are ill-equipped to make this decision without the answer to the primary question on their mind – "After this is all over, how many of my basic goals will this cover?"

Clients often do not know what to expect at each step of the litigation process and thus feel disempowered. They do not fully understand the time it will take to get court approval, settle liens or wrangle with the defense over the wording of the settlement agreement. At some point in mediation,

many clients get angry at the defendant and its insurers, at the system, the process and often at their own attorneys. It can become difficult to convince angry clients to accept reasonable offers and even harder for them to be pleased with your representation or their own decisions made in that environment.

On the other hand, a client who is prepared for what to expect at mediation and who knows the costs of meeting his goals feels empowered to make an informed settlement decision. This client is more likely to follow the advice of counsel and to be more content with the settlement.

The transition into post-settlement financial life can be difficult. Left to their own devices, settlement recipients often seek advice from sources unfamiliar with the complexities associated with the financial aspects of handling a settlement recovery and fall prey to the all-too-familiar predators. Post-settlement financial education for injury victims and their families has traditionally been glaringly absent. Post-settlement financial education should be more comprehensive than just investing the proceeds and should also include credit repair, budgeting, insurance review, estate planning and tax planning.

JUST A SETTLEMENT OR A REMEDY?

A client's transition from litigation and final settlement to post-settlement life is not an easy one. Every client's financial knowledge and education is different. Each client needs specific attention to help bridge the gap from pre-injury life to post-settlement normalcy.

Plaintiff's attorneys are all too aware that they cannot turn back time and reverse the wrongs done to their clients. All they can do is seek financial compensation for the injuries suffered. If money is the primary balm an attorney has to offer to an injured client, it stands to reason the attorney should not only maximize the settlement received by the client, but also put a remedial plan in place that will continue to address the client's needs into the future. Some attorneys may feel comfortable providing their clients this type of financial education themselves while others prefer to bring in an independent settlement planning specialist.[13] In either case, it is the plaintiff's attorney who holds the key to helping the client create and implement a comprehensive plan that will increase their client's quality of life and long-term financial security.

Author's Note: Portions of this article previously appeared in a 2010 article of the Utah Trial Lawyer's Journal titled "Protecting the Settlement Recovery: Planning Options for Settlement Recipients and their Attorneys".

ABOUT THE AUTHORS

John Wylie is of counsel with Tombs Maxwell LLP, a multi-state law firm that deals with the legal and financial issues that arise at the time of settlement. Mr. Wylie is a member the OU College of Law class of 1997. He lives and practices in Norman.

Joseph Tombs serves as a settlement-planning attorney in Lubbock, Texas. Mr. Tombs has a focus in financial and tax planning for recipients of tort settlements. He is a founding member of Amicus Settlement Planners LLC, Amicus Financial Advisors LLC and Tombs Maxwell LLP.

Greg Maxwell of Tombs Maxwell LLP focuses his practice on settlement planning and special-needs planning for injury victims and provides consulting services to law firms regarding Medicare secondary payer compliance. Mr. Maxwell is a certified financial planner and founded Amicus Settlement Planners LLC, a plaintiff-loyal structured settlement planning firm, in 2004.

ENDNOTES

1. *See*, Oklahoma Rules of Professional Conduct, Rule 2.1, Comments 4 and 5.
2. *State ex rel. Oklahoma Bar Association v. Friesen*, 2016 OK 109, 384 P.3d 1129.
3. Cordell, D.M. and J.W. Tombs, "Planning Considerations for Personal Injury Settlement Recipients," *Journal of Financial Planning*, January 2005, pp. 26-28.
4. I.R.C. §5891 (2002).
5. I.R.C. §5891(b)(2)(A)(ii) (2002).
6. 12 O.S. §3238 *et seq.*
7. I.R.C. §5891(a) (2002).
8. *E.g., Grillo v. Henry, 96th Dist. Ct, Tarrant Co.* (Tex.) and G*rillo v. Pettiette*, et al., 96th Dist. Ct. Tarrant Co.
9. *E.g., Lyons v. Medical Malpractice Insurance Association,* 730 N.Y.S.2d 345, 286 A.D.2d 711 (N.Y. App. Div. 2001) and *Macomber v. Travelers Property and Casualty Corporation*, 260 Conn. 620, 804 A.2d 180 (Sept. 3, 2002).
10. Oklahoma Rules of Professional Conduct, Rule 2.1, Comments 4 and 5.
11. Additionally, in negotiating any settlement, a plaintiff's attorney should be mindful that most insurance companies will want to service any resulting structured settlement or annuity themselves, or through some subsidiary of the insurance company. Annuities are financial investments that are regularly sold to the public, and which are offered on a basis that makes money for the annuity provider. In negotiations, the attorney should be aware that the "face value" of an annuity may represent the "retail" cost of the annuity, where the settlement payor may be purchasing it at "cost" from itself or its wholly-owned subsidiary.
12. Most personal injury attorneys do not have errors and omissions liability coverage for financial and tax advice. Referring clients to independent financial and/or tax professionals helps ensure that the client is educated, and the personal injury attorney is protected from potential liability regarding the financial and tax aspects of the settlement.
13. Make sure that any professional you introduce has experience with injury victims and the proper credentials and education. The Certified Financial Planner (CFP®) designation and membership in the Society of Settlement Planners are good indications of competence and experience in the field. The Society of Settlement Planners is a national group of attorneys and settlement planners dedicated to protecting Plaintiff's rights and interests in financial matters.

SPECIAL JUDGE

COMANCHE COUNTY

The district judges of the Fifth Judicial District will begin accepting applications for the position of Special Judge in Comanche County on the 1st day of December 2018.

Applicants must submit an **original and 4 copies of a one page letter** expressing the applicant's reasons for applying for the position no later than 5:00 p.m. on the 31st day of December 2018.

The letters should be mailed or hand delivered to the office of:
District Judge Irma J. Newburn
Comanche County Courthouse
315 SW 5th Street Room 506
Lawton, Oklahoma 73501

Resumes and references are not required, but may be requested at a later date at the discretion of the district judges.

Salary and benefits are paid pursuant to State Law and/or Supreme Court order.

Anticipated start date is February 4, 2019.

★ ★ ★ ★

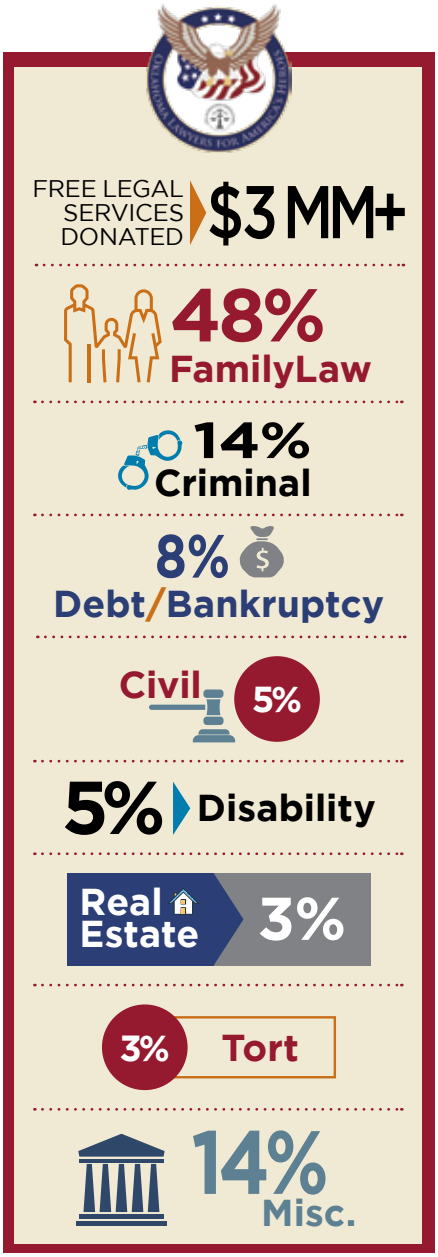
Heroes Program Volunteers Donate Over $3 Million in Free Legal Services

By Carol Manning

THIS NOVEMBER THE OBA celebrates the seventh anniversary of its Oklahoma Lawyers for America's Heroes Program. Created by Past President Deborah Reheard, the program helps service members and veterans with their legal needs. The rallying cry that motivates its 657 active volunteer attorneys is "Thank you is not enough." More than 200 "heroes" have been helped this year alone.

Since the program was launched on Veterans Day in 2010, Oklahoma lawyers throughout the state have helped 4,770 people with free legal advice totaling $3,321,000.

One grateful hero said, "I want to thank you from the bottom of my heart for this! You have no idea how hard and scary this has been. I don't know if or how I can thank you enough."



WHO QUALIFIES FOR FREE SERVICES?

A hero must 1) be a veteran of the U.S. armed forces, currently active or on reserve duty for the U.S. armed forces; 2) if on active duty or a member of the guard or reserves, the hero's pay grade must be a E-6 or below; 3) if a veteran, the hero's gross income per year cannot exceed $40,000 (all income is considered); 4) if a veteran, the hero must have an honorable discharge; and 5) have a legal issue within Oklahoma and cannot be currently represented by counsel.

Consistent with previous years, nearly half the cases involve family law, such as dissolution of marriage, adoption and paternity. About 14 percent of legal services given are criminal issues (primarily VPOs and DUIs) followed by 8 percent of debt-issue cases. General civil cases and disability each represent about 5 percent of cases. Other legal needs are real estate, tort/personal injury, estate planning, landlord/tenant, probate, military, employment, contracts/breach, administrative/immigration, discrimination and taxes.

HEROES WAITING FOR VOLUNTEER HELP

Program Coordinator Margaret Travis said, "We have the greatest volunteers who step up again and again to take our cases; it makes me proud to be an attorney and to help with the organization. Our need is greatest in family court, but we also need people to assist with landlord-tenant issues, social security and VA disability problems, real estate problems, criminal matters, debt and bankruptcy

problems and wills, trusts and estates. Our heroes have the same kinds of problems as the rest of society, and we need attorneys who can handle all kinds of matters all over the state."

Attorney Courtney Zamudio of Oklahoma City said, "Our service members sacrifice so much for so little. They should be able to focus their efforts on the mission and their job in our armed services and not the financial and legal burdens they may be facing. Serving as a volunteer helps to relieve these burdens while giving our heroes comfort that someone cares and is providing them services they may not otherwise be able to afford. Every one of my heroes cases expresses their heartfelt gratitude and appreciation for the time I spent on their case. The appreciation keeps me going and volunteering."

Jan Meadows of Norman said, "Though I am only helping one service member at a time, it's an opportunity to say thanks and to give back. If you're looking for an easy and rewarding method to provide needed legal services, the heroes program is it! Margaret sends a monthly list of the cases available, and volunteers have the option whether to accept a case. There are always different types of cases on the list. I can choose a case that fits my schedule and is in my area of practice."

It's easy to sign up as a volunteer online at www.okbarheroes.org or call Ms. Travis at 405-416-7086. You can also email her at heroes@okbar.org.

Ms. Manning is OBA communications director.

Mona Salyer Lambird Spotlight Award Recipients Honored

THE SPOTLIGHT AWARDS were created in 1996 to annually honor five women who have distinguished themselves in the legal profession and who have lighted the way for other women. The award was later renamed to honor 1996 OBA President Mona Salyer Lambird, who died in 1999, the first woman to serve as OBA president and was one of the award's first recipients.

This is the 22nd year for the awards to be presented by the OBA Women in Law Committee. Award winners were honored Oct. 19 at the Women in Law Conference in Oklahoma City.

Elise Dunitz Brennan

Elise Dunitz Brennan has practiced healthcare law for more than 30 years. She is a partner at Conner & Winters in Tulsa. Her practice concentrates on general representation of healthcare systems, including hospitals, ambulatory surgery centers, managed care organizations, pharmaceutical and device companies and long-term care facilities. She also serves as an arbitrator on the commercial and health care panels of the American Arbitration Association and as an arbitrator, mediator and trainer for the American Health Lawyers Association Dispute Resolution Services. She is an adjunct professor of the OU College of Law, teaching in the Master of Legal Studies Healthcare Law Program.

She obtained her law degree from Southern Methodist University and earned a Master of Social Work from the University of Michigan. She earned her undergraduate degree with honors from Tulane University and is a member of Phi Beta Kappa.

She was elected by the Tulsa City Council to the City of Tulsa Ethics Advisory Board. She is a member of the Board of Directors of Tulsa Ballet Theatre Inc. and is a past president of Family & Children's Services Inc. She is a Fellow of the American Health Lawyers Association, having served on the Board of Directors and on the editorial board of the *Journal of Health and Life Sciences Law*. She is married to Terry Brennan, an attorney practicing at the firm of Levinson, Smith & Huffman and is the mother to a daughter and son, Katie and Danny.

Christine Batson Deason

Christine Batson Deason is a solo practitioner in Oklahoma City with a focus on family law involving dissolution of marriage, guardianship, adoption and probate actions. She primarily represents clients in high net worth divorces or in complex child custody litigation. She is an experienced trial lawyer and family law mediator. Prior to her solo practice, she worked for firms in both Edmond and Oklahoma City. She obtained her law degree from the OU College of Law and her Bachelor of Arts from OU.

She is the co-founder of the Legal Aid/OCU Law School Pro Se Waiver Divorce Docket Project and has been a successful fundraising facilitator in conjunction with the Ruth Bader Ginsburg Inn of Court for underfunded inner-city public schools and first responders outreach programs since 2012. She is president of the Ruth Bader Ginsburg Inn of Court. She serves on the Oklahoma County Bar Association Board of Directors and Fee Grievance Committee. She will

serve as a delegate to the OBA House of Delegates.

She has also been honored with a *Journal Record* Leadership in Law Award, OCBA Briefcase Award and OBA Alma Wilson Award.

Laurie W. Jones

Laurie W. Jones has been a member of the OCU School of Law faculty since 1999, where she has taught legal research and writing, legal analysis, contract drafting and evidence in practice courses. She currently teaches the Street Law course at OCU, which places law students in local high school classrooms to teach the high school students about law and the legal system, with a focus on the practical application of the law to the high school students' lives.

Along with several other women lawyers, she collaborated on the development of the Pro Se Waiver Divorce Docket Project at the Oklahoma County Courthouse while the pro bono and public interest law coordinator at OCU. She coaches the Constance Baker Motley Mock Trial Team and has served as the dean of admissions since 2012.

Prior to joining the law school faculty, she was in private practice for 15 years in Oklahoma City. She represented corporate and individual clients in employment, civil rights, commercial law and general tort cases. She co-authored the third edition of *Oklahoma Trial Practice* and in 2012 she received awards for pro bono service from the Oklahoma County and Oklahoma bar associations. In 2014, she received the Ada Lois Sipuel Fisher Diversity Award from the Oklahoma City Association of Black Lawyers. She is a member of Leadership Oklahoma City's Class XXVII, an active member of St. Paul's Episcopal Cathedral, served on the OBA Access to Justice Committee, on the Emerson School Community Action Board and volunteered at the YWCA Passageways shelter for domestic violence victims.

She has three grown daughters and one granddaughter and is eagerly awaiting the arrival of another grandchild in February.

Jonna Kauger Kirschner

Jonna Kauger Kirschner was appointed as Chickasaw Nation Industries Inc.'s first ever senior vice president of economic development, where she works to enhance CNI's ability to grow its economic impact.

Before joining CNI, she was appointed Oklahoma Department of Commerce executive director by Gov. Mary Fallin in October 2012. Her other roles during her 10-year tenure at the Oklahoma Department of Commerce included serving as the deputy director and general counsel.

She attended Dartmouth College and obtained her law degree from Boston College Law School. She has practiced in both Oklahoma City and London, and she is licensed to practice Oklahoma, Massachusetts and Washington, D.C. and as a solicitor of the Supreme Court of England and Wales

She is a member of various professional organizations, serves as an advisory director for REI Oklahoma New Market Investments LLC and is the vice president of the Board of Directors of the Oklahoma

Israel Exchange and Sister Cities International OKC. She also serves on the Executive Committee of the International Inter-Tribal Trade and Investment Organization.

She has served or currently serves on several boards and committees, including the OETA 60th Anniversary Gala Committee, YWCA of Oklahoma City's 15th Annual Purple Sash Gala, Oklahoma Symphony Show House Patrons' Party, Private Reserve for the Community Literacy Centers, Bridges to Peace – Peace through Business 2018 Gala and Heroes, St. Augustine of Canterbury Episcopal Church Stewardship Committee and Side Kicks Ball. She was also listed as one of the "50 Most Powerful Women in Oklahoma" and "50 Most Powerful Oklahomans" in 2018 by *The Friday Newspaper.*

She is married to Bruce Scambler and has two sons, Jay and Winston.

Amy Monsour Santee

Amy Monsour Santee is a senior program officer at the George Kaiser Family Foundation in Tulsa. She joined the team in 2006 and has directed the foundation's investments in the areas of female incarceration and criminal justice reform. She helped launch several new initiatives in Tulsa and led the foundation's investments in one-of-a-kind programs including Women in Recovery (one of only a few alternatives to incarceration programs in the nation that provides dual generation programming to justice involved women and their children), Center for Employment Opportunities (a nationally recognized proven model that provides immediate, effective and comprehensive employment services to men and women returning to their communities after incarceration) and Still She Rises Tulsa (the first and only public defender office dedicated exclusively to the representation of mothers in the criminal justice system). She currently serves on the board of Oklahomans for Criminal Justice Reform.

She graduated Order of the Coif from the OU College of Law in 2001, where she served as research editor of the *Oklahoma Law Review.* Prior to joining the foundation, she practiced real estate law at the firm of Conner & Winters and served as in-house counsel at WilTel Communications. She is married to Stephen Santee, and they have two children, Sarah and Jack.

Join A Committee

The OBA encourages you to join one of its 24 committees that cover a diverse range of topics that impact attorneys in their everyday practice. The opportunity to join and participate in the work of committees is among the most effective and rewarding benefits of membership.

Here are several reasons why: it increases your knowledge in areas of interest to you; joining a committee helps build relationships with some of the OBA's most talented professionals; and you're guaranteed to make new friends. You have the chance to contribute to the growth and future success of the OBA. I've been a member of many committees and have experienced all of these benefits.

I understand that it's hard to leave the office for meetings, but now you don't have to. New remote technology called BlueJeans makes geography irrelevant. You can attend right in your office; however, in-person committee involvement is a good reason to get out of town. An occasional, professional break can do wonders for your mental health and energy – and builds your network, which can be vital to your practice.

Sign up today; it's easy. Option #1 – online at www.okbar.org, click on the "2019 Committee Signup" button. Options #2 & #3 – fill out this form and mail or fax as set forth below. I'll be making appointments soon, so please sign up by Dec. 21.

Charles W. "Chuck" Chesnut, President-Elect

Note: An email has been sent if your term is expiring.
There is no need to sign up again if your current term has not expired.

Please Type or Print

Name _____

Telephone _____ OBA # _____

Address _____

City _____ State/Zip _____

Fax _____ Email _____

Committee Name

1st Choice _____

2nd Choice _____

3rd Choice _____

Have you ever served on this committee? If so, when? How long?

1st Choice ❑Yes ❑No _____

2nd Choice ❑Yes ❑No _____

3rd Choice ❑Yes ❑No _____

Please assign me to ❑one ❑two or ❑three committees.

Besides committee work, I am interested in the following area(s):

_____

_____

Mail: Chuck Chesnut, c/o OBA, P.O. Box 53036, Oklahoma City, OK 73152

Fax: (405) 416-7001

Standing Committees

- Access to Justice
- Awards
- Bar Association Technology
- Bar Center Facilities
- Bench and Bar
- Civil Procedure and Evidence Code
- Communications
- Disaster Response and Relief
- Diversity
- Group Insurance
- Law Day
- Law-Related Education
- Law Schools
- Lawyers Helping Lawyers Assistance Program
- Legal Internship
- Legislative Monitoring
- Member Services
- Military Assistance
- Professionalism
- Rules of Professional Conduct
- Solo & Small Firm Conference Planning
- Strategic Planning
- Women in Law
- Work/Life Balance

Some More Stuff to Think About

By John Morris Williams

Law school admissions have made a slight rebound, but bar admissions continue to decrease and by as much as one-third of those 30 years ago. If my guesses are anywhere correct, the Oklahoma Bar Association may reach its zenith of membership in the next three years or so. As new admissions remain relatively low, those leaving the profession by death or retirement will outpace new admissions. The result: fewer lawyers in the future.

It is not a surprise to anyone that for at least 10 years the legal futurists have predicted this.

While there are some very bright people in that universe of predictions, one need not be out of NASA to understand the simple numbers. We know big student loans, low starting salaries, more lucrative work in other sectors and other factors have contributed to fewer law school admissions.

The irony is that the demand for legal services has never been greater. Supply and demand theories in a market economy is expected to have movement toward meeting demand. Doesn't it? Most studies indicate that the cost of traditional legal services may well be beyond the ability, or at least perceived ability, of a large segment of the population to afford. Thus, many are not even attempting to enter the market and demand is never actualized.

In its barest form, our legal system is method for dispute resolution in a civilized and orderly manner. However, on the complex side of things, the judiciary is an independent branch of government with grave responsibility of maintaining checks and balances in our system of government. I question if most people who are involved in the legal system give much thought to the dual purposes of the legal system. Most, I suspect, see it as a necessary evil to move them through a particular issue and do not give much pause to the constant tension and strain of maintaining a fair and independent legal system.

While technology and self-help may help to offset the diminishing number of lawyers and the oft times prohibitive costs in less complex matters, no technology or standardized form will supplant the "rule of law" trained legal practitioner. We call them lawyers. A million computer innovations from now, lawyers will still be needed to guard the scales of justice not just from imbalance, but to ensure it exists and its result is fair, impartial and just.

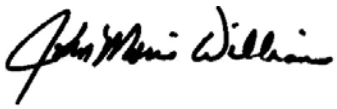
While the OBA has encouraged lawyers to explore the concept of limited scope practice for a few select areas to give greater access to legal services, there are definite limitations. The most obvious limitation is where there needs to be a full understanding of organic concepts like due process and equal protection. Knowing you need to give someone a piece of paper because the instructions said to is not the same as understanding the notice requirements of due process.

The paradox lies in there being more demand, less supply and some things that are flexible and subject to efficiency with the use of technology and some things that require "old fashioned" rigors of research, brief writing and memorialization of the result. On the one hand, lawyering now requires one to be adept at technology, creative in delivery models, efficient in document production and even entrepreneurial enough to be online and perhaps market online legal products. On

the other hand, every lawyer needs to be skilled in the knowledge and concepts of the law to ensure the rule of law and the essential role of the courts in sustaining our democracy remains viable.

It is a lot to ask of our profession. To be innovative problem solvers, creative business people and guardians of the flame of the rule of law at the same time requires more than flexibility. I can think of no other profession, or even business, that has such a diverse and complicated universe to navigate. As lawyers today, we are asked to solve more problems, and more complex problems, with less expense and to utilize our skill as advocates to advance the rule of law and protect citizens from the overreach of the richest and most powerful government in the history of the world.

Good thing this has been given to lawyers to solve. I doubt any other group could handle it.



To contact Executive Director Williams, email him at johnw@okbar.org.

Ten Tips From the OBA Opening Your Law Practice Program

By Jim Calloway

It's a challenge to open your own law firm directly out of law school.

We provide some basic training to Oklahoma lawyers who are opening their own law practices.

Since 2012, we have offered a free program in the spring and fall called Opening Your Law Practice. Prior to that, we called the program New Lawyer Experience, but we learned some of our attendees were not "new" lawyers, but included some lawyers who were leaving public service and re-entering private practice along with some veteran small firm lawyers who just wanted a refresher on what our department suggested for various law firm management challenges, so we renamed the program.

We have completed Opening Your Law Practice for 2018. We appreciate Oklahoma Attorneys Mutual Insurance Company (OAMIC) for providing sponsorship and talking about buying professional liability insurance. We also appreciate Judge David Lewis of the Oklahoma Court of Criminal Appeals speaking on professionalism, OBA General Counsel Gina Hendrix speaking on ethics and trust accounting and James A. Porter III, CPA, who spoke on accounting and taxes.

So, for this month's Law Practice Tips column we share some tips from Opening Your Law Practice. Maybe we will see you there next year.

- In the future, almost every successful law practice will rely even more heavily on technology tools than they do today. What worked in the past for lawyers may not work as well in the future.
- Our Opening Your Law Practice Directory[1] has lots of great materials for download including First Steps in Building Your New Law Firm, a 65-page downloadable PDF originally prepared for ABA TECHSHOW 2016 that contains forms and a sample business plan.
- The OBA Family Law Section Practice Manual[2] is still a good deal at $100 a year and those who are starting a new practice without many existing clients will probably find themselves doing some family law.
- If you are going to open a solo practice, or a new small firm, today you are making an extremely poor decision if you don't use practice management software and digital client files. This is easier to implement when you don't have dozens of open files.
- Don't forget that six practice management tools were added as OBA member benefits this summer.[3]
- With digital files, the scanner is the new "two-hole punch." You need one at the workstation of everyone who may need to place a document into a digital client file in our view. Yes, we know often a large firm IT department or vendor prefer the firm purchase the larger multifunction machines and place them in each hall, but we don't think your two-hole punch needs to be down the hall. We still like the Fujitsu ScanSnaps. The model we use is the IX500.

In the future, almost every successful law practice will rely even more heavily on technology tools than they do today.

- While it is true that failing to appropriately communicate with clients (*e.g.*, failing to return client phone calls within a reasonable time) is a very common source of client complaints, and systems should be in place to avoid these failures, the converse is important as well. That means having great communications with clients producing great client satisfaction means your practice generates satisfied clients that refer other clients to you and may return for future legal services. Having good client communications systems in place is equal in importance to having systems for the delivery of legal services.
- Setting appropriate expectations for a new client is an important part of assuring client satisfaction. As lawyers all understand, this can be difficult when some of the important facts are not yet determined.
- New lawyers just beginning their practices must have a marketing plan which includes a website and online resources. But they also have to get out and be active in their communities.
- Attorney-client agreements signed by a lawyer and client should be a part of almost every engagement. There are form agreements OBA members can use as a starting point available in the MyOKBar Practice Management Advice community. To access it, log in to your MyOKBar account using the link at the top of the OBA's recently redesigned website, then click the red MYOKBAR Communities (Sections and Committees) link. From there, select Communities, then All Communities and you will see the _Practice Management Advice Forum. If you'd like to get updates on items posted here, click the blue Join Community button on the right.

All lawyers today, no matter what their level of experience and what the size of their law firm, need to re-evaluate their business processes and technology tools regularly. Hopefully, these tips for opening a new practice spark some ideas for your practice.

Mr. Calloway is OBA Management Assistance Program director. Need a quick answer to a tech problem or help solving a management dilemma? Contact him at 405-416-7008, 800-522-8065, jimc@okbar.org. It's a free member benefit!

ENDNOTES

1. www.okbar.org/oylp/.
2. http://flspm.com/.
3. www.okbar.org/six-attorney-practice-management-tools-added-as-oba-member-benefits/.

If You See Something, Say Something

TRAGICALLY, ANOTHER lawyer has taken their life, leaving behind a spouse and child. Another lawyer, who was a close friend of the deceased lawyer, was profoundly affected by the loss and was contemplating suicide when two attorney friends cared enough to intervene. They saw something, said something and did something!

As we all know, lawyer suicide, which is almost always accompanied by a mental health or addiction issue, is much more frequent than in the general population. The now popular phrase "If you see something, say something" is directly applicable to lawyer suicide and mental health and addiction issues. So often, close friends or colleagues recognize another lawyer isn't doing well - it could be unreturned phone calls, missed court hearings, the attorney isolating themselves or any number of other symptoms. Rather than saying something, the friend or colleague decides to not "poke their nose into someone else's business." It is hard to insert yourself into the issues someone else is experiencing, but the legal profession is literally in crisis. As lawyers, we are trained to observe and ascertain the facts, use our powers of lawyerly deduction and arrive at a conclusion. That is exactly what we should do with our friends and colleagues who are experiencing difficulties. If you see something, say something.

In 2016, the American Bar Association (ABA) in conjunction with the Hazelden Betty Ford Foundation, conducted an in-depth study of 12,500 lawyers. Approximately one-third of lawyers surveyed admitted to having mental health or addiction issues.

After the ABA/Hazelden study was published, the National Task Force on Attorney Well-Being performed a more in-depth examination of the results of the study and found that 50 percent of the approximately 12,500 lawyers who responded did not answer the questions regarding the prescription drug use/abuse. Using our "powers of the lawyerly deduction," it logically follows that the actual incidence of mental health or addiction issues among lawyers is higher than one-third.[1]

The ABA recently stated that health and wellness are every lawyer's ethical and professional responsibility. What does that mean? It means we *must* make time to ensure we are physically, mentally, emotionally and spiritually healthy. These characteristics are basic to our health and well-being.

PERSONAL WELL-BEING

In that regard, how are you? Have you stopped and taken the time to assess your own personal

well-being? Are you taking care of yourself? Are you taking time to ensure you are physically, mentally, emotionally and spiritually healthy? You have got to take care of yourself! No one else is going to do it for you. Your personal well-being *must* be one of your priorities. Awareness is the first step. Pay attention to how you're feeling, what you are thinking and how you react to stressful situations. Are you are stressed or overwhelmed? Are you depressed, anxious, irritable, lethargic or don't have your usual spark? Are you suffering from an addiction? Are your personal relationships suffering? If you are in need of help in any way, the OBA Lawyers Helping Lawyers Assistance Program (LHL) is available to help you.

LAWYERS HELPING LAWYERS

The OBA LHL Committee was created decades ago. There are literally hundreds of OBA members who volunteer their time to help other lawyers in need. LHL is not just for alcoholics or drug addicts. The committee provides services to any OBA member who is experiencing physical, mental, emotional, psychological and/or financial issues. As an OBA member benefit, the services provided are free and are confidential per Rule 8.3 of the Oklahoma Rules of Professional Conduct.[2]

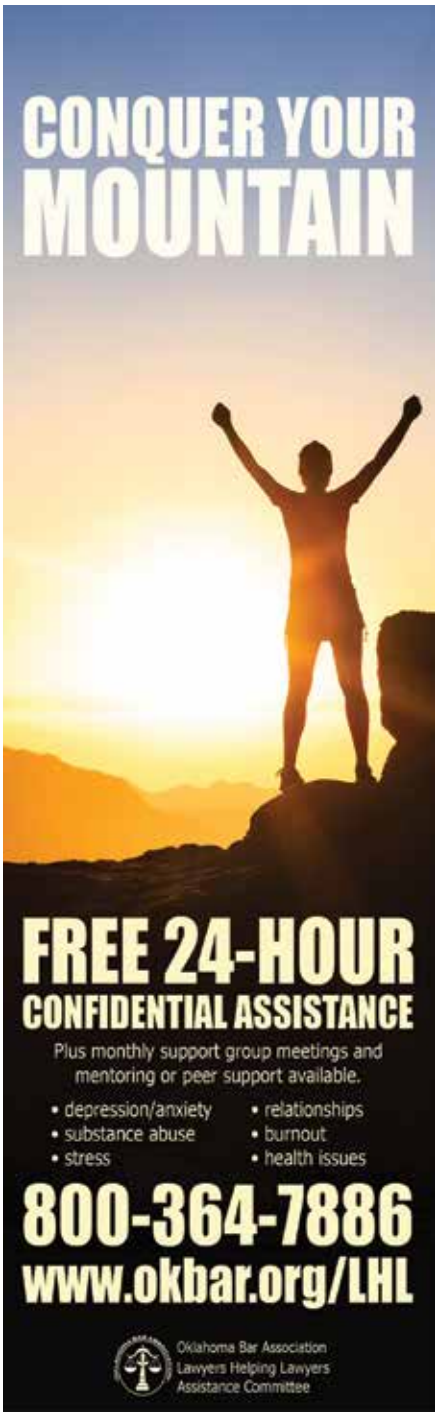
The incidence of mental health and addiction issues, along with the simple fact that so many lawyers are overwhelmed by the combination of personal and career responsibilities, have reached the level of becoming an epidemic. We must not only take care of ourselves but must as a profession take care of each other. If you see a friend or colleague whom you think might be having problems, have the courage to talk to them about it. So often the simple act of reaching out to someone can actually save a life.

Mr. Balkenbush is OBA ethics counsel. Have an ethics question? It's a member benefit and all inquiries are confidential. Contact him at joeb@okbar.org or 405-416-7055; 800-522-8065.

ENDNOTES

1. American Bar Association, Report from the National Task Force on Lawyer Well-Being, 2018, www.americanbar.org/groups/lawyer_assistance/task_force_report.html.

2. Oklahoma State Courts Network, Oklahoma Statutes Citationized, 2008, www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=448827.



Meeting Summary

The Oklahoma Bar Association Board of Governors met Friday, Sept. 21, at the Oklahoma State University Foundation in Stillwater.

APPRECIATION EXPRESSED

Board members expressed their appreciation to Governor Oliver and Past President Melissa DeLacerda for their efforts on behalf of the Payne County Bar Association for the gift bags and Thursday evening social event. The board voted to issue a resolution of appreciation to the county bar for its hospitality.

REPORT OF THE PRESIDENT

President Hays reported she participated in the Payne County Bar Association reception, Annual Meeting planning meeting, OBA Family Law Section meeting, selection of Mona Salyer Lambird Spotlight Award recipients and executive director review. She also made a presentation to the Creek County Bar Association.

REPORT OF THE PRESIDENT-ELECT

President-Elect Chesnut reported he participated in a budget planning meeting with Executive Director Williams and Administration Director Combs, chaired the Budget Committee meeting, worked on appointments to the Forensic Review Board and attended the Payne County Bar Association reception/dinner.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended the Annual Meeting meeting, staff budget planning meeting, budget planning meeting with President-Elect Chesnut, Budget Committee meeting, Group Insurance Committee meeting, Boiling Springs Institute, Comanche County Bar Association luncheon CLE, meeting on the Lawyers Helping Lawyers Assistance Program intake system and the Payne County Bar Association social event.

REPORT OF THE PAST PRESIDENT

Past President Thomas reported she attended the Washington County bench and bar meeting, OBA Group Insurance Committee meeting, Washington County Bar Association monthly meeting and Payne County Bar Association social event.

BOARD MEMBER REPORTS

Governor Beese reported he attended the OBA Budget Committee meeting, Muskogee County Bar Association meeting, joint Law Day/Law Related-Education Committee meeting and Payne County Bar Association reception/dinner. **Governor Fields** reported he attended the Payne County Bar Association reception/dinner. **Governor Hermanson** reported he chaired the District Attorneys Council executive board meeting, DAC board meeting and Oklahoma District Attorneys Association board meeting. He attended the Kay County Drug Court graduation, OBA Budget Committee meeting, DAC Technology Committee meeting, ODAA Legislative Committee meeting and the Payne County Bar Association reception/dinner. **Governor Hutter** reported she attended the Cleveland County Executive Committee meeting, Cleveland County Bar Association meeting, OBA Budget Committee meeting and Women in Law Committee meeting. **Governor Morton** reported he attended the Oklahoma County Criminal Defense Lawyers Association meeting, Boiling Springs Legal Institute hosted by the Woodward County Bar Association, William J. Holloway Inn of Court opening banquet and Payne County Bar Association social event. **Governor Oliver** reported he worked on arrangements for the Payne County Bar Association hosting the Board of Governors' September meeting in Stillwater. **Governor Williams** reported he attended the OBA Diversity Committee meeting and Tulsa County Bar Association Board of Directors meeting.

REPORT OF THE YOUNG LAWYERS DIVISION

Governor Richter reported he attended the OBA Budget Committee meeting and Canadian County Bar Association meeting. He said the YLD, together with the

Oklahoma Bar Foundation, will hold a speakeasy theme special event Friday evening in Oklahoma City to honor and engage OBF scholarship and award recipients.

BOARD LIAISON REPORTS

Past President Thomas said the Group Insurance Committee met, and the OBA offers three types of insurance through the 3000 Insurance Group. She said increases were negotiated down for term insurance, the workers' compensation carrier will be switched and long-term care insurance will be referred to a broker. The 3000 Insurance Group is looking at new programs. Insurance education classes will be offered early next year. President-Elect Chesnut said the Budget Committee met and adopted the proposed budget. A hearing for bar members will be held at the bar center Oct. 11. The proposed budget will be on the board's agenda next month. Governor Oliver said the Law-Related Education Committee held a joint meeting with the Law Day Committee. The LRE Committee helped finish lesson plans for the Newspapers in Education Program, which will be published in *The Oklahoman* and distributed to classrooms participating in the program across the state. Law Day contest promotion efforts will be repeated, including mailing postcards. Materials are being developed for students and educators focusing on the First Amendment theme, "Free Speech, Free Press, Free Society." Topics for the *Ask A Lawyer* TV show will be family law and domestic issues, landlord/tenant issues and The Innocence Project/wrongful conviction. The video company used for the first time last year, Windswept Media, will be used again. The cost will be a little higher because new legal Q&A segments will be added to the three main segments. Governor Hutter said the Women in Law Committee is finalizing conference details, and Mona Lambird Spotlight Award winners have been selected. General Council Hendryx said the Clients' Security Fund will make its recommendations at the December board meeting. She said a large claim is looming. Governor Williams said the Diversity Committee will hold its awards dinner Oct. 18 and its Boot Camp on Oct. 20.

REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx reported the OBA was involved in litigation as an association in two cases; however, one was dismissed. She shared details with board members. A written report of PRC actions and OBA disciplinary matters for August was submitted to the board for its review.

RESOLUTION NO. 1 AMENDMENT TO RULE 1.2 RULES OF PROFESSIONAL CONDUCT

Rules of Professional Conduct Committee Chairperson Paul Middleton said the committee was asked after the passage of SQ 788 for its recommendation on whether an amendment to the rules was needed. He said the committee reviewed information from 30 other states that had passed similar legislation and came up with the proposed resolution, patterned after Oregon. Other committee members have

Materials are being developed for students and educators focusing on the First Amendment theme, "Free Speech, Free Press, Free Society."

written a minority opinion. General Council Hendryx said the resolution gives lawyers guidance, but it does not shelter them from federal laws. Guy Clark reviewed issues of the minority opinion. Assistant U.S. Attorney Scott Williams made additional comments on his minority opinion. Committee member Gary Rife said he was present to support the minority opinions and agreed with the comments made. The board voted to recommend to the House of Delegates the resolution not be passed.

FINANCIAL INSTITUTIONS AND COMMERCIAL LAW SECTION PROPOSED DUES INCREASE

Section Chair Miles Pringle said the section has increased its member benefits and contributions in the past several years and voted to increase its dues. The section, which has about 250 members, proposed to raise its annual dues from $15 to $20. The board approved the increase.

AWARDS COMMITTEE RECOMMENDATIONS

Committee Chairperson Jennifer Castillo reported the total number of nominations was down this year, and she encouraged the board to be more engaged in increasing nominations next year. She explained that some nominees were moved from one category to another. The board voted to table the vote until after the executive session.

EXECUTIVE SESSION

The board voted to go into executive session, met in executive session and voted to come out of executive session.

EVALUATION

President Hays said the board reviewed the evaluation of Executive Director Williams during executive session, and she will review the details with him later.

ACTION ON OBA AWARDS

The board approved the Awards Committee recommendations with one change.

NEXT MEETING

The Board of Governors met in October. A summary of those actions will be published in the *Oklahoma Bar Journal* once the minutes are approved. The next board meeting will be at 1 p.m. Wednesday, Nov. 7, at the Hyatt Regency Hotel in Tulsa in conjunction with the OBA Annual Meeting.

Announcing 2019 Grantees

THE OKLAHOMA BAR Foundation is excited to announce $500,000 in grants for legal services and education. The OBF is committed to ensuring justice is possible for all and our grantees are the boots on the ground making real change happen. Each year, law-prelated nonprofit organizations apply for funding to support their programs. This year, 21 nonprofits have been named OBF grantees, and among them you will find court advocacy for victims of violence, youth court for first-time offenders, civil legal aid for low-income families, legal services for refugees and guardian *ad litem* services to name a few. Each program – in its own way – addresses important legal needs in communities all over our state.

The following is a list of our 2019 grantees and the impact they make in Oklahoma.

Above: *Students in Youth Court of Tulsa*

Right: *A volunteer and participant at the OCU American Indian Wills Clinic*

Grantee	Program	Area of Service	Lives Impacted	Funding Amount
Canadian County CASA	Court Advocates	Canadian County	85	$8,000
Center for Children & Families	Divorce & Co-Parenting Services	Cleveland & Oklahoma Counties	900	$15,000
Community Crisis Center	Court Advocate	Ottawa, Craig & Delaware Counties	60	$5,000
Oklahoma County Juvenile Bureau	Literacy Initiave	Oklahoma County	160	$7,000
Domestic Violence Intervention Services	DVIS Legal Program	Tulsa & Creek Counties	10,470	$5,000
Foundation for Oklahoma City Public Schools	Law & Public Safety Career Academy	Northeast Oklahoma City	60	$18,000
Legal Aid Services of Oklahoma	Civil Legal Services	Statewide	12,000	$85,000
Marie Detty Youth & Family Services Center	New Directions Shelter	Comanche, Cotton & Caddo Counties	1513	$15,000

OCU School of Law	American Indian Wills Clinic	Statewide	100	$30,000
OBA-YLD Mock Trial	High School Mock Trial Program	Statewide	800	$50,000
Oklahoma Access to Justice Foundation	Legal Assistance Resource Center	Statewide	new	$12,500
Oklahoma Guardian Ad Litem Institute	Family Court GAL Services	Central Oklahoma	150	$35,000
Oklahoma Lawyers for Children	Legal Services for Abused & Neglected Children	Oklahoma County	2500	$54,000
Teen Court	Deliquency Prevention for First Offenders	Comanche County	800	$49,500
The Spero Project	The Common	Oklahoma City Area	350	$15,000
Trinity Legal Clinic	Civil & Criminal Legal Services for Low Income	Oklahoma City Area	250	$20,000
Tulsa Lawyers for Children	Legal Services for Abused & Neglected Children	Tulsa County	450	$40,000
TU College of Law	Immigrants' Rights Project	Statewide	75	$8,266
YMCA of Greater Oklahoma City	Youth & Government Program	Statewide	600	$3,200
Youth Services of Tulsa	Youth Court Program	Tulsa & Ottawa Counties	450	$10,000
YWCA Tulsa	Immigration Legal Services	Tulsa Area	773	$15,000

Owasso Mock Trial teams at the 2018 state championship

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WAYS TO SUPPORT THE OKLAHOMA BAR FOUNDATION

Fellows Program

An annual giving program for individuals

Community Fellows Program

An annual giving program for law firms, businesses and organizations

Memorials & Tributes

Make a gift in honor of someone — OBF will send a handwritten card to the honoree or their family

Unclaimed Trust Funds

Direct funds to the OBF by mailing a check with the following information on company letterhead: client name, case number and any other important information

Cy Pres Awards

Leftover monies from class action cases and other proceedings can be designated to the OBF's Court Grant Fund or General Fund as specified

Interest on Lawyer Trust Accounts

Prime Partner Banks give higher interest rates creating more funding for OBF Grantees. Choose from the following Prime Partners for your IOLTA:

BancFirst • Bank of Oklahoma • MidFirst Bank • The First State Bank • Valliance First Oklahoma Bank of Tulsa • City National Bank of Lawton • Citizens Bank of Ada First Bank and Trust Duncan • Grand Savings Bank

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State of the YLD

By Nathan D. Richter

AS WE NEAR THE CLOSE of another year, the state of the Young Lawyers Division is healthy. This past year, the YLD has accomplished much. Lifelong relationships have been forged and expectations have been shattered. The YLD is thriving because of the dedication, sacrifice and purpose-driven ambition of its Board of Directors. In addition to running their practices, meeting the needs of their clients and juggling their personal and family responsibilities, the YLD board has gone above and beyond for the organization by serving first responders, supporting law students and new admittees and, most importantly, developing new leaders. This has been an excellent year for the YLD, and the future looks even brighter.

Melanie Christians and Brittany Byers serve new admitees cookies and sweet breads at the September new lawyer swearing-in receptions.

The mission for 2018 was simple: serve. So, we did! For most of my adult life, I have lived by a simple idea – make a positive difference in someone's life every day. It's simple to say but much harder to do – especially when that jerk cuts you off in traffic or takes your prime parking spot at the store. Those people… I digress.

In February we stuffed bar exam survival kits and passed the kits out at the February bar exam in support of the law students seeking to become lawyers. Although it may seem like such a small token of support, many of the test takers remember relying on the kit for a pencil when their lead broke or for a piece of candy for a jolt of sugar or ear plugs to drown out the background noise in the room. In this way, the YLD supports the students during one of the most stressful times in their lives. It's a small way of showing you care, much like making baloney sandwiches for kids in a youth shelter or holding the door open for an elderly person.

In March, April and May the YLD developed young leaders by sending board members to American Bar Association (ABA) events, such as the ABA Midyear Meeting in Vancouver, Canada, and the ABA Regional Summit in Wyoming. The YLD also participated in OBA Day at the Capitol, assisted in the swearing-in ceremonies for those who passed the February bar exam and promoted Law Day events in communities throughout Oklahoma.

Summer didn't slow down for the YLD. In June, the YLD hosted a Wills for Heroes event in Broken Arrow, drafting simple wills for first responders. We also held our Midyear Meeting in conjunction with the OBA Solo & Small Firm Conference in Tulsa. We also began preparing for the July bar exam by stuffing survival kits.

August, September and October were filled with more ABA conferences to develop leaders, ceremonies to welcome the newest members of our profession and preparations for the OBA Annual Meeting. Fall is now upon us and soon Christmas – yes Christmas – will be here. The holidays have always been the perfect time of the year to reflect on where we came from, appreciate where we are and plan for where we are going. Service has always been a large part of my life. Early on I was told a story of a young man and his grandfather. It went something like this:

> A grandfather and a grandson are walking along the beach when they come upon

Bradley Brown and Gary Davis hand out bar exam survival kits to February test takers.

thousands of starfish washed ashore. As they continue down the beach amongst the starfish, the grandson begins reaching down, grabbing a starfish and throwing it back into the water. Realizing what he is doing, the grandfather says, "What are you doing, grandson? There are thousands of starfish on this beach. You cannot possibly make a difference!" The grandson calmly reaches down, grabs a starfish and throws it back into the water and says, "I made a difference for that one!"

The YLD has given me the opportunity to be the grandson and make a positive difference in people's lives through service to others. I have now made it a habit to live out this idea every day of my life. Whether it be a small gesture such as holding the door for a stranger or a large service project for first responders, making a positive difference in someone else's life has an enormous impact and the ripple effect is immeasurable.

The YLD is healthy because the officers, directors and volunteers live by this principle. These dedicated warriors sacrifice their most precious resource – time – in service to the organization, its members and their communities. They do so without asking what they get in return. They do so out of a heart of servitude to make a positive difference in someone else's life. As the soon-to-be immediate past chair of the YLD, I tip my hat to these leaders and say thank you for the difference you have made in my life, for making my year as chair memorable and, most of all, for your friendship.

Mr. Richter practices in Mustang and serves as the YLD chairperson. He may be contacted at nathan@dentonlawfirm.com. Keep up with the YLD at www.facebook.com/yld.

ON THE MOVE

Brandi M. Haskins joined the Oklahoma City-based firm of Fuller Tubb & Bickford PLLC. Ms. Haskins practices civil litigation and business transactions, with particular focus in federal law.

Jessica N. Cory, **Martin J. Lopez III** and **Travis E. Harrison** joined the Oklahoma City-based firm Phillips Murrah as associate attorneys. Ms. Cory practices in the firm's Tax Law Practice Group, Mr. Lopez practices in the firm's Litigation Practice Group and Mr. Harrison practices in the firm's Transactional Practice Group.

Rebecca Wood Hunter opened Rebecca Wood Hunter PLLC. Ms. Hunter can be reached at 217 S. Broadway, Coweta, 74429, or by phone at 918-279-0041.

Raymond "Trey" Purdom and **Stephen J. Pontius** joined the Tulsa-based firm of Atkinson, Haskins, Nellis, Brittingham, Gladd & Fiasco as associates. Both Mr. Purdom and Mr. Pontius graduated from the TU College of Law this year.

Austin Rabon joined the Lawton-based firm of Godlove, Mayhall, Dzialo & Dutcher PC. Mr. Rabon graduated from the OU College of Law this year.

Eleanor Burg, **Colby Byrd**, **Cole McLanahan**, **Lake Moore** and **Jennifer Pucket** joined the Oklahoma City office of McAfee & Taft as associates. Ms. Burg and Mr. Moore are transactional attorneys whose practices encompass a broad range of corporate and business matters. Mr. Byrd practices civil litigation in the areas of condemnation disputes, landowner rights and agricultural litigation. Mr. McLanahan is a trial lawyer whose practice encompasses a broad range of business and commercial litigation. Ms. Puckett is a trial lawyer whose civil litigation practice is focused on the resolution of complex business disputes.

Sarah Wittrock Moore was named associate underwriting counsel for First American Title Insurance Co. in its direct operations in Oklahoma. Ms. Moore advises and underwrites for the residential division of the company. **Joseph Svetlic** has been named underwriting counsel for the company's direct operations in Tulsa. He is a 2005 graduate of the TU College of Law.

Bill Johnston joined the Law Office of Daniel M. Davis in Oklahoma City. Mr. Johnston will practice in the Personal Injury Department.

Richard Parr was named chief legal officer of Aspen Dental Management Inc., based in Chicago. Mr. Parr previously worked as general counsel of HCR ManorCare Inc., in Toledo, Ohio.

Alexandra L. Simmons joined Lizama Law PLLC as an associate. Ms. Simmons will focus her practice in the areas of criminal defense, family law, civil litigation and business and transactional law.

John S. Farley III joined the Tulsa-based firm of Drummond Law PLLC as an associate. Mr. Farley will focus his practice on banking, employment, oil and gas, commercial transactions and complex civil litigation.

Lee Paden of Tulsa was confirmed as a Cherokee Nation Supreme Court justice. Mr. Paden served on the Cherokee Administrative Appeals board as a special hearing officer from 2013 to 2017.

Elise M. Horne joined the Oklahoma City-based firm of Johnson Hanan Vosler Hawthorne & Snider as an associate attorney. Ms. Horne will focus her practice on medical malpractice defense, civil rights defense and various in-house matters for corporate clients.

KUDOS

Jimmy K. Goodman was elected as secretary of the American Bar Foundation (ABF). As secretary, Mr. Goodman will help coordinate and supervise several projects for the ABF, including funding and research.

Gary Wood has been selected as a member of Leadership Oklahoma City's Signature Program Class 37. Mr. Wood will participate in a 10-month series of classes focusing on various community issues with the goal of further developing Oklahoma City leaders for civic service.

Guy A. "Tony" Fidelie Jr. of Wichita Falls, Texas, was appointed to the Midwestern State University Board of Regents for a term set to expire in 2024.

Kelly Offutt won in the law category for the 2018 NextGen Under 30 competition. Ms. Offutt earned her J.D. from the OU College of Law in May 2017.

AT THE PODIUM

Louis W. Bullock of Tulsa and **David W. Lee** of Oklahoma City were panelists at the 10th Circuit Court of Appeals Bench & Bar Conference in Colorado Springs, Colorado. The subject of the panel discussion was "Living and Litigation With Qualified Immunity in the Tenth Circuit." Mr. Lee moderated the panel.

Gary Wood presented a CLE on driving under the influence at Elevate by LegalShield. Elevate by LegalShield is a three-day event where attorneys gain insight and inspiration from fellow lawyers across the nation.

HOW TO PLACE AN ANNOUNCEMENT:

The *Oklahoma Bar Journal* welcomes short articles or news items about OBA members and upcoming meetings. If you are an OBA member and you've moved, become a partner, hired an associate, taken on a partner, received a promotion or an award, or given a talk or speech with statewide or national stature, we'd like to hear from you. Sections, committees, and county bar associations are encouraged to submit short stories about upcoming or recent activities. Honors bestowed by other publications (*e.g., Super Lawyers, Best Lawyers, etc.*) will not be accepted as announcements. (Oklahoma based publications are the exception.) Information selected for publication is printed at no cost, subject to editing and printed as space permits.

Submit news items to:

Lacey Plaudis
Communications Dept.
Oklahoma Bar Association
405-416-7017
barbriefs@okbar.org

Articles for the January issue must be received by Dec. 1.

In Memoriam

George William Armor of Laverne died Aug. 30. He was born Aug. 5, 1931, near Canton. He attended OU, majoring in history. In 1954, he graduated from the OU College of Law with a LL.B. and received a **commission as 2nd lieutenant in the United States Air Force that same year. Mr. Armor then received orders to begin his active JAG officer service at McClellan Air Force Base near Sacramento from 1955 to 1958.** Following active duty, he returned to Oklahoma City to begin a career as assistant city attorney. He opened his law practice in 1959, serving as Harper County attorney, Laverne School Board attorney and church board attorney. He was an officer and member of the Laverne Lions Club, Chamber of Commerce and American Legion Post #273. Donations in his name can be made to Laverne United Methodist Church at P.O. Box 612, Laverne, 73848.

Gary L. Brooks of Oklahoma City died Sept. 2. He was born Nov. 8, 1950. In 1969, he began his education in letters and education at OU. He received his J.D. from the OU College of Law in 1975. After passing the bar he began practicing in Norman. Mr. Brooks was board certified in medical negligence by the American Board of Professional Liability Attorneys and in civil trial law by the National Board of Trial Advocacy. He served on the governing boards of both organizations. He founded the American College of Board Certified Attorneys and assisted many of his colleagues in becoming board certified. Mr. Brooks served as the president of the Oklahoma Trial Lawyers Association in 1999. He was appointed to Oklahoma Board of Medical Licensure by Gov. Brad Henry in 2003. Donations in his name can be made to any animal shelter or the American Cancer Society.

Harry M. Crowe Jr. of Tulsa died Sept. 2. He was born Nov. 12, 1919, in Chicago. He moved to Tulsa in 1921 and later was in the first graduating class of Central High School. He earned a degree in business as well as a J.D. from the University of Kansas. **Mr. Crowe served in the Navy during World War II as a lieutenant aboard the USS Mount Baker. He reached the rank of commander.** He was a city attorney as well as utility board attorney for the city of Tulsa. His career as an attorney spanned 60 years. Mr. Crowe was a member of the Rotary Club of Tulsa as well as an avid supporter of the Center for the Physically Limited.

Frank W. Davis of Guthrie died Sept. 9. He was born Aug. 24, 1936. He graduated from East Central University in 1958 with a B.A. degree in history and government. Mr. Davis received a LL.B. degree from the OU College of Law. After admission to the bar, he returned to Ada where he was appointed acting postmaster. In 1961, he was appointed county attorney in Guthrie. In 1965, he established a private practice in Guthrie with emphasis on real estate and probate. Mr. Davis served as Guthrie municipal judge and as an attorney for the Masonic Charity Foundation of Oklahoma, several rural water districts and two municipal governments. He has been Republican County chairman for both Pontotoc and Logan counties and was an Oklahoma delegate to the National Republican Conventions in 1984 and 1996 and an alternate delegate in 2000. In 1978, Mr. Davis was elected to the Oklahoma House of Representatives for District 31 where he continued to be re-elected and served for 26 years. He served as assistant minority floor leader and was minority floor leader from 1982 to 1986.

Kenneth N. McKinney of Oklahoma City died Sept. 17. He was born Feb. 13, 1936, in Ponca City. In 1959, he received a Bachelor of Science in geology from OU. In 1962, he received a J.D. from the OU College of Law. **Mr. McKinney was commissioned as captain in the U.S. Army and served as a judge advocate in the Judge Advocate General's Corps while a member of the Army Reserve.** Upon graduation from law school, he joined the firm Duvall, Head, McKinney and Travis. In 1971, he founded McKinney, Stringer & Webster in Oklahoma City. He was a strong presence at the firm until its dissolution in 2005. He then joined the law office of Tomlinson McKinstry as of counsel, where he practiced until his retirement in 2014. Donations in his name may be made to the United Way of Central Oklahoma, P.O. Box 248919, Oklahoma City, 73124-8919, or the University of Oklahoma Foundation, OU College of Law, Monnet General Fund in memory of Ken McKinney, 300 West Timberdell, Norman, 73019.

Robert Otto Stiner of Edmond died Aug. 30. He was born Nov. 23, 1926, near Wynnewood. **He was a World War II and Korean War veteran having been drafted in 1945 to the U.S. Navy. He re-enlisted in 1949 and spent a total of seven years in the Navy.** He attended OU on the G.I. Bill. He then worked as a claims adjuster for The Hartford while attending law school at night. He earned his law degree from the OCU School of Law in 1968.

Oklahoma Bar Journal Editorial Calendar

2018 ISSUES

DECEMBER
Ethics & Professional Responsibility
Editor: Leslie Taylor
leslietaylorjd@gmail.com

2019 ISSUES

JANUARY
Meet Your Bar Association
Editor: Carol Manning

FEBRUARY
Estate Planning
Editor: Amanda Grant
amanda@spiro-law.com

MARCH
Criminal Law
Editor: Aaron Bundy
aaron@fryelder.com

APRIL
Law Day
Editor: Carol Manning

MAY
Technology
Editor: C. Scott Jones
sjones@piercecouch.com
Deadline: Jan. 1, 2019

AUGUST
Appellate Law
Editor: Luke Adams
ladams@tisdalohara.com
Deadline: May 1, 2019

SEPTEMBER
Bar Convention
Editor: Carol Manning

OCTOBER
Indian Law
Editor: Leslie Taylor
leslietaylorjd@gmail.com
Deadline: May 1, 2019

NOVEMBER
Starting a Law Practice
Editor: Patricia Flanagan
patriciaaflanaganlawoffice@cox.net
Deadline: Aug. 1, 2019

DECEMBER
Ethics & Professional Responsibility
Editor: Melissa DeLacerda
melissde@aol.com
Deadline: Aug. 1, 2019

If you would like to write an article on these topics, contact the editor.

What's Online

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Practice Management Technology News

If you haven't been following the latest practice management technology news, read this article for major announcements from MyCase, Rocket Matter, Ruby Receptionists, Tabs3 and Cosmolex.

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Just Another Day

By Daniel V. Flatten

1969. A remote fighter base in Korea. The two Koreans eyed each other warily across the DMZ, and the familiar Air Force warhorses of the Vietnam War – F-105s, F-4s, F-100s – patrolled the skies here, as well.

The sleepy routine of a spring day was broken by a radio call. An F-106 had suffered a flameout over the firing range, about 30 miles to our west. The F-106: a mach 2+ delta-winged interceptor, different in design and mission from the rest of our fighters and fighter-bombers. A single squadron of them was stationed at Osan AB, 150 miles to the north. A flameout! The pilot had a stark choice – eject or attempt a controlled glide to a "dead stick" landing. We were the nearest base, and our 10,000-foot runway would accommodate his roll-out, assuming everything else went well. So, the pilot decided to save the American taxpayer several million dollars and try to bring his plane in.

The staff judge advocate was not important to this effort, but I hurried to the flight line. There, the rescue and recovery resources were assembled. Fire trucks, ambulance, tow tug and even a crane were soon arrayed at the edge of the runway with a helicopter hovering overhead.

All eyes looked west. Without the jet engine, there was no contrail, but his enlarging silhouette soon appeared. He was coming fast, but I suppose that was necessary to retain control and lift in a high-performance airplane. He had plenty of altitude, but if he misjudged, there would be no go-around, no burst of power to correct a glide slope error or to hold speed when he lowered his landing gear.

He didn't need it. He brought the plane down in a textbook glide path, tufts of white smoke marking where his wheels kissed the runway, his drogue chute deploying at almost the same instant. He coasted to a stop well short of the end of the runway, but without power, he didn't taxi anywhere. Instead, we went to him. He popped the canopy and stood in the cockpit. The pilot was a lieutenant colonel – in fact, the F-106 squadron commander – who had short-cropped greying hair and an easy smile. If his heart was in his throat, he didn't show it. The tug towed his plane to the maintenance hangar while he and his jubilant hosts adjourned to our small officers' club for drinks and the aeronautical banter that is the currency of the fighter pilot's life.

Even in that distant youth, I recognized that while the emergency was immediate, the response was the product of a lifetime of training and practice. It made me wonder how often this sort of unsung, almost anonymous, performance of duty occurs. Nighttime carrier landings, explosive ordnance disposal, firing ranges, obstacle courses, aerial refueling, helicopters, all fraught with danger even in a training context. How often are such dangers – often heightened by failure or mishap – faced with no audience save the participants, no glory save pride? Every day. So, here's to that lieutenant colonel and to all who labor in that vineyard.

Mr. Flatten is an OBA member who practices in Houston.

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