



# OADC OUTLOOK

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## President's Letter

by Roger N. Butler, Jr.

TO THE MEMBERSHIP:

By all accounts, OADC's annual meeting in Los Colinas, Texas, at the Four Seasons Resort & Club was a tremendous success. In attendance were over 150 members and their spouses and/or guests, as well as numerous children. Although the weather was warm, the event was a lot of fun, and everyone seemed to enjoy the more casual atmosphere which was intentionally planned. There was not a coat or tie in sight. I understand from Mike Heron, our president elect, that he intends to continue the casual atmosphere next year at the Hyatt Lost Pines Resort & Spa near Austin, Texas; which, by the way, is another "kid friendly" property.

On August 7, 2008, OADC sponsored a "legislative happy hour" at The Summit Club in Tulsa. Senator Brian Crain spoke to those in attendance about tort reform and legislative activities at the capitol in Oklahoma City. He also answered questions for almost 30 minutes, thus the event was very informative and entertaining.

Our trial school is scheduled for October 16 & 17, 2008, and will once again be held in Oklahoma City. I strongly encourage our young lawyers to take advantage of this opportunity to learn trial skills from some of Oklahoma's finest civil defense attorneys.

Very recently, Jon Starr and I attended the DRI southwest regional meeting in New Orleans, and our region has adopted new election guidelines in regard to regional directors. David Davis, the present regional director, from Austin, Texas, will complete his term next year, and a new regional director will be elected. Jon describes the new election procedures in his report on page three.

Thanks to everyone, including Skoshi Heron, who makes OADC such an enjoyable and educational organization to be a part of. I look forward to seeing you soon at one of our events.

Sincerely,

ROGER N. BUTLER, JR.

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## **23 O.S. § 9.1: OKLAHOMA'S UNCONSTITUTIONAL PUNITIVE DAMAGES STATUTE**

By Michael T. Maloan  
Foliart, Huff, Ottaway & Bottom

Since the Supreme Court of Oklahoma issued its opinion in Gilbert v. Security Fin. Corp. of Oklahoma, Inc., 2006 OK 58, 152 P.3d 165, some thought constitutional challenges to Oklahoma's punitive damages statute, 23 O.S. § 9.1, were futile. After all, in Gilbert, the Supreme Court held that 23 O.S. § 9.1 was constitutional, even in light of the cases from the United States Supreme Court in recent years discussing constitutional limits on punitive damages, particularly State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408 (2003) and BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996). The fight to bring Oklahoma's punitive damages statute in line with all of the United States Supreme Court's teachings about punitive damages is far from over, however. In February 2007, with its decision in Phillip Morris USA v. Williams, \_\_\_ U.S. \_\_\_, 127 S.Ct. 1057 (2007), the Supreme Court gave Oklahoma defendants additional ammunition to use in attacking Section 9.1. In Phillip Morris, the Court held that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." Id. at 1063. Because Section 9.1 **specifically requires** juries to consider harm to nonparties caused by the defendant's action, Oklahoma's punitive damages statute is facially unconstitutional.

23 O.S. § 9.1 provides for three categories of punitive awards with different standards and different damage caps available to each category. Category I permits an award of punitive damages where the jury finds by clear and convincing evidence that a "defendant has been guilty of reckless disregard for the **rights of others . . .**" Id. (Emphasis added). Category II and III punitive damages can be awarded where, in addition to other requirements, the jury finds a "defendant has acted intentionally and with **malice toward others . . .**" Id. (Emphasis added). Thus, the statute does not merely suggest that juries consider harm to nonparties, it requires it. Furthermore, the Supreme Court of Oklahoma has specifically found that harm suffered by third parties is an appropriate factor for juries to consider when awarding punitive damages: "If potential harm to other victims is a consideration, then *actual* harm to others is also an appropriate consideration." Gilbert, 152 P.3d at 179 (Emphasis in original).

Phillip Morris, on the other hand, stands for the proposition that a jury cannot consider harm to others in determining the amount of punitive damages to be awarded. In Phillip Morris, the United States Supreme Court overturned a \$79.5 million punitive damages award from an Oregon jury in a wrongful death case against cigarette manufacturer Phillip Morris. The Court held that the defendant's rights under the Due Process Clause of the Fourteenth Amendment were violated when the jury considered harm to nonparties when it determined the amount of punitive damages. Phillip Morris, 127 S.Ct. at 1063. Over the objection of the defendant, the trial judge instructed the jury that "[p]unitive damages are awarded against a defendant to punish misconduct and to deter misconduct," and "are not intended to compensate the plaintiff or anyone else for damages caused by the defendant's conduct." Id. at 1061.

The Supreme Court found that this instruction violated the Due Process Clause because it risked "arbitrariness, uncertainty, and a lack of notice," in that behavior aimed at strangers to the litigation or general bad acts, could result in a punitive damages award to the plaintiff. Id. at 1063. The Court explained its reasoning as follows:

For one thing, the Due Process Clause prohibits a State from punishing an individual without providing that individual with an opportunity to present every available defense. Yet a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example, in a case such as this, the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary.

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## DRI Report

Jon Starr, Oklahoma DRI Representative

Oklahoma's DRI membership was at 369 as of the end of August 2008. I have set a goal to get the DRI membership in Oklahoma up to 400 members by the time Cary Hiltgen becomes President next year, so we are about 30 new members short of reaching that goal. With Kevin Driskill's assistance, I am continuing my efforts to establish DRI Law Student Association at the three Oklahoma Law Schools.

OADC President Roger Butler and I attended the Regional DRI meeting on August 22 and 23, 2008 in New Orleans. The main issue of interest was how the Southwest Regional Director in 2009 will be elected. A procedure was decided on the week following the meeting which will prohibit a state from having a candidate for the Regional Director position if a person from that state has been the Regional Director in the last 2 terms. The prohibition does not start until after the new Southwest Regional Director is elected in 2009, and the limitation can be suspended by a unanimous vote of the five states in the Southwest Region if unusual circumstances exist. Next year's Regional meeting will be in San Antonio August 28th and 29th. Also, the Annual DRI meeting will be held in New Orleans this year. The Annual Meeting will occur from October 22 through 26, 2008. Several nationally known speakers will be speaking at the meeting, including former House speaker, Newt Gingrich. Oklahoma's own, Cary Hiltgen, will become the President-elect of DRI at that meeting before ascending to DRI President at the Annual Meeting in Chicago in October 2009. You can register online at [www.dri.org](http://www.dri.org).

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Punitive Damages continued.....

For another, to permit punishment for injuring a nonparty victim, would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer—risk of arbitrariness, uncertainty and lack of notice—will be magnified.

Id. (internal quotation marks and citations omitted).

Importantly, harm to others can be considered by the jury in assessing the reprehensibility of the defendant's conduct, but cannot be considered when the jury is deciding the amount of punitive damages to award. Id. at 1064. To strike this balance, the Court held that "the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." Id. at 1064. Recognizing the practical difficulty of permitting the jury to consider harm to others for one purpose, but not for the purpose of determining the amount of punitive damages, the Court stated the following:

How can we know whether a jury, taking account of harm caused others under the rubric of ~~reprehensibility, also seeks to punish~~ the defendant for having caused injury to others? Our answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring. In particular, we believe that where the risk of that misunderstanding is a significant one - because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury - a court, upon request, must protect against that risk. Although the States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases.

**To read the complete article go to: [WWW.OADC.ORG](http://WWW.OADC.ORG)**

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## 3rd Annual Trial School

This seminar will focus on the basics of trial strategy and practice. It is designed to give new lawyers and those with limited trial experience practical information on the basics of conducting a trial. Taught by OADC members who are among the finest trial lawyers in the state, the limited class size will provide an opportunity for gaining real insight into the art and science of successfully trying a lawsuit. Participants will be sent a case fact summary in advance. Participants will be required to prepare their own voir dire, opening statement, direct/cross exam of critical witnesses and closing statement in advance of the event for presentation during the second day or the workshop.

### Registration

Name \_\_\_\_\_

Firm \_\_\_\_\_

Address \_\_\_\_\_

Phone \_\_\_\_\_

Email \_\_\_\_\_

\$250 OADC Member     \$300 Non-Member

Mail payment to:

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