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Recent Developments in Oklahoma Law--Civil Procedure

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RECENT DEVELOPMENTS IN OKLAHOMA LAW — CIVIL PROCEDURE

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I. INTRODUCTION

The most controversial and significant development during the past year was the enactment of the Tort Reform Law.[1] In addition to modifying the substantive standards and procedures for the award of punitive damages, the Tort Reform Law provides for a new offer of judgment procedure. This procedure authorizes recovery of attorney fees if an offer is rejected and the final judgment is less favorable than the offer to the party who rejected it.[2]

There were also a number of important and interesting cases decided by the Oklahoma Supreme Court and Oklahoma Courts of Appeals relating to civil procedure. Three cases during the past year were concerned with arbitrations, which may increasingly provide an alternative forum for dispute resolution.[3] In one interesting case,[4] a trial judge attempted to transfer a case to another district on *forum non conveniens* grounds on his own motion, but the Supreme Court

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1. 1995 Okla. Sess. Laws 287.

2. *Id.*

3. *See* Rollings v. Thermodyne Indus., Inc., 910 P.2d 1030 (Okla. 1996); Carris v. John R. Thomas & Assoc., 896 P.2d 522 (Okla. 1995); Southern Okla. Health Care v. JHBR-Jones-Hester-Bates-Riek, Inc., 900 P.2d 1017 (Okla. Ct. App. 1995).

4. Stevens v. Blevins, 890 P.2d 936 (Okla. 1995).

issued a writ of prohibition to prevent him from doing so.[5] In addition, there were several cases involving statutes of limitations. There were also a number of cases involving appellate procedure in which the Oklahoma Supreme Court continued to rule that a court's minute order does not trigger the time for filing an appeal, even though the order is signed by the trial judge.

II. TORT REFORM

The Tort Reform Law[6] was the product of a compromise negotiated between two opposing groups — the Citizens Against Lawsuit Abuse and the Oklahoma Trial Lawyers Association. What sparked the compromise was the threat of an initiative petition on tort reform that would have included graduated limits on attorneys' contingency fees. These limits would have restricted all costs and expenses, including attorney fees, to 33-1/3% of the first $100,000 of the recovery, with the amount of costs and expenses being reduced on amounts over $100,000 to as low as 10%.

The Tort Reform Law has three parts: 1) an offer of judgment procedure;[7] 2) a three-tier system for punitive damages;[8] and 3) immunity from tort liability for volunteers.[9] It also includes transition provisions, stating that the Law applies only to cases filed after September 1, 1995, and not to cases that were pending on that date.[10] Part of the compromise that was reached is not found in the Law, but instead is in the form of a letter from Governor Keating to the Speaker of the House and the President Pro Tem of the Senate promising a moratorium on other tort reform for the remainder of the Governor's term.

The new offer of judgment statute, which is being codified at section 1101.1 of title 12 of the Oklahoma Statutes, has some similarity to the offer of judgment provision in section 1101 of title 12,[11] which has never been amended since its adoption in 1910. Both procedures may be initiated only by a defendant and provide that before the trial, the defendant may make an offer for judgment to be taken against the defendant for a specified amount. If the plaintiff does not accept the

5. *Id.* at 940.
6. 1995 Okla. Sess. Laws 287.
7. OKLA. STAT. tit. 12, § 1101.1 (Supp. 1995).
8. OKLA. STAT. tit. 23, § 9.1 (Supp. 1995).
9. OKLA. STAT. tit. 76, § 31 (Supp. 1995).
10. 1995 Okla. Sess. Laws 287, §§ 1(F), 2(G), 3(G).
11. OKLA. STAT. tit. 12, § 1101 (1991).

offer and then proceeds to trial and recovers a judgment that is less than the offer of judgment, the plaintiff will be liable for certain expenses that the defendant incurred after the making of the offer of judgment.[12] The primary difference between the offer of judgment provisions in sections 1101 and 1101.1 is that the expenses for which the plaintiff is liable under section 1101 are the defendant's costs, while the plaintiff is liable for the defendant's attorney fees in addition to costs under section 1101.1.

The new offer of judgment statute differentiates between personal injury, wrongful death, discrimination,[13] and retaliatory discharge cases,[14] which are governed by section 1101.1(A), and all other types of actions, which are governed by section 1101.1(B). This distinction is important, because section 1101.1(A)(5) provides that the offer of judgment procedure applies only if the plaintiff demands more than $100,000 in a pleading or at trial, or the defendant makes an offer of more than $100,000. Section 2008(A) of title 12[15] prohibits a plaintiff from specifying in the petition the amount of damages in an action not sounding in contract in which damages in excess of $10,000 are being sought. Consequently, a plaintiff will never demand more than $100,000 in a pleading in a personal injury, wrongful death, discrimination, or retaliatory discharge case in an Oklahoma state court. In addition, a plaintiff is not required to specify the amount of damages at trial, since section 2004(B) of title 12[16] provides that the judgment shall grant the relief to which the prevailing party is entitled, even if that relief is not demanded in the pleadings. Therefore, a plaintiff can avoid the application of section 1101.1 by not making a demand for $100,000 at trial, unless the defendant makes an offer of judgment for more than $100,000. The $100,000 limitation does not apply to the business actions that are governed by section 1101.1(B).

If the offer of judgment procedure was intended to weed out frivolous tort cases, it is apparent that it will not succeed, because the procedure will apply only if the defendant makes an offer of judgment for more than $100,000. Obviously, no defendant would offer $100,000 to settle a frivolous case.

As under the prior offer of judgment procedure in section 1101, only a defendant may initiate the new offer of judgment procedure in

12. *Id.*
13. Under OKLA. STAT. tit. 25, §§ 1101-18 (1991 & Supp. 1995).
14. Under OKLA. STAT. tit. 85, § 5 (1991).
15. OKLA. STAT. tit. 12, § 2008(A)(2) (1991).
16. *Id.* at § 2004(B).

section 1101.1 by filing an offer of judgment with the court.[17] In contrast to the prior procedure, though, once the new offer of judgment process is initiated, the plaintiff may make a counteroffer, and the defendant may be liable for attorney fees to the plaintiff for not accepting the counteroffer if the eventual judgment is greater than the counteroffer.[18] Evidence that an offer or counteroffer was made is not admissible to prove liability or damages, but only for the purposes of awarding reasonable litigation costs and attorney fees.[19]

An offer of judgment is deemed to include any costs or attorney fees that are otherwise recoverable.[20] Also, the offer has to be filed at least ten days before trial.[21] The plaintiff in turn has ten days in which to accept or reject the offer, or else file a counteroffer.[22] If the plaintiff files a counteroffer, the defendant has ten days to accept or reject it.[23]

If the plaintiff rejects, or does not accept the defendant's offer, and the plaintiff eventually recovers a judgment that is less than the defendant's final offer, then the defendant is entitled to reasonable litigation costs and attorney fees that the defendant incurred after making the offer.[24] Although the term "reasonable litigation costs" is not defined in the statute, it could easily be construed to include expenses beyond those listed in section 942 of title 12 of the Oklahoma Statutes,[25] such as expert witness fees.

An apparent inconsistency in the new statute is that section 1101.1(A)(1) states that the defendant's offer is deemed to include costs and attorney fees that are otherwise recoverable, but under section 1101.1(A)(3), the judgment is exclusive of costs and attorney fees that are otherwise recoverable. Thus, deciding whether the plaintiff is liable for reasonable litigation costs and attorney fees requires comparing apples to oranges, because the offer of judgment is deemed to include costs and attorney fees, while the judgment does not. For example, if the defendant makes an offer of $200,000, which includes $30,000 in costs and attorney fees that are otherwise recoverable, and the plaintiff obtains a judgment for $220,000 of which $30,000 is costs

17. *Id.* at § 1101.1(A)(1).
18. *Id.* at § 1101.1(A)(4).
19. *Id.* at § 1101.1(C).
20. *Id.* at § 1101.1(A)(4).
21. *Id.* at § 1101.1(A)(1).
22. *Id.*
23. *Id.* at § 1101.1(A)(2).
24. *Id.* at § 1101.1(A)(3).
25. OKLA. STAT. tit. 12, § 942 (1991).

and attorney fees that are otherwise recoverable, the plaintiff would be liable for reasonable litigation costs and attorney fees under a literal reading of the statute, even though the plaintiff in fact recovered $20,000 more than the defendant offered.

An interesting feature of the new statute is that a defendant who is entitled to reasonable litigation costs and attorney fees may offset them against the plaintiff's judgment.[26] However, the plaintiff's attorney has priority for any attorney's lien not exceeding 25% of the judgment and for recovery of reasonable litigation costs not exceeding 15% of the judgment.[27]

The offer of judgment procedure for cases other than personal injury, wrongful death, discrimination, and retaliatory discharge cases is found in section 1101.1(B). As noted previously, the main difference between the offer of judgment procedure for personal injury and the procedure for other cases is that there is no $100,000 offer requirement for the other cases.[28] The other differences are rather confusing and probably of limited practical significance. In personal injury cases, a defendant will be entitled to an award of reasonable litigation costs and attorney fees incurred from the time of filing of the final offer of judgment until the judgment.[29] In the other actions, though, a defendant will be entitled to an award of reasonable litigation costs and attorney fees that were incurred between the time of the filing of the first offer of judgment that is larger than the judgment and the judgment. For example, the defendant might make 3 offers: $50,000; $100,000; and $200,000, which are all rejected. If the plaintiff eventually obtains a judgment for $75,000, then the defendant is entitled to reasonable litigation costs and attorney fees from the date of the second offer for $100,000, rather than from the date of the last offer for $200,000.

Another difference between sections 1101.1(A) and 1101.1(B) is that section 1101.1(B) specifies that it is possible for both the plaintiff and defendant to be entitled to an award of reasonable litigation costs and attorney fees, and if so, they can offset each other. This may happen if the defendant starts with a high offer that is rejected and then makes a lower offer later. For example, the defendant might make an offer of $200,000 initially, which the plaintiff rejects. Then right

26. OKLA. STAT. tit. 12, § 1101.1(A)(3) (Supp. 1995).
27. *Id.*
28. *See id.*
29. *Id.* at § 1101.1(A)(3).

before trial the defendant offers $50,000, and the plaintiff counteroffers $125,000, which the defendant now rejects. If the plaintiff recovers a judgment for $150,000 the defendant would be entitled to an award of reasonable litigation costs and attorney fees from the date of the initial $200,000 offer, and the plaintiff would be entitled to reasonable litigation costs and attorney fees from the date of the $125,000 offer. However, most negotiations do not begin with high offers and then go lower.

It remains to be seen how much this new offer of judgment provision will be used. The previous procedure in section 1101 does not appear to have been used a great deal, judging by the small number of reported decisions listed under the section in the Oklahoma Statutes Annotated.[30] The availability of attorney fees may increase the use of the offer of judgment procedure somewhat, but other states with similar procedures, such as Florida,[31] Indiana,[32] and Nevada,[33] did not see a deluge of offers of judgment after their statutes were adopted. Moreover, the $100,000 offer requirement can be expected to drastically restrict its use in personal injury cases. Another factor that may reduce the use of the offer of judgment procedure is that while the process can be initiated only by a defendant, the defendant may be reluctant to do so, because once the defendant starts the process, the plaintiff can then respond with a counteroffer that will put pressure on the defendant to settle. Initiating the process may therefore be a two-edged sword from the defendant's perspective.

The new punitive damages statute is being codified at section 9.1 of title 23 of the Oklahoma Statutes and replaces section 9 of title 23, which has been repealed.[34] Under the prior statute, punitive damages were limited to the amount of actual damages, unless the trial judge decided there was clear and convincing evidence of "wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed . . . ."[35] If so, the judge could lift the cap on punitives, and this led to a few large punitive awards, the most notorious of which was a $10 million award described in *Scribner v. Hillcrest Medical Center*.[36]

30. *See* OKLA. STAT. ANN. tit. 12, § 1101 (West 1988 & Supp. 1996).
31. FLA. STAT. ch. § 45.061 (1990).
32. IND. CODE § 34-4-44.6.9 (1986).
33. NEV. REV. STAT. § 17.115 (1991).
34. 1995 Okla. Sess. Laws 287, § 4.
35. OKLA. STAT. tit. 23, § 9 (1991) (repealed 1995).
36. 866 P.2d 437, 440, 446 (Okla. Ct. App. 1992) (judgment affirmed conditioned on remittitur of punitive damages to $5 million).

The major change made by the adoption of the new punitive damages statute is the division of punitive damages awards into the following three categories: Category I) where the defendant was guilty of reckless disregard of the rights of others; Category II) where the defendant acted intentionally and with malice towards others; and Category III) where the defendant acted intentionally and with malice towards others and also "engaged in conduct life-threatening to humans."[37]

Under the prior law,[38] the trial judge determined whether to lift the cap on punitive damages. In contrast to the prior law, the decision of whether a case falls into Category I or II is now made by the jury, which must make particular findings by clear and convincing evidence in a separate proceeding before determining whether to award punitive damages and their amount.[39] In order for a case to come under Category III, both the judge and the jury must make particular findings before the jury determines whether to award punitive damages and their amount.[40]

Category I requires a finding by the jury of clear and convincing evidence that the defendant acted in reckless disregard of the rights of others or an insurer recklessly disregarded its duty to deal fairly and act in good faith with its insured. In this Category, punitive damages are limited to the greater of $100,000, or the actual damages awarded.[41] The statute does not define "reckless disregard," but the Oklahoma Uniform Jury Instructions supply the following definition:

> The conduct of [Defendant] was in wanton or reckless disregard of another's rights if [Defendant] was either aware, or did not care, that there was a substantial and unnecessary risk that [his/her/its] conduct would cause serious injury to others. In order for the conduct to be in wanton or reckless disregard of another's rights, it must have been unreasonable under the circumstances, and also there must have been a high probability that the conduct would cause serious harm to another person.[42]

Category II is probably the most important of the three categories. It requires a finding by the jury of clear and convincing evidence that the defendant acted intentionally and with malice towards others

37. OKLA. STAT. tit. 23, § 9.1(D)(2) (Supp. 1995).
38. OKLA. STAT. tit. 23, § 9 (1991) (repealed 1995).
39. OKLA. STAT. tit. 23, § 9.1(B),(C) (Supp. 1995).
40. *Id.* at § 9.1(D).
41. *Id.* at § 9.1(B).
42. Oklahoma Supreme Court Committee for Uniform Civil Jury Instructions, Oklahoma Uniform Jury Instructions—Civil (2d ed. 1993).

or that an insurer intentionally and with malice breached its duty to deal fairly and act in good faith with its insured.[43] Again, the statute does not define "malice," but the Oklahoma Uniform Jury Instructions supply the following definition: "Malice involves either hatred, spite, or ill-will, or else the doing of a wrongful act intentionally without just cause or excuse."[44] In this Category, punitive damages are limited to the greater of $500,000, twice the amount of actual damages, or the increased financial benefit that the defendant or insurer derived as a direct result of the conduct causing the injury to the plaintiff and other persons or entities.[45] The last measure concerning the financial benefit to the defendant is subject to reduction by the amount that the defendant has already paid in punitive damages in Oklahoma state court actions to other defendants on account of the same conduct.[46] No reduction is authorized, however, for punitive damages awards in federal courts or the courts of other jurisdictions.[47]

This last measure in Category II is entirely new. Basing the punitive damages award on the defendant's financial benefits could produce enormous exposure for a defendant, especially in a products liability case. Consider, for example, the famous case against McDonald's Corporation for injuries to a plaintiff who suffered serious burns from hot coffee that she was served.[48] Because of the large exposure under this last measure, a determination that a case comes under Category II may have nearly the same effect, as a practical matter, as the judge's lifting the cap under prior law. Of great benefit to the plaintiff, however, is that the determination is made by the jury, instead of the judge.

Category III is characterized by no limits on punitive damages. As in Category II, the jury has to find by clear and convincing evidence in a separate proceeding that the defendant acted intentionally and with malice towards others or an insurer intentionally and with malice breached its duty to deal fairly and act in good faith with its insured.[49] In addition, though, the judge must find there is evidence

43. OKLA. STAT. tit. 23, § 9.1(C) (Supp. 1995).

44. Oklahoma Supreme Court Committee for Uniform Civil Jury Instructions, Oklahoma Uniform Jury Instructions—Civil (2d ed. 1993).

45. OKLA. STAT. tit. 23, § 9.1(C) (Supp. 1995).

46. *Id.*

47. *Id.*

48. *Judge Reduces Award in Coffee Scalding Case; From $2.7 Million to $480,000*, THE LEGAL INTELLIGENCER, Sept. 15, 1994, at 3.

49. OKLA. STAT. tit. 23, § 9.1(D) (Supp. 1995).

beyond a reasonable doubt that the defendant or insurer acted intentionally and with malice and engaged in conduct life-threatening to humans.[50] Only if the appropriate findings are made by both the judge and the jury, may the judge lift the cap on punitives.

Once the appropriate Category has been selected, the jury must then determine the amount of punitive damages in a separate proceeding. In contrast to the prior statute, the new statute lists a number of factors to govern the award of punitive damages. These are:

> [T]he seriousness of the hazard to the public arising from the defendant's misconduct; the profitability of the misconduct to the defendant; the duration of the misconduct and any concealment of it; the degree of the defendant's awareness of the hazard and of its excessiveness; the attitude and conduct of the defendant upon discovery of the misconduct or hazard; in the case of a defendant which is a corporation or other entity, the number and level of employees involved in causing or concealing the misconduct; and the financial condition of the defendant.[51]

The bifurcation of the award of punitive damages into one phase for determining the appropriate Category and another phase for the amount of the award is significant because the defendant's financial condition would not be relevant to the determination of either the defendant's liability or the Category, although it would be relevant to the amount of the award. Thus, evidence of the defendant's net worth would not be admissible until after actual damages had been awarded and the jury had determined the appropriate category based on the defendant's conduct. It also appears that information concerning a defendant's financial worth would not be discoverable until the jury had decided that the defendant was liable for punitive damages.[52]

In some ways, the new statute is more restrictive with respect to punitive damages than the prior statute, but punitive damages may also be greater in many circumstances under the new statute than they would have been under the prior statute. As noted above,[53] the most obvious difference between the two statutes is that the new statute has three categories for punitive damages,[54] while the prior statute had only two. Under the prior statute, punitive damages were limited to

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50. *Id.* at § 9.1(D)(2).

51. OKLA. STAT. tit. 23, § 9.1(A) (Supp. 1995).

52. *See* Cox v. Theus, 569 P.2d 447, 450 (Okla. 1977) (abuse of discretion for trial court to order production of defendant's financial records before trial).

53. *See supra* text accompanying note 38.

54. OKLA. STAT. tit. 23, § 9.1(B),(C),(D) (Supp. 1995).

actual damages, unless the trial judge lifted the cap, in which case they were unlimited.[55] Punitive damages are not unrestricted under the new statute unless both the judge and jury make the appropriate findings to place the case into Category III.[56]

Another difference is in the standard of proof required for an award of punitive damages. Under the prior statute, a jury was authorized to award punitive damages up to the amount of actual damages if it found by a preponderance of the evidence the defendant guilty of reckless disregard for the rights of another, oppression, fraud, or malice.[57] In contrast, under the new statute, the jury must find by clear and convincing evidence that the defendant was guilty of reckless disregard for the rights of others before it can award punitive damages.[58] Once the jury finds reckless disregard by clear and convincing evidence, though, it may award the greater of $100,000 or the amount of actual damages;[59] under the prior statute, the punitive damages award was limited to the amount of actual damages.[60] In a case where the jury could find reckless disregard by clear and convincing evidence, but the judge would not, and the amount of actual damages was less than $100,000, a punitive damages award could be higher under the new statute than it could under the prior statute.

A punitive damages award could also be higher under the new statute in a case where the jury could find by clear and convincing evidence that the defendant acted intentionally and with malice towards others, but the judge would not find reckless disregard by clear and convincing evidence. Instead of being limited to the amount of actual damages, the jury could award punitive damages in such a case up to the greater of $500,000, twice the actual damages, or the amount of the increased financial benefit that the defendant derived as a direct result of its conduct.[61] As a practical matter, a jury that is unable to find clear and convincing evidence of reckless disregard or intentional conduct and malice would be unlikely to award significant punitive damages. Thus, the restrictions in Categories I and II may be more apparent than real in many cases, and as a result, there may well

55. OKLA. STAT. tit. 23, § 9 (1991) (repealed 1995).
56. OKLA. STAT. tit. 23, § 9.1(D) (Supp. 1995).
57. OKLA. STAT. tit. 23, § 9 (1991) (repealed 1995).
58. OKLA. STAT. tit. 23, § 9.1(B) (Supp. 1995).
59. *Id.*
60. OKLA. STAT. tit. 23, § 9 (1991) (repealed 1995).
61. OKLA. STAT. tit. 23, § 9.1(B) (Supp. 1995).

be more punitive damages awards that are greater than actual damages under the new statute than there were under the prior statute.

The third part of the Tort Reform Law provides immunity from liability for volunteers, but only if they were acting within the scope of their duties for a charitable or not-for-profit corporation.[62] The statute also provides that the doctrine of respondeat superior applies so that, while the volunteer may have immunity, the plaintiff is allowed to recover from the volunteer's employer.[63] Since a plaintiff will ordinarily be looking to the employer for compensation, the immunity that the statute confers on the volunteer is unlikely to have any significant effect.

Besides the enactment of the Tort Reform Law, there were a number of appellate decisions relating to civil procedure. These are the subject of the remainder of this paper.

III. PRETRIAL PROCEDURE

There were a number of decisions involving statutes of limitations during the past year.[64] Another case ruled that a trial judge could not transfer a case on *forum non conveniens* grounds upon his own motion.[65] There were also several decisions involving issues under the Oklahoma Pleading Code, such as the amendment of pleadings,[66] the assertion of third-party claims,[67] and real parties in interest issues.

One statutory change was the amendment to section 1751 of title 12 of the Oklahoma Statutes,[68] which expanded the jurisdictional limits for small claims courts to $4500 from $2500.[69] Another statutory development that related to discovery was the amendment to section

62. OKLA. STAT. tit. 76, § 31(A) (Supp. 1995).

63. *Id.* at § 31(B).

64. Cruse v. Atoka County Bd. of Comm'rs, 910 P.2d 998 (Okla. 1996); Stephens v. General Motors Corp., 905 P.2d 797 (Okla. 1995); Resolution Trust Co. v. Grant, 901 P.2d 807 (Okla. 1995); Marshall v. Fenton, Smith, Reneau & Moon, 899 P.2d 621 (Okla. 1995); Weathers v. Fulgenzi, 884 P.2d 538 (Okla. 1994); Dennis v. City of Chickasha, 898 P.2d 744 (Okla. Ct. App. 1995); Bruce v. Employers Casualty Co., 897 P.2d 313 (Okla. Ct. App. 1995); Randolph v. Oklahoma Military Dep't, 895 P.2d 736 (Okla. Ct. App. 1995); Ranier v. Stuart & Freida, P.C., 887 P.2d 339 (Okla. Ct. App. 1994).

65. Stevens v. Blevins, 890 P.2d 936 (Okla. 1995).

66. Dotson v. Rainbolt, 894 P.2d 1109 (Okla. 1995); Bray v. Thomas Energy Sys., Inc., 909 P.2d 1191 (Okla. Ct. App. 1995); Nealis v. Knight, 901 P.2d 228 (Okla. Ct. App. 1995); Sedbrook v. Rouse, 894 P.2d 435 (Okla. Ct. App. 1994).

67. Stotts v. Church of Jesus Christ of Latter Day Saints, 882 P.2d 1106 (Okla. Ct. App. 1994).

68. OKLA. STAT. tit. 12, § 1751 (Supp. 1995).

69. *See* 1995 Okla. Sess. Laws 136.

3228 of the Oklahoma Discovery Code[70] authorizing trial courts to issue commissions and letters rogatory in connection with the taking of depositions in other states.[71] Before this amendment, commissions and letters rogatory had been limited to depositions in foreign countries.

In *Cruse v. Atoka County Board of Commissioners*,[72] the Oklahoma Supreme Court resolved the issue of whether Oklahoma's savings statute at section 100 of title 12 of the Oklahoma Statutes[73] was applicable to cases filed under the Oklahoma Governmental Tort Claims Act. The plaintiffs submitted a timely claim, and after it was deemed denied they filed a timely action against the Board of Commissioners of Atoka County.[74] After the Board filed a motion for summary judgment but before the court ruled on the motion, the plaintiffs voluntarily dismissed the action without prejudice to refiling.[75] When the plaintiffs refiled their action, the Board moved to dismiss on the ground that the second action was barred because it was not filed within the 180-day period provided for in the Tort Claims Act.[76] The plaintiffs argued that Oklahoma's savings statute extended the time for them to file a new action for one year after the dismissal of their earlier action.[77] The trial court dismissed the second action and the Court of Appeals affirmed, but the Oklahoma Supreme Court reversed.[78] The Supreme Court rejected the Board's argument that the 180-day time limitation in the Tort Claims Act was a condition upon the plaintiffs' right to bring an action under the Act, rather than a true statute of limitations to which section 100 would apply.[79] Instead, it ruled that, in the absence of legislative intent to the contrary, section 100 was as applicable to a tort claim against a political subdivision as a tort claim against any other defendant.[80] *Cruse* overruled three recent Court of Appeals decisions[81] to the contrary.

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70. OKLA. STAT. tit. 12, § 3228 (Supp. 1995).
71. *See* 1995 Okla. Sess. Laws 253, § 5.
72. 910 P.2d 998 (Okla. 1996).
73. OKLA. STAT. tit. 12, § 100 (1991).
74. *Cruse*, 910 P.2d at 999.
75. *Id.*
76. OKLA. STAT. tit. 51, § 157(B) (1991).
77. *Cruse*, 910 P.2d at 1000.
78. *Id.* at 1005.
79. *Id.* at 1004.
80. *Id.* at 1005.
81. Gibson v. City of Tulsa, 880 P.2d 429 (Okla. Ct. App. 1994); Robbins v. City of Del City, 875 P.2d 1170 (Okla. Ct. App. 1994); Ceasar v. City of Tulsa, 861 P.2d 349 (Okla. Ct. App. 1993). For analysis of these cases, see Charles W. Adams, *Recent Developments in Oklahoma Law—Civil Procedure*, 30 TULSA L.J. 485, 490-91 (1995).

Dennis v. City of Chickasha,[82] involved the limitations period in the Oklahoma Governmental Tort Claims Act,[83] which requires an action to be commenced within 180 days after a claim has been denied, or deemed denied by the municipality's failure to approve the claim within ninety days. The Court of Appeals held that fundamental notions of due process required the sending of notice of the denial of the claim to the claimant in order for the 180 day period to begin. In 1994, the Oklahoma Governmental Tort Claims Act,[84] was amended to add an express requirement for giving written notice to the claimant.

The Oklahoma Supreme Court examined the discovery rule for accrual of medical malpractice claims in *Weathers v. Fulgenzi*.[85] Following precedent such as *Lovelace v. Keohane*,[86] the Supreme Court held that under the discovery rule, an action for medical malpractice accrued when the plaintiff became aware of her injury, and that the statute of limitations required the plaintiff to pursue her claim with reasonable diligence after she became aware of the injury.[87]

Marshall v. Fenton, Smith, Reneau & Moon,[88] *Ranier v. Stuart & Freida, P.C.*,[89] and *Stephens v. General Motors Corp.*[90] were concerned with the accrual of legal malpractice claims. In these cases, the courts required that the fact (although not the amount) of the injury must be ascertained with certainty before the claim accrues and the limitations period begins to run.[91] In the *Marshall* case, the Supreme Court held that the claim of an administrator of a guardianship against his attorney did not accrue until after the administrator had been discharged and the newly appointed guardian filed suit against the former administrator to surcharge him on his guardianship bond.[92] It decided that even though the former administrator may have been aware of the attorney's negligence before, he did not suffer any damages until the newly appointed administrator filed suit against him.[93]

82. 898 P.2d 744 (Okla. Ct. App. 1995).
83. OKLA. STAT. tit. 51, § 157(B) (1991).
84. *Id.* at § 157(A).
85. 884 P.2d 538 (Okla. 1994).
86. 831 P.2d 624 (Okla. 1992).
87. *Weathers*, 884 P.2d at 542.
88. 899 P.2d 621 (Okla. 1995).
89. 887 P.2d 339 (Okla. Ct. App. 1994).
90. 905 P.2d 797 (Okla. 1995).
91. *See Marshall*, 899 P.2d at 623; *Ranier*, 887 P.2d at 343; *Stephens*, 905 P.2d at 800.
92. *Marshall*, 899 P.2d at 624.
93. *Id.*

Marshall was followed in *Stephens v. General Motors Corp.*[94] After summary judgment was granted against the plaintiff on the grounds that her action was barred by the statute of limitations, she filed a legal malpractice action against her attorney.[95] The trial court ruled that the malpractice action was barred by the statute of limitations because more than two years had passed since the granting of the motion for summary judgment.[96] The Oklahoma Supreme Court reversed, holding that the statute of limitations did not begin to run until the summary judgment was affirmed on appeal and the petition for rehearing was denied.[97]

Similarly, the Court of Appeals held in the *Ranier* case that a client's claim for legal malpractice that arose out of an attorney's representation of him in a previous case did not accrue until the previous case was finally resolved on appeal, at least if there was no indication that the client was aware of any harm suffered before the appeal was decided.[98]

The Oklahoma Supreme Court analyzed the doctrine of adverse domination as a means of tolling a statute of limitations in *Resolution Trust Corp. v. Grant.*[99] After the Resolution Trust Corporation was appointed the receiver of a failed savings and loan association, it filed a federal court action against a number of the association's former directors.[100] The directors moved to dismiss on statute of limitations grounds, and the federal court certified questions to the Oklahoma Supreme Court concerning whether the statutes of limitations should be tolled during the period that the directors controlled the corporation.[101] The Supreme Court analogized the tolling issue to Oklahoma's discovery rule, under which a tort action is tolled until the injured party knows, or in the exercise of reasonable diligence, should have known of the injury.[102] Like the discovery rule, the adverse domination doctrine arises out of the inability of a party to know of an injury or its cause. As long as the wrongdoing directors are in control of a corporation, the corporation is prevented from asserting a claim against them, and it is only when a new entity, such as a

94. 905 P.2d 797 (Okla. 1995).
95. *Id.* at 798.
96. *Id.*
97. *Stephens*, 905 P.2d at 800.
98. *Ranier*, 887 P.2d at 343.
99. 901 P.2d 807 (Okla. 1995).
100. *Id.* at 809.
101. *Id.* at 809-10.
102. *Id.* at 813.

receiver, takes control, that suit can be filed against the wrongdoers. While recognizing the adverse domination doctrine, the Supreme Court cautiously limited its scope to situations involving fraudulent conduct while the corporation was controlled by a majority of culpable directors and officers.[103]

The Court of Appeals considered the application of equitable estoppel to assert the statute of limitations in *Randolph v. Oklahoma Military Department*.[104] It held that for equitable estoppel to apply, a defendant must: 1) lull the plaintiff into delaying the filing of suit through assurance of settlement negotiations, 2) make express and repeated admissions of liability with promises of settlement, or 3) engage in fraud or concealment to induce the plaintiff to delay bringing the action.[105] Since none of these grounds were shown, the Court of Appeals affirmed the trial court's decision to dismiss the suit as time-barred.[106]

Bruce v. Employers Casualty Co.[107] involved an unusual issue: whether the court clerk's filing stamp was determinative of the date of the filing of an action. The plaintiff sent her petition to the court clerk's office by certified mail three days before the statute of limitations expired.[108] On the following day, the post office left notice with the court clerk that the certified mail was at the post office, and the court clerk signed for the certified mail the next day, one day before the statute of limitations ran.[109] However, the court clerk's file stamp showed a date of receipt three days after the statute of limitations expired.[110] The Court of Appeals held that this evidence created an issue of fact as to whether the action had been timely commenced, which precluded a summary judgment.[111]

The Oklahoma Supreme Court reversed the trial judge's *sua sponte* transfer of a case on *forum non conveniens* grounds in *Stevens v. Blevins*.[112] The case arose out of an injury on a go-cart at a recreation center in Kingfisher County.[113] The plaintiff filed a negligence

103. *Id.* at 819.
104. 895 P.2d 736 (Okla. Ct. App. 1995).
105. *Id.* at 739 (following Jarvis v. City of Stillwater, 832 P.2d 470 (Okla. 1987)).
106. *Id.* at 739.
107. 897 P.2d 313 (Okla. Ct. App. 1995).
108. *Id.* at 314.
109. *Id.*
110. *Id.*
111. *Id.*
112. 890 P.2d 936 (Okla. 1995).
113. *Id.* at 937.

and products liability action in Oklahoma County against the recreation center as well as the seller and manufacturer of the go-cart.[114] Venue was proper in Oklahoma County, because the seller of the go-cart was located there. Although the defendant did not seek a transfer, the trial court ordered the case transferred on *forum non conveniens* grounds to Kingfisher County, which was where the injury occurred.[115] The Supreme Court issued a writ of prohibition to prevent the transfer, holding that a trial judge does not have authority to alter a plaintiff's choice of venue unless venue is improper, the plaintiff's choice violates the Oklahoma Constitution, or there is a motion for transfer on *forum non conveniens* grounds or under section 140 of title 12 of the Oklahoma Statutes.[116]

Several cases concerned the amendment of pleadings under section 2015 of title 12.[117] In *Sedbrook v. Rouse*,[118] the Court of Appeals applied the rule that once a responsive pleading is served, leave of court or written consent of the defendant is required for an amendment.[119] Since neither leave of court nor the defendant's consent was obtained, the plaintiff's purported amendment naming additional defendants was a nullity.[120] When the plaintiff attempted to file a new action against these additional defendants, the trial court dismissed it on statute of limitations grounds and the Court of Appeals affirmed.[121] The plaintiff argued that Oklahoma's savings statute[122] allowed a new action to be filed within one year of the dismissal of an action other than on its merits.[123] The Court of Appeals decided, however, that section 100 was not available to the plaintiff since the purported amendment naming the additional defendants was a nullity and therefore was not a timely commencement of an action against them.[124] In *Nealis v. Knecht*,[125] the Court of Appeals held that leave to amend a petition should have been allowed where the amendment

114. *Id.*
115. *Id.*
116. *Bruce*, 890 P.2d at 938-40.
117. OKLA. STAT. tit. 12, § 2015 (Supp. 1994).
118. 894 P.2d 435 (Okla. Ct. App. 1994).
119. *Id.* at 438.
120. *Id.*
121. *Id.*
122. OKLA. STAT. tit. 12, § 100 (1991).
123. *Sedbrook*, 894 P.2d at 438.
124. *Id.*
125. 901 P.2d 228 (Okla. Ct. App. 1995).

concerned the same claim alleged in the original petition and did not seek to add a new and different claim.[126]

In *Dotson v. Rainbolt*,[127] the Oklahoma Supreme Court determined that an amendment naming defendants who had originally been named as John Does did not relate back to the filing of the petition for statute of limitations purposes, because the plaintiff knew the identities of the defendants before the statute of limitations ran.[128] The plaintiff argued that the amendment should relate back because she did not learn that the defendants were liable to her until shortly before she filed the amended petition.[129] The Supreme Court relied on the language in section 2015(C) of title 12 that "but for a mistake concerning the identity of the proper party, the action would have been brought against him"[130] to hold that the plaintiff's lack of knowledge must relate to the identity, rather than the culpability, of the new defendants.[131]

Dotson was followed by the Oklahoma Court of Appeals in *Bray v. Energy Systems, Inc.*[132] The Court of Appeals affirmed the trial court's decision denying the relation back of an amendment to add new defendants, whose identities were available to the plaintiff before the statute of limitations ran and the plaintiff failed to offer any reason why the defendants were not included in the action before expiration of the statute of limitations.[133]

The Court of Appeals analyzed impleader procedure under section 2014 of title 12[134] in *Stotts v. Church of Jesus Christ of Latter Day Saints*.[135] In a negligence action arising out of an auto accident, the defendants filed a third-party petition seeking contribution against a construction company and a sign company, alleging negligence by the third-parties in warning motorists about construction on the street where the accident occurred.[136] The trial court dismissed the third-party petition on the grounds that impleader was not available because the defendants had denied liability to the plaintiff, but the Court

126. *Id.* at 231.
127. 894 P.2d 1109 (Okla. 1995).
128. *Id.* at 1113.
129. *Id.*
130. OKLA. STAT. tit. 12, § 2015(C) (Supp. 1995).
131. *Dotson*, 894 P.2d at 1113.
132. 909 P.2d 1191 (Okla. Ct. App. 1995).
133. *Id.* at 1196.
134. OKLA. STAT. tit. 12, § 2014 (1991).
135. 882 P.2d 1106 (Okla. Ct. App. 1994).
136. *Id.* at 1107.

of Appeals reversed, holding that inconsistency in pleading was permitted under the Oklahoma Pleading Code.[137] It also ruled that a contingent third-party claim for contribution could be asserted before the plaintiff's claim against the defendant was decided.[138]

Two Court of Appeals cases dealt with real parties in interest issues under title 12, section 2017 of the Oklahoma Statutes. In *Muskogee Title Co. v. First National Bank & Trust Co.*,[139] the Court of Appeals decided that both a partially subrogated insurer and its insured may join as co-plaintiffs in an action to recover the entire loss from a third party.[140] Alternatively, an insured may bring a claim on its own to recover for its loss as the real party in interest; however, a partially subrogated insurer may not maintain an action on its own.[141] The Court of Appeals also decided in *Weeks v. Cessna Aircraft Co.*[142] that if an action is inadvertently brought by an improper party, the trial court should allow a reasonable opportunity for substitution of the proper party as the real party in interest instead of dismissing the action.[143]

The next section of this Article examines a number of appellate decisions dealing with trials. It also discusses several cases that were concerned with arbitration and the settlement of cases.

IV. Trial Procedure, Arbitrations, and Settlement

The appellate courts in Oklahoma decided several cases involving trial procedure in 1995.[144] *Parrish v. Lilly*[145] was concerned with challenges of jurors for cause. *Crussel v. Kirk*[146] allowed the use of a rebuttal witness who was not listed in the pretrial order. In *Propst v. Alexander*,[147] the Oklahoma Supreme Court expressed great deference to the trial court's discretion in reviewing orders granting new trials. The increasing importance of alternative dispute resolution was

137. *Id.*
138. *Id.*
139. 894 P.2d 1148 (Okla. Ct. App. 1995).
140. *Id.* at 1150.
141. *Id.*
142. 895 P.2d 731 (Okla. Ct. App. 1994).
143. *Id.* at 733.
144. Propst v. Alexander, 898 P.2d 141 (Okla. 1995); Crussel v. Kirk, 894 P.2d 1116 (Okla. 1995); Parrish v. Lilly, 883 P.2d 158 (Okla. 1993).
145. 883 P.2d 158 (Okla. 1993).
146. 894 P.2d 1116 (Okla. 1995).
147. 898 P.2d 141 (Okla. 1995).

reflected by a number of decisions involving arbitration[148] and settlement.[149] Of special importance in light of the new offer of judgment process in the Tort Reform Law are three Court of Appeals decisions[150] concerned with the previous offer of judgment procedure in section 1101 of title 12.

The Oklahoma Supreme Court held that the district court abused its discretion in refusing to dismiss a juror for cause in *Parrish v. Lilly*.[151] The *Parrish* case was a medical malpractice action alleging that the defendant doctor was negligent in failing to diagnose and treat the decedent's lung cancer.[152] During *voir dire*, the prospective jurors on the panel were asked about their reactions to probable trial testimony that the decedent had smoked a pack of cigarettes a day for over forty years.[153] After the jurors were selected and sworn, one of the jurors expressed concern about his impartiality both orally in open court and in a note to the judge that said he had already formed an opinion from the evidence of the decedent's smoking.[154] The judge summoned the juror to his chambers and explained that no evidence had yet been introduced.[155] The discussion ended with the juror stating that he could impartially judge the evidence after it was introduced.[156] The plaintiffs then moved to strike the juror and replace him with the alternate juror, but the defense counsel resisted because he did not like the alternate, and the trial judge denied the motion.[157] Following a unanimous defense verdict, the plaintiffs appealed.[158] The Supreme Court determined that the record showed the juror to have had an opinion that hampered his ability to render an unbiased verdict, and it decided that under the circumstances, doubt as to the juror's impartiality should have been resolved in the plaintiffs' favor.[159] The Supreme Court also ruled that the trial court's error in refusing to

148. Rollings v. Thermodyne Indus., Inc., 910 P.2d 1030 (Okla. 1996); Carris v. John R. Thomas & Assocs., P.C., 896 P.2d 522 (Okla. 1995); Southern Okla. Health Care v. Jones, Hester, Bates, Rick, Inc., 900 P.2d 1017 (Okla. Ct. App. 1995).

149. Moss v. City of Oklahoma City, 897 P.2d 280 (Okla. 1995); Goldman v. Goldman, 883 P.2d 164 (Okla. 1994).

150. Gaston v. Tillery, 900 P.2d 1012 (Okla. Ct. App. 1995); Allison v. City of El Reno, 894 P.2d 1133 (Okla. Ct. App. 1994); Hernandez v. United Supermarkets of Okla., Inc., 882 P.2d 84 (Okla. Ct. App. 1994).

151. 883 P.2d 158 (Okla. 1993).

152. *Id.* at 159.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 160.

157. *Id.*

158. *Id.*

159. *Id.* at 161.

dismiss the juror was not harmless, despite the fact that only nine jurors were needed to reach a verdict.[160] It held that even though only nine concurring jurors are required to render a verdict, all of the jurors are required to be qualified and impartial.[161]

In *Crussel v. Kirk*,[162] the Oklahoma Supreme Court discussed the use of rebuttal witness testimony and the limitations on a lawyer testifying as a witness.[163] The trial judge refused to permit an attorney who was the plaintiff's counsel of record to testify as a rebuttal witness concerning a prior inconsistent statement of an opposing witness.[164] Even though the attorney was not listed as a witness in the pretrial order, the Supreme Court held that the trial court erred because the attorney's testimony was critical to assessing the veracity of the opposing witness. The Supreme Court first determined that a rebuttal witness does not need to be listed on a pretrial order in order to testify to a prior inconsistent statement of an opposing witness. A rebuttal witness differs from other witnesses in that the testimony of the rebuttal witness depends on the testimony from the opposing witness who is sought to be impeached by the rebuttal witness. To require an attorney to list every potential rebuttal witness on a pretrial order would require him to anticipate fully the testimony of each opposing witness.[165] This would not only be impractical in many cases, but it would also undermine the usefulness of rebuttal witnesses by eliminating the element of surprise.

The Supreme Court next addressed whether an attorney should be permitted to testify in a case where he is counsel of record.[166] The Supreme Court held that Rule 3.7 of the Rules of Professional Conduct was limited to trial advocates.[167] Although the attorney in the *Crussel* case was the plaintiff's counsel of record, he did not act as an advocate; instead, other attorneys from his firm presented arguments and examined witnesses.[168] The Supreme Court therefore concluded that the attorney was not precluded from testifying as a rebuttal witness.[169]

160. *Id.*
161. *Id.* at 162.
162. 894 P.2d 1116 (Okla. 1995).
163. *Id.* at 1120.
164. *Id.* at 1121.
165. *Id.* at 1120.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*

In affirming the granting of a new trial in *Propst v. Alexander*,[170] the Oklahoma Supreme Court emphasized the broad discretion given to a trial judge: "The granting of a new trial will not be reversed on appeal unless it is shown that the trial court materially and manifestly erred beyond a reasonable doubt."[171] The Supreme Court noted that a stronger showing of error is required for reversal of an order granting a new trial than an order denying one.[172] The opposite rule prevails in the federal courts.[173]

In *Clark v. Bearden*,[174] however, the Oklahoma Supreme Court reversed a grant of new trial on the issue of damages only that was based on the alleged misconduct of the defendant's attorney in a medical malpractice case.[175] The alleged misconduct occurred during *voir dire*, when the defense counsel told the jury that the judge's husband was a plaintiff's lawyer.[176] While recognizing that this statement was improper, the Oklahoma Supreme Court held that it did not warrant a new trial in the absence of a showing that it prejudiced the jurors against the plaintiff and resulted in an unreasonable verdict.[177]

Three appellate decisions were concerned with arbitrations. The Oklahoma Supreme Court upheld the constitutionality of arbitration clauses in contracts in *Rollings v. Thermodyne Industries, Inc.*[178] After one party to a contract filed a declaratory judgment action, the other party moved for an order compelling arbitration pursuant to an arbitration clause in the contract.[179] The trial court denied the motion on the ground that the arbitration clause violated the access-to-court provision in article 2, section 6[180] of the Oklahoma Constitution.[181]

170. 898 P.2d 141 (Okla. 1995).

171. *Id.* at 147.

172. *Id.*

173. *See, e.g.*, Latino v. Kaizer, 58 F.3d 310 (7th Cir. 1995).

174. 903 P.2d 309 (Okla. 1995).

175. *Id.* at 309.

176. *Id.* at 311.

177. *Id.* at 312.

178. 910 P.2d 1030 (Okla. 1996).

179. *Id.* at 1031.

180. OKLA. CONST., art. II, § 6 provides:

> The courts of justice of the state shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay or prejudice.

181. OKLA. CONST. art. XXIII, § 8 provides:

> Any provision of a contract, express or implied, made by any person, by which any of the benefits of this Constitution is sought to be waived, shall be null and void.

The Supreme Court reversed.[182] It noted that arbitration is authorized under the Oklahoma Uniform Arbitration Act,[183] and the Uniform Act includes provisions for the parties to obtain judicial review of an award from an arbitration proceeding.[184] These provisions protect against unfairness and bias in the arbitration process, and the Supreme Court concluded that they were sufficient "access to court" to satisfy the requirements of article II, section 6.[185] Accordingly, it upheld the enforceability of the arbitration clause in the contract.[186]

Southern Oklahoma Health Care Corp. v. JHBR-Jones-Hester-Bates-Riek, Inc.,[187] involved the enforceability of an arbitration clause in a contract for the renovation of a hospital. After the hospital brought an action against the contractor, the contractor sought an order directing arbitration pursuant to the mandatory arbitration clause in the contract.[188] The hospital challenged the arbitration clause as violative of title 15, section 216 of the Oklahoma statutes and section 8, article 23 of the Oklahoma Constitution, but the Court of Appeals decided that it was unnecessary to reach the issue of whether the clause was enforceable under Oklahoma law because it ruled that it was enforceable under the Federal Arbitration Act.[189] Relying on the broad interpretation that the United States Supreme Court gave to the Federal Arbitration Act in *Allied-Bruce Terminix Companies v. Dobson*,[190] the Oklahoma Court of Appeals determined that the contract affected interstate commerce because goods and services from outside Oklahoma were to be used in performing the contract, and therefore it came within the Federal Arbitration Act.[191]

Carris v. John R. Thomas & Associates[192] dealt with the claim and issue preclusion effects of an arbitration clause on subsequent litigation. The *Carris* case arose out of a construction dispute involving a property owner, a contractor, and an architect.[193] Pursuant to an arbitration clause in the contractor's contract with the property owner, the

182. *Rollings*, 910 P.2d at 1036.
183. OKLA. STAT. tit. 15, §§ 801-18 (1991).
184. *Id.* at §§ 811-17,
185. *Rollings*, 910 P.2d at 1035-36.
186. *Id.* at 1031.
187. 900 P.2d 1017 (Okla. Ct. App. 1995).
188. *Id.* at 1019.
189. 9 U.S.C. §§ 1-307 (1994).
190. 115 S. Ct. 834 (1995).
191. *Southern Okla. Health Care*, 900 P.2d at 1019.
192. 896 P.2d 522 (Okla. 1995).
193. *Id.* at 525.

contractor proceeded to arbitration, and the arbitrator awarded damages to both the contractor and the property owner.[194] The contractor then brought a negligence action against the architect, who moved for summary judgment on the grounds that the action was precluded by the arbitration proceeding.[195] The Supreme Court held that neither claim nor issue preclusion barred the negligence action against the architect, because the architect could not have been made a party to the arbitration proceeding and hence no relief was available in the arbitration proceeding against the architect.[196]

The effect of settlements was the subject of two Oklahoma Supreme Court decisions. In *Goldman v. Goldman*,[197] the Supreme Court refused a joint request of the parties to an appeal to withdraw a Court of Appeals decision as a condition of settlement. In doing so, the Oklahoma Supreme Court anticipated a similar ruling by the United States Supreme Court in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*.[198] *Moss v. City of Oklahoma City*[199] involved the effect on other tortfeasors of a release given to one tortfeasor. Noting a three-way split of authority in other jurisdictions that had considered the issue, the Oklahoma Supreme Court adopted the specific identity rule, under which a general release will discharge potential tortfeasors who are not parties to the release from liability only if they are expressly designated or otherwise specifically identified in the release.[200] *Moss* was followed in *Cotner v. Cessna Aircraft Co.*,[201] another case involving a general release that purported to release unnamed tortfeasors from liability.

Of particular interest because of the adoption of the new offer of judgment procedure in the Tort Reform Law are several Court of Appeals decisions involving the previous offer of judgment procedure in title 12, section 1101 of the Oklahoma Statutes. Following the majority of other jurisdictions that had considered the issue, the Court of Appeals held in *Hernandez v. United Supermarkets of Oklahoma, Inc.*[202] that an offer of judgment is irrevocable for the period provided

194. *Id.*
195. *Id.*
196. *Id.* at 530.
197. 883 P.2d 164 (Okla. 1994).
198. 115 S. Ct. 386 (1994).
199. 897 P.2d 280 (Okla. 1995).
200. *Id.* at 286.
201. 903 P.2d 878, 879 (Okla. 1995).
202. 882 P.2d 84 (Okla. Ct. App. 1994).

by the statute for the plaintiff's response.[203] This period is five days for offers of judgment under section 1101 and ten days for offers of judgment under section 1101.1. The same conclusion was reached by a different panel of the Court of Appeals in *Allison v. City of El Reno*.[204] The *Allison* court also ruled that plaintiffs who accept an offer of judgment are eligible for an award of attorney fees as prevailing parties if another statute[205] authorizes such an award.[206] *Gaston v. Tillery*[207] was concerned with the effect of a plaintiff's rejection of an offer of judgment when the amount of the judgment is less than the offer. The Court of Appeals held that the plaintiff was liable to the defendant for the defendant's costs incurred after the making of the offer of judgment, but the plaintiff was entitled to recover those costs that were incurred before the offer of judgment was made.[208]

The next section summarizes a number of decisions dealing with appellate procedure. None of them announced any new principles, but several are helpful in clarifying the recently enacted Oklahoma Judgments and Appeals Act.

V. Appellate Procedure

A number of cases addressed the timing of appeals under the Oklahoma Judgment Act, which went into effect on October 1, 1993. The Oklahoma Supreme Court has consistently ruled that since the effective date of the Oklahoma Judgments and Appeals Act, the filing of a court minute order does not trigger the thirty-day time limit for filing a petition. An example is *Corbit v. Williams*.[209] Relying on express language in section 692.2(C) of title 12[210] that a minute entry is not a judgment, decree or appealable order, the Oklahoma Supreme Court held that its filing did not commence the period for filing a petition in error and therefore it dismissed the appeal as premature.[211] The Oklahoma Supreme Court also ruled in *Manning v. State ex rel. Department of Public Safety*,[212] however, that a minute order filed

203. *Id.* at 87-88.
204. 894 P.2d 1133, 1135-36 (Okla. Ct. App. 1994).
205. *E.g.*, Okla. Stat. tit. 12, § 940(A) (1991).
206. *Allison*, 894 P.2d at 1137.
207. 900 P.2d 1012 (Okla. Ct. App. 1995).
208. *Id.* at 1013-14.
209. 897 P.2d 1129 (Okla. 1995).
210. Okla. Stat. tit. 12, § 692.2(C) (Supp. 1995).
211. *Corbit*, 897 P.2d at 1131-32.
212. 876 P.2d 667 (Okla. 1994).

before October 1, 1993, can constitute an appealable order or judgment if it fully adjudicated the rights of the parties. The *Manning* decision has little practical significance because it has been given only prospective effect and therefore would apply only to orders issued after June 7, 1994.[213] Minute orders issued after June 7, 1994 would not be appealable, however, since they would come under the Oklahoma Judgments and Appeals Act.[214]

Besides complying with the formal requirements of section 692.2(C), a judgment must also express a final determination of the rights of the parties. For example, the Oklahoma Supreme Court ruled in *Kelsey v. Dollarsaver Food Warehouse*[215] that an order stating that "the Court finds that the motions should be overruled" was not sufficient to constitute a final appealable order. Instead, the order should have stated that "the motions are overruled."[216] In addition, the Supreme Court determined in *McMillian v. Holcomb*[217] that an order containing a direction to the prevailing party to prepare a journal entry or judgment is not a judgment for the purposes of commencing an appeal.

The time to appeal is extended by the filing of a timely post-trial motion, such as a motion for new trial. In *Brown v. Green Country Softball Ass'n*,[218] the Oklahoma Supreme Court held that a motion for new trial did not extend the time for appeal because it was filed before the judgment was filed. The Supreme Court gave its ruling only prospective effect, however.[219] Moreover, a 1994 amendment to section 653 of title 12[220] eliminated the procedural trap that was highlighted by the *Brown* case by allowing motions for new trial to be effective if they are filed after the trial court's pronouncement but before the filing of the judgment.[221]

In contrast to a motion for new trial, a motion to vacate a judgment does not extend the time to appeal. The difference between a motion for new trial and a motion to vacate a judgment for appellate procedure purposes is in the timing; a post-trial motion filed within

213. *See* Meadows v. Pittsburg Bd. of City Comm'rs, 898 P.2d 741 (Okla. 1995); Lucas v. Bishop, 890 P.2d 411, 412 (Okla. 1995); *In re* Estate of Robinson, 885 P.2d 1334, 1336 (Okla. 1994).
214. *See* Corbit, 897 P.2d at 1131.
215. 885 P.2d 1353 (Okla. 1994).
216. *Id.* at 1357-58.
217. 907 P.2d 1034, 1036 (Okla. 1995).
218. 884 P.2d 851, 852 (Okla. 1994).
219. *Brown*, 884 P.2d at 853; *McMillian*, 907 P.2d at 1037.
220. OKLA. STAT. tit. 12, § 653 (Supp. 1994).
221. *Brown*, 884 P.2d at 852.

ten days of the filing of the judgment is treated as a motion for new trial, and a post-trial motion filed more than ten days after the filing of a judgment is treated as a motion to vacate.[222] Although the filing of a motion to vacate does not extend the time to appeal from a judgment, the denial of a motion to vacate constitutes a final order and it may be appealed through the filing of a petition in error within thirty days of the filing of the motion to vacate.[223]

Similarly, the filing of a motion for costs, attorney fees, or interest does not extend the time to appeal.[224] An order awarding or denying costs, attorney fees, or interest will be a final order, though, and it is reviewed through the filing of a petition in error within thirty days of the filing of the order.[225] An appeal from a judgment will generally not suffice for obtaining review of a subsequent award of attorney fees.[226] However, if the underlying judgment is reversed, an award of attorney's fees based on a party's having prevailed at trial would have to be vacated.[227]

The procedure for applying for attorney's fees for services performed on appeal was clarified by an amendment to section 696.4 of title 12 of the Oklahoma Statutes.[228] A party may apply for attorney's fees at any time before issuance of mandate and may make the request either in the brief on appeal or by a separate motion. The appellate court decides whether to award the attorney's fees, but the trial court determines the amount, and the trial court's determination is an appealable order.[229]

In order for a petition in error to be timely filed, it must either be received by the Oklahoma Supreme Court or sent by certified mail, return receipt requested, within thirty days of the filing of the judgment. In *Rusk v. Independent School District No. 1*[230] the appeal was dismissed as untimely because the petition in error was sent by priority mail rather than certified mail, and it unfortunately did not arrive at the Supreme Court until the thirty-day period had expired.

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222. *See* OKLA. STAT. tit. 12, § 990.2 (Supp. 1995).
223. *See* Peoria Corp. v. Lemay, 895 P.2d 1340, 1341 (Okla. 1994) (appeal was limited to the denial of the petition to vacate the judgment).
224. *See* OKLA. STAT. tit. 12, § 990.2(D) (Supp. 1995).
225. Keel v. Wright, 890 P.2d 1351, 1354 (Okla. 1995) (petition in error was timely filed with respect to attorney fees award but not as to underlying judgment).
226. *See* Thompson v. Independent Sch. Dist. No. 94, 886 P.2d 996, 997 (Okla. 1994) (no timely appeal from order awarding attorney's fees).
227. *Id.* at 998.
228. *See* 1995 Okla. Sess. Laws 253, § 1.
229. *Id.*
230. 885 P.2d 1365 (Okla. 1994).

VI. CONCLUSION

The past year has seen a variety of significant developments in Oklahoma civil procedure. The most noteworthy is the new Tort Reform Law. The Tort Reform Law extends Oklahoma's prior offer of judgment procedure beyond costs to include attorney fees, adopts a three-tiered system to govern the award of punitive damages in tort cases, and provides immunity for volunteers. Whether the offer of judgment procedure will be utilized to a greater extent than it was in the past remains to be seen because of the $100,000 minimum offer requirement for personal injury and similar cases. The new system for punitive damages awards is more complex than the prior procedure, and this may make it more difficult for trial judges and juries to apply correctly. It does promote clarity, though, by specifying standards for the jury to use in determining the amount of punitive damages awards, and it provides somewhat greater control over juries. Compared to the Tort Reform Law, the case law developments in the past year relating to civil procedure were relatively modest, but they did provide further guidance for attorneys and trial courts in a number of areas.