

OADC OUTLOOK

A Publication of the Oklahoma Association of Defense Counsel

November 2019

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President's Message

by Steve Johnson

As our 53rd year comes to a close, I encourage all members to save two key dates on your calendars. First, on **Monday, December 16, 2019**, OADC will hold a Deposition Academy at the OU College of Law. This will be an excellent opportunity to learn deposition techniques and strategy from experienced OADC members. Watch your email; www.oadc.org; and social media (Facebook: [@OklahomaAssocDefenseCounsel](https://www.facebook.com/OklahomaAssocDefenseCounsel); Twitter: [@OklaDefense](https://twitter.com/OklaDefense)) for details and registration information.

Second, the annual OADC Winter dinner meeting is scheduled for **Friday, January 17, 2020** at the Mayo Hotel in Tulsa. (A room block has already been reserved at \$129.00 and \$159.00/night). In conjunction with that meeting, the OADC board of directors will conduct a long-range planning meeting on Friday afternoon and Saturday morning. The meeting will be led by DRI member John C. Trimble of Indianapolis, IN. John has significant experience in leading long-range planning meetings for state defense organizations, and his services are being provided as a courtesy to our organization by DRI.

In order to ensure the success of our long-range planning meeting, we need your help. You will receive an email in the near future containing a member survey. There are only 10 questions in the survey, which will only take a few minutes to complete. Please begin thinking now about your responses and any ideas you would like to share regarding the long-range plan for our organization. For example: Why did you join OADC, and why do you remain a member? What do you believe OADC does well? What additional activities or initiatives could OADC offer? Importantly, the survey is designed to be anonymous and all responses will go directly (and only) to John Trimble. John will utilize the response data in leading us in our strategic planning discussion sessions. Therefore, I respectfully ask for your participation in this process, as we plan for the long-term success of our organization.

Finally, the nominating committee will soon begin preparing a slate of officers and directors for next year. If you are interested in serving OADC as an officer or member of the board of directors, please email me directly at: sjohnson@oklahomacounsel.com. Thank you!

Nominations Wanted

2019 Outstanding Defense Lawyer

Candidate has demonstrated an outstanding commitment to the work of OADC and during 2019 has obtained one or more substantial litigation wins (not necessarily a defense verdict).

Nominations must include:

1. Candidate
2. Candidate's Firm
3. Person Nominating
4. Reason for Nomination

Send all nominations to Steve Johnson @ Sjohnson@oklahomacounsel.com by **January 1.**

2019 Outstanding Young Lawyer

Candidates for the award must have demonstrated outstanding commitment to the work of OADC and during the 2019 year have one or more of the following:

1. Published Articles
2. Pro Bono Work
3. Work with Law Students
4. Community Service

Board Members

Three Positions Open 3 Year Terms

Requirements:

1. Participate in the monthly conference calls. These are set for noon and are usually the 3rd Thursday of the month, Feb. – May and July – Dec. They usually take about 30 – 45 min, sometimes less. No call in Jan. or June due to the other meetings.
 - a. Of course, there are times when work conflicts with the monthly call or the meetings. We ask that board members try their best to attend and be active; board members can be removed after 3 unexcused absences.
2. Participate/attend the winter meeting.
3. Participate/ attend in the summer meeting.
4. Be an active participant on a committee of your choosing.
5. Recruit OADC members.
6. Promote the OADC meetings and CLE events.

Registration Information coming soon.....

Deposition Academy Monday, December 16
OU College of Law, Norman

OADC Winter Meeting: Friday, January 17, 2020
Mayo Hotel, Downtown Tulsa

To Offer or Not to Offer. That is the Question

Offers of Judgment under 12 O.S. § 940

by: Robert Betts

Pierce Couch Hendrickson Baysinger & Green, L.L.P.

While 12 O.S. § 940 declares that all cases in which property damage is at issue are subject to attorneys' fees (and potentially fee shifting), application of the statute may not always be clear. In addition, 12 O.S. § 1101 and § 1101.1 muddy the waters by layering additional possibilities for recovery of costs and attorney's fees. This article seeks to provide some clarity to the interpretation of the statutes, particularly for § 940 as well as some strategic suggestions for practice

§ 940

Oklahoma follows the American Rule when it comes to attorney's fees – unless there is a statute or enforceable contract providing otherwise, each party is responsible for its own attorney's fees. *Morgan v. Galilean Health Enterprises, Inc.*, 1998 OK 130, ¶ 11, 977 P.2d 357, 362. For instance, in cases of bodily injury, claimants do not have an automatic right to attorney fees. *Winters By & Through Winters v. City of Oklahoma City*, 1987 OK 63, 740 P.2d 724, 725. However, in cases where the plaintiff claims negligent or willful damage to property, 12 O.S. § 940 provides that, "the prevailing party shall be allowed reasonable attorney's fees, court costs and interest to be set by the court and to be taxed and collected as other costs of the action." This statutory exception to the American Rule is often seen to enhance the value of a property damage case for Plaintiff's counsel. However, it can also be viewed as a trap for Plaintiff's counsel that improperly values his client's damages.

Before diving into the offer of judgment section of the statute, a clear understanding of who is the prevailing party is necessary. The prevailing party is the entity that obtains judgment in its favor. The amount of the judgment is irrelevant. Judgment for \$1 or \$1,000,000 in favor of the Plaintiff makes it the prevailing party. The existence or non-existence of an offer of judgment is also irrelevant to determining who is the prevailing party. Moreover, this fee award is available only for physical damage to property. *Turner Roofing & Sheet Metal, Inc. v. Stapleton*, 1994 OK 36, 872 P.2d 926, 928 ("§ 940(A) applies only to those actions for damages for the negligent or willful physical injury to property"). Even if successful, claims against property such as slander of title, *Id.*; mismeasurement of proceeds from a mineral estate, *Woods Petroleum Corp. v. Delhi Gas Pipeline Corp.*, 1984 OK 94, 700 P.2d 1011, 1013; and conversion, *Stites v. Duit Const. Co., Inc.*, 1999 OK CIV APP 113, ¶ 13, 992 P.2d 913, 916, are not included in the § 940 attorneys' fee grant. The best practice is to simply define the prevailing party based on the judgment, and allow the statute to operate on the award of fees. *Evans v. Sitton*, 1987 OK 12, ¶ 6, 735 P.2d 334, 336.

Further, there can be more than one prevailing party. Opposing parties can state claims and compulsory counterclaims and both be successful on them. In *Smith v. Jenkins*, two participants in a car wreck were adjudged to be 50% liable each, and thus both were prevailing parties based on § 940. 1994 OK 43, 873 P.2d 1044, 1049 ("[I]t is clear that parties who stand victorious on their respective claims for the same tortious event are each entitled to a counsel-fee allowance against the other, which award, once ascertained, must be reduced by the fact trier's percentage allocation of negligence."). Of course, had either party been adjudged *more than 50% liable*, that party could not recover. *Id.* at 1047, n. 15.

Absent an offer of judgment, the prevailing party will be entitled to attorney's fees under § 940. The offer of judgment potentially changes this entitlement by requiring plaintiff's counsel to perform a reasonable evaluation of the case. Let's look at a hypothetical case. Plaintiff sues for recovery of damage due to a repair shop's negligence in customizing her vintage 1971 Triple Black Chevy Chevelle SS. After discovery ends and prior to trial, defendant Speed Wrench Auto Techs (SWAT) makes an offer of judgment pursuant to 12 O.S. §940 to plaintiff for \$5,000 for any and all recoverable damages to the vehicle. Plaintiff simply does not respond to the offer.

Scenario 1: At trial, judgment is rendered for Defendant.

Here, SWAT is the prevailing party and is entitled to attorney's fees. This would be true with or without an offer of judgment.

Scenario 2: At trial, judgment is rendered for Plaintiff for \$4,750.

Here, Plaintiff is the prevailing party but not entitled to *any* attorney's fees. The amount of the judgment is less than the offer of judgment. Plaintiff's counsel has over valued his case and loses the opportunity for fees because of it. SWAT, however, is not the prevailing party and is not entitled to attorney's fees. *Evans*, 735 P.2d at 336 ("Under § 940(B), if the plaintiff prevails, but receives a judgment for a lesser amount than the defendant offered, the plaintiff is not entitled to recover attorney fees and costs. Nothing, however, dictates that the defendant should be awarded attorney fees.")

Scenario 3: At trial, judgment is rendered for Plaintiff for \$5,000.

Here, neither Plaintiff nor Defendant is awarded attorney's fees. The judgment is equal to the offer of judgment; therefore, each party will bear its own attorney's fees. In other words, this scenario leads to the same result as Scenario 2.

Scenario 4: At trial, judgment is rendered for Plaintiff for \$6,875.

Here, Plaintiff is entitled to recover attorney's fees and court costs.

These scenarios show that the offer of judgment contained in 12 O.S. § 940 allows the defendant to raise the floor on plaintiff's potential recovery of attorney's fees. By savvy evaluation of the case, the defendant can set the minimum level for plaintiff to recover attorney's fees at a level driven by the facts of the case. Where plaintiff may be able to prove some liability and damages, but those damages are nominal, an offer of judgment can prevent a \$100 verdict from becoming a \$100,100 judgment (\$100 in damages and \$100,000 in attorney's fees).

Inclusive versus Exclusive

The scenarios above use an offer of judgment that is solely for the property damages. This offer is "exclusive" of costs and fees. In other words, if an offer of judgment under § 940 is accepted, the Plaintiff may well then also file an application for an award of attorney's fees. One approach to managing the risk of Plaintiff demanding exorbitant fees is to make the offer of judgment "inclusive of all damages, costs, and attorney's fees." This phrase ensures that attorney's fees are included in the total payment if accepted.

If a Plaintiff prevails at trial, "taxable court costs" are added to the verdict to determine if the final judgment exceeds the offer. *Carson v. Specialized Concrete, Inc.*, 1990 OK 87, 801 P.2d 691, 693. Further, the amount of fees that are added to the judgment cuts off as of the day of the offer. *Id.* Consider again the Plaintiff vs. SWAT scenario. This time, the damages at trial are determined to be \$7,000 and costs and fees provable by Plaintiff, at the time of the offer are \$5,000, the amount the court is allowed to consider with the offer. However, at the end of trial, Plaintiff's total fees and costs are \$35,000. If the offer of judgment was \$10,000, the Court will award the entire \$35,000 in attorneys' fees plus the \$7,000 judgment to Plaintiff because the combined judgment and allowable fees of \$12,000 exceed the offer. If, however, the offer of judgment was \$15,000, then the Plaintiff walks away with only the \$7,000 judgment because the offer of judgment exceeds the combined judgment and allowable fees.

Some of the confusion that has arisen around use and interpretation of this statute comes from the *Carson* case. At no point in *Carson* does the Oklahoma Supreme Court state that “attorney’s fees” are to be added to the judgment to determine whether the offer of judgment has been exceeded. However, it is common judicial practice to do just that.¹ *Parks v. Am. Warrior, Inc.*, 44 F.3d 889, 894 (10th Cir. 1995) (“However, where, as here, an offer includes fees and costs, the court will look at the combined total of the damages awarded and fees and costs to determine whether the total falls below the offer of judgment.”); *L. Envtl. Serv., Inc. v. United Motors, Inc.*, 2006 OK CIV APP 49, ¶ 8, 134 P.3d 928, 930 (“Notwithstanding that § 1101 is silent regarding the inclusion of attorney fees and costs with the jury verdict for purposes of comparison with an offer to confess judgment, we hold those expenses must be considered where such were included as part of the offer.”); *H & S Equip., Inc. v. Devon Energy Prod. Co., L.P. by Felix Energy, L.L.C.*, CIV-15-1244-HE, 2017 WL 5760122, at *2 (W.D. Okla. Oct. 10, 2017) (Plaintiff’s “fees” overcame \$5,000 gap between trial judgment and offer of judgment inclusive of costs and fees entitling Plaintiff to attorneys’ fees under § 940). Whether this practice is warranted or not under the holding of *Carson*, the practitioner should be aware of and plan for the addition of attorneys’ fees to the judgment. The desire to compare the same elements in the offer to the same elements in the final judgment would suggest that that addition of attorney’s fees would be appropriate.

Timing

An offer of judgment made before trial can be an effective means of limiting exposure. In cases where liability or damages are not certain, the offer can entice a plaintiff to accept in order to limit her own potential susceptibility to a minimal damages award or even an attorney’s fee award against her. Defendant should still be sure to have a good understanding of a potential attorney’s fees award, because, make no mistake, if a plaintiff accepts an offer of judgment, she is automatically the prevailing party.

Accordingly, the offer of judgment under § 940 should not be considered just a trial tool. It is also a means of limiting attorney’s fees awards even when damages are certain and high. For instance, in a case of clear liability with substantial damages, it may be in the defendant’s best interest to file an offer of judgment early. Plaintiff may be enticed to accept a substantial offer of judgment. However, this early offer also limits the amount of time that plaintiff’s counsel can support for a fee award. Even if the damages are in the 7-figure range, if Plaintiff’s counsel has been working on the case for 2 weeks, then provable fees will be minimal.

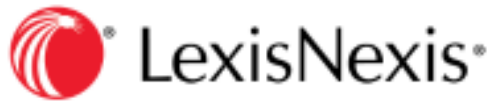
Proper and adequate case assessment is always necessary, but it is a critical factor in making the offer of judgment for property damage. An offer that is too low will have no effect if the eventual judgment is higher. An offer that is too high may be accepted, but will expose the client to a higher-than-necessary judgment payment. An offer made when the client has no liability will result in an unnecessary judgment against the client (though perhaps a nominal offer would still be appropriate).

These guidelines serve as a starting point for considering the appropriateness, structure, and timing of an offer of judgment under § 940. However, § 940 can only be applied in cases where there is property damage, both real and personal. For cases without these types of damages, two other statutes may be used (12 O.S. §§ 1101 and 1101.1).

A more thorough examination of §§ 1101 and 1101.1 is beyond the scope of this article. Suffice to say that the structure and judicial interpretation of this statutory provision is likely to ignite debate and litigation for year to come. Defense counsel should develop a strategy for offers of judgment as early as possible in each case. Each statute has its own applications, advantages, and drawbacks, and clients should be kept in the loop and advised as early as possible as to those factors.

¹ Under Oklahoma law, “taxable costs” are either ordinary court costs or equitable litigation expenses. *Fleet v. Sanguine, Ltd.*, 1993 OK 76, 854 P.2d 892, 902. Those ordinary costs “are taxed summarily by the ministerial act of a clerk, without any antecedent judicial action or a party’s request.” *Chamberlin v. Chamberlin*, 1986 OK 30, 720 P.2d 721, 727, n. 25 (emphasis in original). This would seem to not include attorneys’ fees.

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