



OADC OUTLOOK

A Publication of the Oklahoma Association of Defense Counsel

July 2014

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President's Message

by Jennifer R. Annis

The OADC Summer Meeting was held on June 19th and 20th at the Four Seasons Resort in Las Colinas, Texas. A special thanks goes to all of the CLE presenters, and I think that everyone in attendance would agree that the presentations this year were especially thought provoking. At the President's Dinner on Friday evening, Mike Carter received the OADC Legislative Service Award in recognition of his tireless work as the OADC Legislative Committee Chairman.

Those who attended the Summer Meeting had an opportunity to complete a survey to give the Board of Directors a better idea as to how we can better serve our members. A copy of the survey is enclosed with this newsletter, and it is also available on the OADC website. Please take a few minutes to complete the survey and return it to our Executive Director, Skoshi Heron (skoshi@gobaker.com). You will note that the last question on the survey relates to locations for future summer meetings. Please keep in mind that the 50th anniversary of OADC is in 2016, and the Board is currently considering locations for that very special summer meeting. If you have ideas or suggestions, please contact any Board member prior to July 31, 2014. That is the date of our next Board meeting, at which time we will vote on the location of that meeting and begin taking steps to get it scheduled and confirmed.

Jennifer R. Annis

Submissions should be sent to Skoshi Heron
at: Skoshi@GoBaker.com

Skoshi Heron
PO Box 5445
Edmond, OK 73083

Fax:: 405-415-7366

Adopted New or Revised Jury Instructions

by: Jeremy K. Ward

Franden | Woodard | Farris | Quillin + Goodnight

On March 23, 2014 the Oklahoma Supreme Court, based on recommendations by the Oklahoma Supreme Court Committee for Uniform Civil Jury Instructions, adopted 43 new or revised uniform civil jury instructions. *In Re: Amendments to the Oklahoma Uniform Jury Instructions, 2014 OK 17*. The Opinion was not immediately released for publication to allow 30 days for revision or withdrawal. It was not withdrawn or revised during the allotted 30 day timeframe; consequently, the new and revised uniform civil jury instructions became effective April 23, 2014.

The Oklahoma Supreme Court also authorized publication of the Committee's Comments and the Supreme Court's modifications to their Comments. Notes on Use and Comments are published within each new or revised uniform jury instruction on www.oscn.net. Even though it will seem lengthy, below is a quick and basic summary of the additions and modifications to the uniform civil jury instruction that became effective April 23, 2014.

Instruction No. 1.2A — Introductory Instructions — Juror Questionnaires

Instruction No. 1.2A is a new uniform civil juror questionnaire. The Notes on Use instruct that trial judges have discretion whether to require each juror to complete and sign the questionnaire and whether the parties have the opportunity to supplement the form. The uniform questionnaire and supplemental questionnaires may be used; however they are not to be a substitute for voir dire.

Instruction No. 1.9 — Jury's Duties — To Be Given Prior to Deliberation

Instruction No. 1.9 was slightly modified to clarify a verdict form will be provided to the jurors for their verdict.

Instruction No. 1.12 — Verdict form — One Plaintiff, One Defendant

Instruction No. 1.12 was slightly modified for clarification to include the word "or" to assist jurors in selecting either the defendant or the plaintiff.

Instruction No. 1.13 — Verdict form — Counterclaim

Instruction No. 1.13 was slightly modified for clarification to include the word "or" to assist jurors in selecting either the defendant prevails on his or her counterclaim or the plaintiff prevails.

Instruction No. 4.17 — Effect of Income Tax Award of Damages

Instruction No. 4.17 is a new uniform jury instruction. Previously Instruction No. 4.17 provided that "no instruction should be given." Now the Instruction notifies jurors that damages arising out of personal injury and wrongful death actions are not subject to federal or state income tax, jury compensations awards should not be adjusted in consideration of income tax consequences, and

evidence related to damage awards must reflect accurate tax ramifications if such evidence is admitted at trial.

Instruction No. 5.9 — Exemplary or Punitive Damages — Second Stage

No revisions occurred to the Instruction. However, within the Notes on Use section common law and statutory guidance was previously provided for use of the Instruction in comparative negligence cases. Due to changes in joint and several liability and comparative negligence, the guidance was deleted.

Instruction No. 9.24 — Blue Verdict Form, For Plaintiff — Multiple Defendants — Directions

No revisions occurred to the Instruction. New Comments to Instruction No. 9.24 state it should only be used if the action accrued before November 1, 2011 or if the action was brought by the State of Oklahoma. Instruction No. 9.24 only applies to cases where joint and severally liability is still applicable.

Instruction No. 9.26 — Blue Verdict Form, For Plaintiff; Non-Party Involved — Directions

No revisions occurred to the Instruction. New Comments to Instruction No. 9.26 state it should only be used if the action accrued before November 1, 2011 or was brought by the State of Oklahoma. Instruction No. 9.26 only applies to cases where joint and severally liability is still applicable.

Instruction No. 9.33 — White Verdict Form, Comparative Two Defendants — Directions

Within the Instruction, phrasing regarding contributory negligence was moved from the first to the second paragraph allowing the use of the form without a prerequisite finding of comparative negligence on a plaintiff. The Notes on Use state the Instruction should be used for civil actions accruing after November 1, 2011. With abolishing joint and several liability for actions accruing after November 1, 2011, the form allows the jury to apportion liability to each party.

Instruction No. 9.34 — White Verdict Form, Comparative, Multiple Defendants — Directions

Within the Instruction, phrasing regarding contributory negligence was moved from the first to the second paragraph allowing the use of the verdict form without a prerequisite finding of comparative negligence on a plaintiff. Jurors are instructed damages are apportioned based on the percentage of liability placed on each party.

Instruction No. 9.36 — White Verdict Form, Comparative, Non-Party Involved — Directions

Within the Instruction, phrasing regarding contributory negligence was moved from the first to the second paragraph allowing the use of the verdict form without a prerequisite finding of comparative negligence on a plaintiff.

Instruction No. 18.1—False Representation — Elements of Liability

Instruction No. 18.1 was revised to include the elements of false representation must be established by clear and convincing evidence. Further, the Notes on Use provide that Instruction No. 3.2, which features a definition of clear and convincing evidence, should accompany Instruction 18.1. The Comments section now provides the elements of common law fraud.

Instruction No. 18.2 — Nondisclosure or Concealment — Elements of Liability

Instruction No. 18.2 was revised to include that the elements of Nondisclosure or Concealment must be established by clear and convincing evidence. Further, the Notes on Use provide that Instruction No. 3.2, which features a definition of clear and convincing evidence, should accompany Instruction 18.2. The Comments section now states if there is a positive contractual duty for a party to speak then failure to speak can constitute fraud.

Instruction No. 21.1— Employment at Will

No revisions occurred to the Instruction. The Notes on Use section now states this instruction should introduce other instructions which deal with wrongful discharge “in violation of public policy and breach of employment contracts.”

Instruction No. 21.2 — Wrongful Discharge —Public Policy Exception — Refusal to Violate Public Policy

Instruction No. 21.2 changes the term “employer” to “defendant” throughout the instruction. A sentence within the Notes on Use section was deleted which pertained to unlawful employment discrimination.

Instruction No. 21.3 — Wrongful Discharge — Public Policy Exception — Consistent with Public Policy

No revisions occurred to the Instruction. A sentence within the Notes On Use section was deleted which pertained to unlawful employment discrimination.

Instruction No. 21.4 — Wrongful Discharge — Public Policy Exception — Employment Discrimination

No revisions occurred to the Instruction. Within the Notes on Use section guidance was provided. Utilization of this instruction is necessary only if a cause of action accrued prior to the enactment of 25 O.S. § 1350 on November 1, 2011. The instruction does not apply to a case controlled by 25 O.S. § 1350 – Creation of Cause of Action – Common Law Remedy Abolished – Standing – Requirements for Notice of Right to Sue – Jury Trial – Defenses – Remedies.

Instruction No. 21.5 – Employee Discharged For Refusing to Violate Public Policy

No revisions occurred to the Instruction. The only revision was within the Comments to correct a case citation using the Oklahoma Supreme Court’s preferred citation method.

Instruction No. 21.6 — Employee Discharged for performing Act Consistent with Public Policy

No revisions occurred to the Instruction. A sentence within the Notes On Use section pertaining to modification of the instruction

for retaliatory discharge claims under 85 O.S. § 5 was deleted. The Notes on Use no longer state: the last sentence of this Instruction should be modified to read: “You are instructed that [filing a claim for Workers’ Compensation in good faith, or retaining a lawyer in connection with a claim for Workers’ Compensation, or testifying in a Workers’ Compensation case] is such an act.”

Instruction No. 21.7 – Employee Discharged Because of Discrimination

No revisions occurred to the Instruction. The Notes on Use state the instruction should only be used for cases accrued prior to the effective date of 25 O.S. § 1350 (November 1, 2011).

Instruction No. 21.8 — Constructive Discharge

Additional jury considerations were added to the Instruction, whether the employer physically threatened or humiliated the employee, how often the employer did so, and whether the employer unreasonably interfered with the employee’s work performance. Additionally, the case law cite for the common law test for constructive discharge is now included within the Comments.

Instruction No. 21.9 — Significant Factor For Discharge.

Language related to the protected status of a plaintiff was removed from the last sentence of the Instruction. Added to the Comments section was a case cite demonstrating even if an employer has legitimate reasons to justify termination of an employee, if the employer’s motivation for retaliation against the employee was a significant factor of the employee’s termination, the termination violates 85 O.S. § 5.

Instruction No. 21.10 – Contractual Limitations On Discharge.

No substantive changes were made to the instruction. Case citations were revised within the Comments to comply with the Oklahoma Supreme Court’s preferred citation method.

Instruction No. 21.11 — Wrongful Discharge — Damages

No revisions occurred to the Instruction. The entire Comments section was stricken.

Instruction No. 21.12 – Breach of Employment Contract - Damages

No substantive changes were made to the instruction. Case citations were revised within the Comments to comply with the Oklahoma Supreme Court’s preferred citation method.

Instruction No. 21.21 — Employment Based Discrimination — Elements

Instruction No. 21.21 is a new uniform jury instruction. Oklahoma common law previously recognized claims for employment based discrimination relating to race, color, religion, sex, national origin, age, and handicap. Instruction No. 21.21 applies 25 O.S. § 1350 enacted November 1, 2011 which abolishes prior common law and codifies the elements to establish an employment based discrimination claim.

Instruction No. 21.22 — Employment Based Discrimination — Retaliation

Instruction No. 21.22 is a new uniform jury instruction. It pertains to claims based on employment based discrimination under

25 O.S. § 1350 possessing a retaliation component. This instruction should be used with Instruction No. 21.21 when retaliation is at issue.

Instruction No. 21.23 — Employment Based Discrimination — Damages

Instruction No. 21.23 is a new uniform jury instruction. It pertains to claims based on employment based discrimination under 25 O.S. § 1350. The instruction advises jurors how to calculate damages available under 25 O.S. § 1350. This instruction should be used with Instruction No. 21.21 (and 21.22 when retaliation is at issue).

Instruction No. 22.7 — Exemplary or Punitive Damages — Second Stage.

A section was added to the Instruction allowing jurors to consider evidence of actual harm to others when determining the seriousness of the hazard a defendant created to the public and advises that the defendant's conduct which risks harm to many may be more reprehensible than conduct that risks harm to fewer people, but jurors may not use punitive damages to punish a defendant for harms caused to others.

Most of the Notes on Use section was deleted which advise the trial court how to implement the different stages of punitive damages in 23 O.S. § 9.1.

Instruction No. 28.1 — Defamation — Introductory Instruction

Instruction No. 28.1 is a new uniform jury instruction providing a preliminary statement of a plaintiff's defamation claim. It should introduce all defamation instructions.

Instruction No. 28.2 — Defamation — Elements (Public Figure Plaintiff)

Instruction No. 28.2 is a new uniform jury instruction which sets forth the elements of defamation when a plaintiff is a public official or public figure. The Comments section provides lengthy definitions and case law pertaining to libel and slander.

Instruction No. 28.3 — Defamation — Elements (Private Figure Plaintiff)

Instruction No. 28.3 is a new uniform jury instruction which sets forth the elements of defamation when a plaintiff is a private figure. It does not require the extra element set forth in 28.2, almost akin to malice, for a public figure plaintiff. The Comments section provides lengthy definitions and case law pertaining to libel and slander.

Instruction No. 28.4 — Defamation — Affirmative Defense of Fair Comment

Instruction No. 28.4 is a new uniform jury instruction which provides the elements for the defamation affirmative defense of fair comment.

Instruction No. 28.5 — Defamation — Affirmative Defense of Fair Reporting

Instruction No. 28.5 is a new uniform jury instruction which provides the elements for the defamation affirmative defense of fair reporting. This instruction is based on 12 O.S. § 1443.1.

Instruction No. 28.6 — Defamation — Affirmative Defense of Good Faith

Instruction No. 28.6 is a new uniform jury instruction which provides the elements for the defamation affirmative defense of good faith. This instruction is based on 12 O.S. § 1446a.

Instruction No. 28.7 — Defamation- Affirmative Defense For Statement Made by Another Person

Instruction No. 28.7 is a new uniform jury instruction which provides the elements for the defamation affirmative defense of statement made by another person. The affirmative defense can only be raised by an agent, employee, owner, licensee, or operator of a television or radio broadcasting station. This instruction is based on 12 O.S. § 1447.1.

Instruction No. 28.8 — Defamation — Affirmative Defense of Qualified Privilege

Instruction No. 28.8 is a new uniform jury instruction which provides the elements of a defamation affirmative defense based on qualified privilege. The instruction is based upon the Restatement (Second) of Torts § 595 (1977).

Instruction No. 28.9 — Defamation — Measure of Damages.

Instruction No. 28.9 is a new uniform jury instruction which provides the elements that jurors may consider when awarding damages for defamation.

Instruction No. 29.1 — Misappropriation of Trade Secrets — Elements

Instruction No. 29.1 is a new uniform jury instruction which provides the elements a plaintiff must prove to recover based on a claim of misappropriation of trade secrets.

Instruction No. 29.2 — Trade Secret Definition

Instruction No. 29.2 is a new uniform jury instruction which defines a trade secret. This instruction is based on 78 O.S. § 86(4).

Instruction No. 29.3 — Misappropriation — Definition

Instruction No. 29.3 is a new uniform jury instruction which defines misappropriation. This instruction is based on 78 O.S. § 86(2).

Instruction No. 29.4 — Improper Means — Definition

Instruction No. 29.4 is a new uniform jury instruction which defines misappropriation. This instruction is based on 78 O.S. § 86(1).

Instruction No. 29.5 — Misappropriation of Trade Secrets — Measure of Damages

Instruction No. 29.5 is a new uniform jury instruction which explains the measure of damages for misappropriation of trade secrets. This instruction is based on 78 O.S. § 88(A). Of note, it states in the Comments section the court may also award exemplary damages for a willful and malicious appropriation in an amount not exceeding twice the compensatory damages under 78 O.S. § 88(B).

Oklahoma Legislature Amends Discovery Statute

by: Jeremy K. Ward

Franden | Woodard | Farris | Quillin + Goodnight

OADC sponsored House Bill 3375 which was recently passed by the Oklahoma legislature. House Bill 3375 becomes effective November 1, 2014. It is procedural in nature, so it will immediately apply in all cases on November 1, 2014, regardless of when they were filed or when the cause of action accrued.

House Bill 3375 amends 12 O.S. § 3226(A)(1) by including that parties may obtain discovery “regarding any matter that is relevant to any party’s claim or defense” by one or more of the following methods: The quoted provision was added to explicitly provide discovery can be conducted concerning any relevant issue.

The new law also includes additional discovery methods. Section 3226(A) will now include “authorizations for release of records; and otherwise by court order upon showing of good cause.” It has been the practice of defense attorneys to seek medical releases and the release of records by court order. This statute expressly authorizes the procedure.

A more beneficial provision from an efficiency standpoint relates to the voluntary production of medical releases. House Bill 3375 adds that releases to obtain records shall be provided by a plaintiff with his or her 12 O.S. § 3226(A)(2)(a) initial disclosures made within 60 days after service of the original Petition. In particular, when physical or mental injury is claimed “the party making the claim shall provide to the other parties a release or authorization allowing the parties to obtain relevant medical records and bills, and, when relevant, a release or authorization for employment and scholastic records” as part of their initial disclosures. If school records are also relevant to a party’s claim, a plaintiff will be required to provide a release to a defendant within 60 days of service of the original petition for those records also.

House Bill 3375 should drastically reduce the difficulties, time, and expense defense lawyers regularly incur to obtain releases or court orders to obtain records. The full version of the bill can be viewed at www.oadc.org within the Members Only Content section.

Save the Date.....

Friday, October 10
7:30am - 1:00pm

followed by golf

The Westin Stonebriar

Frisco, Texas

RED RIVER SHOOTOUT CLE
Joint Meeting of the OADC and TADC

.....More information coming soon!



OADC - 2014 Survey

Name _____ (Optional)

Where does the OADC add value to you?

_____ Legislative _____ Networking/Social
_____ CLE/Information _____ Newsletter
_____ Other? _____

Are you interested in participating as a ...

_____ Member of the Board? _____ Chair of a committee?
_____ Member of a committee(s)?

Circle the committees you would like to work on: Legislative Membership DRI Young Lawyers
Website Newsletter DPAC Amicus OBA Fundraising Meetings & Programs

I would use the OADC website if Please fill in the blank _____

Do you find e-mail blasts to the membership with questions about your practice, experts, etc.
helpful? Yes or No _____

Are you willing to donate to the OADC Political Action Committee (DPAC)?

_____ Yes (If so what is a reasonable contribution? _____) _____ I'm tapped out.

How far would you travel to attend an OADC summer meeting?

_____ Keep them around Oklahoma (Texas, Missouri, etc.)
_____ A short flight or reasonable road trip
_____ Anywhere in the continental U.S.
_____ Other. Suggestion: _____

What other suggestions do you have for your Board?

Thank you for taking a few minutes to provide valuable feedback and information.