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June 18 - 21

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- Horseshoe Tournament
- Kickball
- Sponge Tag
- Kite Flying
- Texas Two Step
- Nature Art
- Tug-O-War
- Sac Races
- S'mores Around The Firepit

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Oklahoma Association of Defense Counsel  
Post Office Box 5445  
Edmond, OK 73083



# OADC OUTLOOK

A Publication of the Oklahoma Association of Defense Counsel

April 2009

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## President's Letter

by Michael J. Heron

I am honored and humbled to serve as your President for 2009 as I follow a tradition of great leadership in the organization. The year began with the Winter Meeting, which was held at the always wonderful Gaillardia Golf and Country Club on January 23<sup>rd</sup>. OADC members and guests celebrated the great job done by 2008 President Roger Butler, who received awards from OADC and DRI for his outstanding accomplishments as the OADC President for 2008. An Outstanding Service Award was given to Dan Folluo for his contributions in establishing and running the OADC Trial Academy. **DRI First Vice President, Cary Hiltgen, was given a gavel inscribed with "Hail to the Chief" recognizing that he will become only the second OADC member to become President of DRI at the 2009 DRI Annual Meeting in October.** Former DRI and OADC President, Burt Johnson was in attendance to see Cary receive the award.

We were honored by the attendance of past OADC Presidents Burt Johnson (1969), Tom Cordell (1985 and 1988), Dan Folluo (1998), Jon Starr (2002) and H. Grady Parker (2007).

During the Winter Meeting the membership in attendance unanimously approved the following to fill vacant officer positions: Jeromy E. Brown, President Elect; G. Calvin Sharpe, Vice President; Jennifer Annis, Secretary; and Angela D. Ailles-Bahm, Treasurer. The membership also unanimously approved the appointment of James Secrest III, Malinda Matlock and Nathan E. Clark to Three (3) year Board terms.

Earlier this year, The Board of Governors of the Oklahoma Bar Association presented to the Oklahoma Supreme Court a new rule to be added as Rule 31 to the Rules of the District Courts for the state of Oklahoma. The new rule restricts an attorney's ability to represent a client during a deposition. The Oklahoma Supreme Court requested written comments regarding the proposed new rule. The written statement submitted by the OADC Officers and Board of Directors to the Supreme Court is reprinted in this newsletter for your information.

Although OADC rightly takes the position that we "have no position" as it relates to lawsuit reform (see Position Statement in this newsletter), there is certainly nothing wrong with defense lawyers participating in the legislative process. The OADC Officers, Board of Directors and Legislative Committee continue to work with our lobbyist, The Milner Group, on a daily basis to monitor the legislative initiatives at the capitol, including the efforts in the lawsuit reform and workers' compensation reform.

As mentioned above, this year Cary Hiltgen will become only the second OADC member to become President of DRI. Cary will take the reins at the **2009 DRI Annual Meeting, October 7 - 11 in Chicago, Illinois. As part of the festivities, OADC will sponsor a reception with DRI in honor of Cary. You are all invited!**

This year's summer meeting will be held June 18-21 at the Hyatt Lost Pines Resort and Spa near Austin, Texas. If you have not been to this resort you are in for a treat. Amenities include championship golf, a world-class spa, and lazy river and water slide, rafting trips on the Colorado River, horseback riding and so much more. Kids will not be bored! For those who like to leave the kids at home, historic Sixth Street in Austin, home to over 50 live music venues is approximately 25 minutes away. Most importantly, you can get six CLE hours including one hour of ethics while you are there. Stay tuned to the OADC website and our newsletter for more details. Make your reservations today at [www.hyatt.com](http://www.hyatt.com). See you there!

# 2008 Oklahoma Supreme Court Year in Review

by: Matthew B. Free, Best & Sharp

The Supreme Court of Oklahoma decided many cases last year that may be relevant to your practice, including the following:

## Litigation Practice

In *Watson v. Gibson Capital, L.L.C.*, 2008 OK 56, 187 P.3d 735, the plaintiff, while represented by counsel, filed a voluntary dismissal with prejudice. Ten days later, the plaintiff's attorney filed a motion to vacate the dismissal. The trial court vacated the dismissal. The Supreme Court affirmed the trial court's decision, finding the **client had no authority to file a dismissal in the case**. "[J]udges cannot act on requests pressed before them by represented clients alone, and represented parties cannot act in court *sans* their lawyers of record."

In *Willis v. Sequoyah House, Inc.*, 2008 OK 87, 194 P.3d 1285, the Supreme Court affirmed a **dismissal for failure to serve** process within 180 days of the filing of the petition. The dismissal was, effectively, with prejudice. The plaintiff's counsel argued in his briefing that "good cause" existed for the failure to serve based on a clerical error in the lawyer's office. The Court rejected the argument on appeal, noting that the statements of counsel in a brief were not "cast in probative form." "The record on appeal is devoid of any supportive proof tendered in the form of testimony, affidavit, or through some acceptable evidentiary substitute."

In *Woods v. Unity Health Center, Inc.*, 2008 OK 97, 196 P.3d 529, the Court held that the **service of process statute applicable to medical liability actions (12 O.S. § 150) was an unconstitutional special statute** in violation of art. 5, § 46 of the Oklahoma Constitution. The statute provided that a medical liability lawsuit was "deemed dismissed" if service of process was not accomplished within 180 days after the filing of the petition. "Section 150 denies such plaintiffs prior notice of dismissal proceedings while the ordinary plaintiff receives notice and an opportunity to be heard prior to any dismissal."

In *Durant Civic Foundation, Inc., v. The Grand Lodge*, 2008 OK CIV APP 54, 191 P.3d 612, the Court of Civil Appeals held that the filing of an answer after the time permitted by the Oklahoma Pleading Code and without leave of court is a nullity, having no procedural effect.

## Negligence Cases

In *Snyder v. Maldonado*, 2008 OK 53, 202 P.3d 135, the Supreme Court reversed a defense verdict in a trucking case, finding that the trial court erred in submitting a **contributory negligence jury instruction**. The defendant claimed that the **passenger-plaintiff was contributorily negligent** because she failed to react and/or warn the driver that the driver was crossing the center line. The Court however found that there was a "complete absence of direct evidence that the passenger was negligent." The Court created new law by stating that the "realities of modern driving are such that a passenger cannot safely be an active participant under normal circumstances . . . A passenger's duty is fulfilled under ordinary circumstances by determining, before becoming a passenger, whether there are any conditions that warrant a heightened level of responsibility. Having done so, however, passengers should be permitted to relax and look

around, read, or even sleep, unless something changes in the interim that would alert a reasonable passenger to exercise greater vigilance." The Court reversed for a new trial.

In *Gomes v. Hameed*, 2008 OK 3, 184 P.3d 479, the defendant, an emergency room physician, was entitled to the protection of the **Good Samaritan Act**, 75 O.S. § 5, because he had no direct contractual relationship with the plaintiff, did not work for the hospital, and merely happened to be at the emergency room going through records and visiting his patient when the code blue (for plaintiff) was called. The Court also held that an **agreement not to sue**, which was negotiated on behalf of a minor or incapacitated person, required court approval to be enforceable.

In *Bierman v. Aramark Refreshment Services, Inc.*, 2008 OK 29, 198 P.3d 877, the Court found that the trial court abused its discretion in striking the plaintiff's claim for **punitive damages** against a vicariously-liable employer-defendant, even though the trial court had separately awarded punitive damages against the defendant's employee that were not enforceable against the employer-defendant. The Court held that punitive damages can be imposed vicariously, and that the trial court's order (denying the plaintiff the right to pursue additional punitive damages against the principal) deprived the employee of a "substantial right."

## Wrongful Termination

The Court recognized a *Burk* wrongful-termination claim in at least two cases. In *Darrow v. Integris Health Inc.*, 2008 OK 1, 176 P.3d 1204, the Supreme Court recognized such a claim in the context of a plaintiff's reporting of record discrepancies related to patient safety or billing practices. In *Vasek v. Board of County Commissioners*, 2008 OK 35, 186 P.3d 928, the Court reversed a summary judgment, finding the plaintiff had presented sufficient evidence on a *Burk*-type claim related to reporting an unsafe or unhealthy condition in a public building (mold in a courthouse).

The Court also answered two certified questions related to the *Burk* tort. In *Kruchowski v. The Weyerhaeuser Co.*, 2008 OK 105, 202 P.3d 144, and *Shirazi v. Childtime Learning Center, Inc.*, 2009 OK 13, \_\_\_ P.3d \_\_\_, 2009 WL 468576, the Court re-emphasized that a *Burk* claim survives when the same remedies are not available to the same class of employment discrimination victims, regardless of whether the remedies originate from federal or state law. The plaintiff apparently does not need to show that federal or state law remedies are "inadequate," as the focus is not on the *adequacy* of the available remedies, but on the *uniformity* of the remedies across an entire class of discrimination victims. Currently, that class consists of wrongful termination claims based on race, color, religion, sex, national origin, age and handicap.

Continued on next page...

Dear OADC Members:

The Officers and Board of Directors of OADC are often asked about OADC's position on lawsuit reform. There appears to be a misconception among OADC members that as an organization, OADC is in favor of lawsuit reform. Actually, the official position of OADC regarding lawsuit reform is that "OADC has no position". The OADC membership is a diverse group with differing beliefs, ideals and interests. The opinions of OADC members regarding tort reform are no different. There is a divergence of personal opinions regarding tort reform among the OADC membership. As this is, and has been, such a contentious political issue even within OADC's membership, when tort reform was an issue in 2004 the Officers and Board of Directors decided OADC would not take an official position on tort reform. OADC's position has not changed.

The Officers and Board of Directors of OADC encourage you to take an active role in protecting, preserving and improving the Oklahoma civil justice system by expressing your personal opinions to your respective legislators.

OADC provides members with many opportunities throughout the year to obtain meaningful CLE credit, network with fellow defense lawyers, providing for the exchange of ideas and information relating to defense litigation and social opportunities. OADC also works to improve the civil justice system through filing amicus briefs, maintaining a presence and voice at the state capitol regarding legislation affecting the defense practice, and keeping OADC members informed as to those legislative developments.

## **Pursuant to the OADC Bylaws, Article II:**

The purpose of this association shall be to bring together by association, communication, and organization, lawyers of Oklahoma who devote a substantial amount of their professional time to handling civil legal matters and whose representation in litigated matters is primarily for the defense; to provide for the exchange among the members of this association of such information, ideas, techniques of procedure and court rulings relating to the handling of litigation as are calculated to enhance the knowledge and improve the skills of defense lawyers; to elevate the standards of trial practice in this area and, in conjunction with similar associations in other areas, to develop, establish, and secure court adoption or approval of a high-standard of trial conduct and courtroom manners; to support and work for the improvement of the adversary system of jurisprudence in our courts; to work for the elimination of court congestion and delays in civil litigation; and in general to promote improvements in the administration of justice and to increase the quantity and quality of the service and contribution which the legal profession renders to the community, State and Nation.

OADC also has an active amicus curiae program and greatly values its ability to participate as a "friend of the court" on important legal issues which help shape those areas of the law which impacts OADC members, members' clients, and the civil justice system in Oklahoma.

The leadership of OADC takes an active role in keeping tabs on what is going on at the capital through a legislative committee, a legislative consultant and our political action committee. The 2009 OADC legislative committee members are Bob Naifeh, Mike Heron, Pete Serrata, Grady Parker, Shane Curtin, Kyle Sweet and Kevin Driskill. These committee members are not only a resource for the Board; they are also a resource for you. If you have questions about what is happening at the capitol contact them or your legislators directly.

The Legislative Committee's primary function throughout the years has been to investigate, analyze, evaluate, and consider existing state statutes, state regulations, and court rules from the standpoint of their potential impact upon the legal/judicial system in Oklahoma. In addition, the committee often assists with the responsibility for formulating and drafting proposed legislation. Finally, the committee is also charged with the responsibility of formulating and communicating observations, opinions, and recommendations to the Board and membership regarding legislative developments.

OADC has established an identity in the Oklahoma legislature to monitor legislation which might have impact upon the civil justice

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### Premises Liability

In *Scott v. Archon Group, L.P.*, 2008 OK 45, 191 P.3d 1207, the plaintiff drove his truck through an entrance ramp with a steel barrier beam. The beam was designed to prevent entrance of trucks taller than 8' 6". The plaintiff was driving a truck which was 11 feet tall. The truck struck the beam and knocked it loose. The beam fell onto the cab and crushed the plaintiff, rendering him a quadriplegic. The Court found that the defendants breached no duty to the plaintiff because the clearance beam was an "open and obvious danger." The defendants owed no duty to warn or otherwise protect him from the open and obvious danger. Expert testimony did not prevent summary judgment. The former owner of property had no liability, as "possession and control of real property is the fundamental requirement for ascribing liability for injury suffered thereon." The Court also rejected any attempt to import ordinary negligence concepts into premises liability law (relational, status-based liability).

In *Bray v. St. John*, 2008 OK 51, 187 P.3d 721, the plaintiff, a business invitee of St. John Medical Center, was abducted from the defendant hospital's garage and raped. The Supreme Court found that there were questions of fact regarding whether the precautions St. John undertook were adequate to provide reasonable protections to the business invitee. St. John maintained security monitoring of the garage, but questions existed about whether the security system was adequate in that (1) St. John only had one monitor dedicated to the garage at the time the assailant circled the garage unnoticed with his tag obscured by duct tape, and (2) St. John had several incidents occurring in parking lots and garages during the year prior to the abduction and rape, including assault, battery, abduction, robbery by force and/or armed robbery. The Court adopted all of Comment "F" to Section 344 of the *Restatement (Second) of Torts*, finding that a possessor of land may have a duty to prevent criminal conduct when "past experience" shows that there is a likelihood of such conduct occurring on the premises.

### Sanctions

In *Barrett v. Simmons*, 2008 OK 100, 197 P.3d 12, the Court addressed a **sanctions order** in the context of **discovery of computerized data**. The trial judge had ordered the plaintiff to provide his computer for inspection by the defendants. The plaintiff, in the interim, attempted to have the hard drive "wiped" clean. The plaintiff ultimately dismissed his case, but the defendant nevertheless sought substantial sanctions. The trial court refused to impose sanctions because the court found that the plaintiff's conduct was not "intentional" or "willful." The Supreme Court reversed the order, finding that "willfulness of party's conduct is relevant to the severity of the sanction to be imposed, not whether a sanction should be imposed." Factors to be considered in the severity of the sanction include willfulness, prejudice, whether there was a warning that failure to cooperate could lead to dismissal, whether less drastic sanctions were imposed or considered, and the amount of interference with the judicial process. The case was remanded for reconsideration.

The Court also recognized a **duty to preserve evidence**. It held that a litigant "who is on notice that documents and information in its possession are relevant to litigation or potential litigation or are reasonably calculated to lead to the discovery of admissible evidence has a duty to preserve such evidence."

In *Garnett v. Government Employees Insurance Company*, 2008 OK 43, 186 P.3d 935, the trial court sanctioned the plaintiff's counsel (in the amount of \$2,500) for **revealing the amount of a settlement offer** in a motion filed with the court. The Court found that the plaintiff's counsel *did* violate the Oklahoma Mediation Act, but found that the Court had no authority to sanction counsel under 12 O.S. § 2011 because the defendant failed to follow the safe-harbor provision of § 2011 (i.e., giving counsel a 21 day opportunity to withdraw the offending pleading). The Court also affirmed summary judgment on a bad faith claim. The Court found that the parties had a legitimate dispute as to value of a UM claim.

### New OUIs

The Supreme Court also adopted new **Oklahoma Uniform Jury Instructions**, including instructions on: (1) statute of limitations, (2) punitive damages, (3) the "substantial certainty" test for employer liability, (4) liability for additional injuries by other persons, (5) liability for increased harm (products liability and negligence), (6) breach of fiduciary duty, and (7) conversion. *See In re: Adoption of the 2008 Revisions to Oklahoma Jury Instructions Civil*, 2008 OK 93. In its order adopting the instructions, the Court noted: "[T]he Court today declines to relinquish its constitutional or statutory authority to review the legal correctness of these authorized instructions when it is called upon to afford corrective relief in any adjudicative context."

## OADC

### Annual Summer Meeting

June 18 – 21, 200

Hyatt Lost Pines, Austin Texas

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**The following letter was submitted by the OADC Officers and Board of Directors to the Supreme Court regarding the proposal to add a new rule to the Rules of the District Courts restricting an attorney's ability to represent a client during a deposition:**

The Oklahoma Association of Defense Counsel (OADC) is an organization comprised of almost 400 attorneys who specialize in civil defense litigation. The Officers and Directors of OADC, on behalf of the OADC membership, submits this comment regarding the new rule proposed for Rules For District Courts, Rule 31. Conduct During depositions.

Depositions may be the single most important aspect of litigation. A deposition is a legal proceeding very much like a court hearing, held primarily in an informal setting. Deposition testimony is sworn testimony that carries the same force and effect as if it were given before a judge and jury. Quite simply, depositions can make or break a case.

The Oklahoma Discovery Code is explicit in how objections are to be made during a deposition. 12 O.S. § 3230 (E)(1) clearly states:

*“Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, or work product protection, to enforce a limitation on evidence directed by the court....”*

Rule 31, as proposed, unjustly restricts deponent's counsel's ability to defend his or her client against abusive, harassing, and overreaching tactics by examining counsel. On occasion depositions veer off course and rather than remain a search for factual information and truth, they become an attempt to manipulate non-expert witnesses to testify in a manner that will improve a party's position in litigation that may be contrary to the truth. Questions may contain misstated facts. Questions can become argumentative and harassing. Questions are asked over and over again. Previous testimony is manipulated and mischaracterized. Witnesses are requested and required to speculate. Improper hypothetical questions are used.

Deponent's counsel, regardless of which party he or she may represent, must be allowed to represent his or her client in a deposition against such abuses of process. Deponent's counsel must be allowed to defend his or her client against abusive, harassing, and overreaching tactics by examining counsel. Deponent's counsel must be allowed to establish a record of examining counsel's inappropriate conduct and attempts to rectify the conduct before stopping a deposition to seek court intervention with a protective order pursuant to 12 O.S. § 3226.

Other states have recognized that the deposition examiner is often abusive, repetitious, misleading, etc. The State of Florida recognizes that examining counsel must not be given *carte blanche* to abuse the deposition process. The Florida Bar's *Guidelines for Professional Conduct* addresses examining counsel's behavior:

Counsel should refrain from repetitive or argumentative questions or those asked solely for purposes of harassment. Counsel should not conduct questioning in a manner intended to harass the witness, such as by repeating questions after they have been answered, by raising the questioner's voice, or by appearing angry at the witness. *Florida Bar Guideline (7)*.

Proposed Rule 31 only seeks to curtail potentially inappropriate behavior of the non-interrogating attorney. Proposed Rule 31 ignores inappropriate behavior of the interrogating attorney who manipulates a witness with abusive, repetitious and misleading questions. As a result, Proposed Rule 31 will foster further abuses by the interrogating attorney who will have statutory permission to continue and even escalate their behavior. Proposed Rule 31 renders the deponent's counsel helpless to respond to such abuses by interrogating counsel.

Beyond the problems expressed concerning potential abuses by the examining attorney, proposed Rule 31 is also overbroad and inconsistent with particular provisions of the Oklahoma Discovery Code under which attorneys in Oklahoma must currently represent and advocate for their clients. Section 3232(B) and (D)(3)(a) and (b) of the Oklahoma Discovery Code specifically require attorneys to make objections beyond the proposed limitations of "Objection, leading" or "Objection, form" to any question relating to the competency of a witness or to the competency, relevancy or materiality of testimony or other irregularity if "the ground of the objection is one which might have been obviated or removed if presented" during the deposition.

For example, if a witness has not been properly credentialed through prior questioning in the deposition or the proper factual or legal foundation has not been laid, and this problem or ground for objection could have been repaired by the interrogator during his or her questioning in the deposition, the non-interrogating attorney will waive these objections if they are not contemporaneously raised.

The Supreme Court of the State of Oklahoma has made it clear that "there is no difference in law between 'discovery' and 'trial' depositions." *Herman v. Robertson*, 145 P.3d 1039. In today's protracted litigation environment, every deposition is potentially "trial" testimony because the testimony in deposition may, pursuant to Section 3232(A)(3), be used "for any purpose" if the witness does not reside in the county where the action is pending, if the party offering the deposition has been unable to procure the attendance of the witness by subpoena, if the witness is an expert witness, or is dead. Proposed Rule 31 prevents attorneys from raising these valid objections during the deposition while Section 3232(D)(3) holds that the failure to assert them during the deposition deems them to be waived.

It is the position of the Officers and Directors of OADC and, on behalf of our membership, that the Rule 31 as proposed will not allow counsel defending a deponent at a deposition to properly and fully represent their client's interests. Rule 31 will have a practical effect of preventing a deponent's right to counsel. The Oklahoma Discovery Code properly governs the deposition process and those rules should be left in place without further restriction. We respectfully request that Rule 31 as proposed be rejected.

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