OADC OUTLOOK

A Publication of the Oklahoma Association of Defense Counsel May 2019

# OADC Outlook



www.OADC.org
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## President's Message

by Steve Johnson

As the 53rd year of our organization flies by, I want to thank you all again for the opportunity to serve as your President in 2019. It is an honor to be included in the list of distinguished members of the bar who have led OADC, from W.J. Otjen, Jr. in 1966 to Eric Begin in 2018.

We kicked off 2019 at the Skirvin Hotel on January 25th with a strong showing of 85 registered attendees. We raised approximately $2,600 at the meeting for DPAC, our defense political action committee (with Ed Main winning the stock-the-bar raffle for a second straight year!). Members of the legislative committee, led by Angela Ailles-Bahm and our lobbyist, Brett Robinson, actively participated in the legislative process during the 57th Oklahoma Legislature. We were ultimately unsuccessful in advancing bills to improve the language of 12 O.S. § 3009.1 and 12 O.S. § 3234, but we had an active role in the process. This active role is important, as recent advancements in the language of the Oklahoma Discovery Code – and Section 3009.1 itself – likely would not currently exist if not for past efforts of OADC's legislative committee.

This year, we have already seen enactment of House Bill 2366, which changed the Oklahoma Supreme Court judicial districts; and the Court's long-awaited decision in *Beason v. I.E. Miller Services, Inc.*, 2019 OK 28, which found the statutory non-economic damages cap of $350,000 to be an unconstitutional special law. You can read more about *Beason* in this issue of the Outlook. In addition, we will likely see the appointment of two new members of the Oklahoma Supreme Court in 2019 by Governor Stitt.

We continue to exchange information and ideas within OADC like never before, with our message board at www.oadc.org, and the ability to send blast emails to members with news and information. Just today, as I write this message, I have seen two emails from our members-only discussion forum seeking exchange of information on expert witnesses. This type of information exchange is at the core of our mission, "To provide for the exchange among members of this association of such information, ideas, techniques of procedure and court rulings relating to the handling of litigation as are calculated to enhance the knowledge and improve the skills of defense lawyers." I encourage you to log in to the website and become involved in the information exchange. Thanks to Kari Hawthorne, our

Website/Social Media Chair, OADC's social media presence is also very active. Have you followed OADC on Twitter (@OklaDefense) or Facebook (@OklahomaAssocDefenseCounsel)?

I hope you are registered for the Summer meeting at Four Seasons Dallas – Las Colinas, June 6th through 8th. The CLE committee, led by Grant Fitz, has prepared an interesting agenda of educational topics, complete with a legislative update from two members of the Oklahoma Legislature; and a panel discussion featuring some of the most distinguished and knowledgeable members of our organization. (Check out the brochure at www.oadc.org and register today!). Most importantly, we will have some fun as we bring defense lawyers together to network, exchange ideas and improve our practice. The Four Seasons at Las Colinas remains a popular yet expensive destination for the Summer meeting. Thanks to the efforts of Eric Clark, our Fundraising/Sponsorship Committee Chair, you will see more sponsorship presence (and possibly more swag!) this year. Following the Summer meeting, I look forward to another successful OADC Trial College later this year, as we provide our younger members with an opportunity to grow in their practice.

I believe the Outlook for OADC remains strong. However, it is important that we retain our membership from year to year, and continue to bring in new members. The annual OADC dues are only $150 per year. For young lawyers (less than 5 years practice), membership dues are only $100 per year. Considering a typical hourly rate for many defense lawyers, membership in OADC for the year will only cost you about an hour of your time. I encourage you not only to renew your membership and recruit new members from your firm, but also to get involved in some way. I am thankful for encouragement I received from President Malinda Matlock in 2013 when I became involved with the website committee; and later from Presidents Angela Ailles-Bahm and Michael Carter when I became more involved in the legislative committee. If you are interested in becoming more involved in our organization in any way, please email me at: sjohnson@oklahomacounsel.com. Thank you.

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# Uncapped:

## The Invalidation of the Oklahoma Cap on Non-Economic Damages

by: Jeffrey Hendrickson and Jake Pipinich
Pierce Couch Hendrickson Baysinger & Green, L.L.P.

In a long-awaited opinion by both sides of the bar, the Oklahoma Supreme Court declared the so-called "non-economic damages cap" in personal injury cases an unconstitutional special law in violation of Art. 5, § 46. *See Beason v. I.E. Miller Services, Inc.*, 2019 OK 28. The majority defined the class of persons at issue as all those who sue to recover for bodily injury; they then reasoned that because the non-economic damages cap only applied to living personal injury plaintiffs, not dead ones, it targeted less than the entire class of personal-injury plaintiffs for different treatment. Ergo, a special law; thus, unconstitutional.

I.

The potential impact of *Beason* cannot be understated, but first, a bit of history. The Oklahoma Legislature created the non-economic damages cap, codified at 23 O.S. § 61.2, as part of the Comprehensive Lawsuit Reform Act of 2009. The statute, which applied in "any civil action arising from a claimed bodily injury" save for "actions for wrongful death," limited judges and juries from awarding compensation for non-economic damages (for example, "pain and suffering") in excess of $400,000.00. If the awarding body was a jury, the statute required them to issue written interrogatories explaining what portion of their award was economic damages and what portion was non-economic damages. It also prevented judges from instructing the jury as to the cap's existence, so as would come to pass in *Beason*, a jury could return a plaintiff's verdict, separate their award into economic and non-economic categories, and then see their non-economic award reduced to $400,000.00 without knowing the reduction would occur. The statute also provided circumstances in which the cap could be lifted, one of which was whether the claim at issue was for professional negligence against a physician.

In 2011, the Legislature amended § 61.2, reducing the cap to $350,000.00 and streamlining the procedure to lift the cap in cases where the judge or jury found, by clear and convincing evidence, that the defendant's acts or failures to act were "in reckless disregard for the rights of others," "grossly negligent," "fraudulent," or "intentional or with malice."[1] Notably, § 61.2 retained the procedural feature that barred the jury from learning of the cap prior to rendering an award. This version of the cap was at issue in *Beason*.

II.

As it happened, less than a year later an employee of I.E. Miller Services attempted to move a 41-ton pump with a single crane without the assistance of additional machinery. Part of the crane broke, causing the crane's boom to fall on worker James Todd Beason. Beason suffered extensive injuries and required two amputations on his arm. Beason and his wife sued I.E. Miller Services in Oklahoma County before Judge Patricia Parrish. In pre-trial filings, the Beasons argued § 61.2 was unconstitutional. Following a trial in 2015, a jury awarded Mr. Beason $14,000,000 and Mrs. Beason $1,000,000. In a "supplemental verdict form," the jury categorized $5,000,000 of Mr. Beason's $14,000,000 award as non-economic damages. Judge Parrish concluded all of Mrs. Beason's $1,000,000 was non-economic damages. Judge Parrish then applied the non-economic damages cap to reduce the jury's non-economic damages award from $6,000,000 to $700,000 ($350,000 per person).

The Beasons argued post-trial for § 61.2's unconstitutionality, but Judge Parrish rejected the challenge. The Beasons appealed Judge Parrish's order to the Oklahoma Supreme Court on several grounds, including that § 61.2 violated the Oklahoma Constitution's ban on special laws.[2] The Supreme Court retained the appeal in October of 2015.

Article 5, Section 46 of the Oklahoma Constitution provides that "the Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law… [r]egulating the practice or jurisdiction of, or changing the

[1] The Supreme Court famously voided the entire 2009 CLRA in 2013 for violating the Oklahoma Constitution's single-subject rule, *see Douglas v. Cox Retirement Properties*, 2013 OK 37, 302 P.3d 789, but because the cap was also modified, and thus essentially re-enacted in 2011, it was not voided by *Douglas*.

rules of evidence in judicial proceedings or inquiry before the courts, justices of the peace, sheriffs, commissioners, arbitrators, or other tribunals, or providing or changing the methods for the collection of debts, or the enforcement of judgments or prescribing the effect of judicial sales of real estate."

As their fourth proposition, the Beasons argued 23 O.S. § 61.2 was one of these unconstitutional special laws. They claimed that although the law "ostensibly applies to 'all plaintiffs with bodily injury,'" it treated living personal-injury plaintiffs who receive greater than $350,000 in noneconomic damages differently from dead personal-injury plaintiffs (whose damage claims are uncapped) or living personal-injury plaintiffs with less than $350,000 in noneconomic damages (whose damage claims are not reduced). The Beasons also argued that if the Court found any provision of the cap statute unconstitutional (such as the bar on jury knowledge, which they also challenged), it could not sever the malcontent provision from the statute as a whole, necessitating a ruling that the entire cap statute was unconstitutional.

In response, I.E. Miller (supported by numerous *amici*) argued that the question was not whether the statute, as applied, created separate classes amongst a similarly situated group, but whether the statute facially created separate classes before application. § 61.2. I.E. Miller argued the statute applied uniformly to all plaintiffs with bodily injuries; thus, it did not create suspect classifications at the outset, and therefore was not an unconstitutional special law. I.E. Miller also argued that even if the statute, as created or as applied, impacted differently portions of a similarly situated group (or, in other words, created classifications amongst a group), it could constitutionally do so because any difference in application bore a "rational relationship to some legitimate legislative objective." Perhaps because, as I.E. Miller believed, the Oklahoma Supreme Court had already identified in § 61.2 a class of general application ("all plaintiffs with bodily injuries"), *see Montgomery v. Potter*, 2014 OK 118, ¶ 7, 341 P.3d 660, 662, or because the Oklahoma Constitution prohibited the Legislature from capping damages in wrongful death claims, or because their secondary argument—the legitimate legislative objective of differential impact—implicitly addressed the reasonableness of a difference in application between the living and the dead, I.E. Miller did not expressly address the potential for a class distinction between wrongful death personal-injury plaintiffs and living personal-injury plaintiffs.

The Beasons argued that (1) *Montgomery v. Potter* was not a pronouncement on the constitutionality of § 61.2, (2) § 61.2 facially distinguished between classes of personal injury plaintiffs, (3) "rational basis" did not apply to a special-law analysis, which is instead a categorical ban on any law found to be "special," and (4) even if some standard of review did apply, § 61.2 did not satisfy it.

As noted above, I.E. Miller also appealed Judge Parrish's order, raising seven different grounds it believed rendered the judgment (and the jury verdict giving rise to it) infirm. One of these grounds concerned 12 O.S. § 3009.1, the statute that, generally, limits parties to introducing as trial evidence only medical bills paid, instead of the full amount charged. The text of the statute uses the past tense. At trial, I.E. Miller attempted to introduce evidence under § 3009.1 that showed the amount Mr. Beason would actually incur in future medical expenses, as opposed to the retail value of such services. I.E. Miller argued that a reasonable interpretation of § 3009.1 is that it applies to past *and* future medical expenses. Thus, I.E. Miller should be able to present evidence showing the amount of future medical expenses Mr. Beason would reasonably pay as opposed to billed amounts without considering markdowns, insurance write-offs and the like.

The Beasons responded that the plain language of 12 O.S. § 3009.1 means it only applies to past medical expenses, as the statute is written in the past tense. They also challenged and attempted to distinguish Texas and California cases I.E. Miller relied upon for their reading of the statute.

The parties and various *amici curiae* fully briefed the case by July 2016. In the ensuing two-and-a-half years, Justices Wyrick (on the Beasons' motion) and Kauger (*sua sponte*) recused, and Combs (*sua sponte*) disqualified himself. In October 2018, Vice Chief Justice Darby appointed Oklahoma Court of Civil Appeals judges Jerry Goodman and John Fischer, as well as Cleveland County District Judge Lori Walkley, as special justices to rule on the appeal.

III.

On April 23, 2019, over three-and-a-half years after retaining the appeal, the Oklahoma Supreme Court released its opinion. The majority, authored by Justice John Reif and joined by Justices Darby and Colbert and Special Justices Goodman and Walkley, declared the so-called "non-economic damages cap" in personal injury cases an unconstitutional

[1] I.E. Miller also appealed Judge Parrish's order, raising seven different grounds it believed rendered the judgment (and the jury verdict giving rise to it) infirm. One of these grounds concerned 12 O.S. § 3009.1. As discussed below, the Oklahoma Supreme Court rejected I.E. Miller's § 3009.1 argument.

special law in violation of Art. 5, § 46. *See Beason,* 2019 OK 28, ¶ 7. The majority defined the class of persons at issue as all those who sue to recover for bodily injury, then reasoned that because the non-economic damages cap only applied to living personal injury plaintiffs, not dead ones, it targeted less than the entire class of personal-injury plaintiffs for different treatment. As Justice Reif explained: "The failing of the statute is that it purports to limit recovery for pain and suffering in cases where the plaintiff survives the injury-causing event, while persons who die from the injury-causing event face no such limitation." *Id.*

The majority reasoned that among personal-injury plaintiffs, the dead and the living stand on "identical footing." *Id.* In other words, the wrongful death statute permits the dead to recover "pain and suffering" in the same manner as the living. *Id.* Thus, the majority concluded, "no good reason exists to treat a person who survives the harm-causing event differently with respect to recovery for the very same detriment." *Id.* The majority found support for this conclusion in Oklahoma's constitutional provision ensuring that jury trial rights "shall be and remain inviolate." It read the jury trial right in conjunction with the constitution's ban on limits on wrongful death claims (Art. 23, § 7) to mean the people of Oklahoma intended to trust juries to hand down awards to living and dead personal-injury plaintiffs equally. As a corollary to that analysis, the majority also questioned the Legislature's power to impose damage caps on any sort of claim outside "civil actions or claims against the state or any of its political subdivisions." *Id.* at 11.

The majority also addressed I.E. Miller's seven grounds for appeal and found none of them sufficient to reverse the trial court's judgment. Specifically addressing 12 O.S. § 3009.1, the majority said simply "12 O.S. § 3009.1 does not apply to future medical expenses not yet incurred." *Id.* at 13. This relatively open question—one that has been debated in courtrooms across the state—received no additional treatment or analysis.

The majority drew one concurring in-part and dissenting-in-part from Justice Kauger, who stated briefly that she found the cap itself constitutional but the interrogatory requirement in (E) and the statutory ban on disclosing the cap to juries prior to their decision in (F) unconstitutional and severable.

The majority also drew two dissents. First, Justice Winchester, writing for himself, argued that because the Legislature is constitutionally prohibited from limiting recovery for wrongful death claims, the majority's grouping of wrongful death personal-injury plaintiffs and living personal-injury plaintiffs was a "constitutional impossibility." Justice Winchester also concluded that § 61.2's plain language showed facial applicability to all personal injury plaintiffs and therefore did not impermissibly target less than all individuals in the class.

Second, Justice Edmonson, joined by Special Justice Fischer, penned a 67-page dissent that, similar to Justice Kauger's statement of her position, argued that (1) the non-economic damages cap was constitutional, but (2) requiring a jury to make special damage findings without the benefit of knowing about the cap was not.

IV.

Why does this matter for defense practitioners?

First, the Court's decision in *Beason* is an obvious negative outcome for the defense bar. Before *Beason*, personal-injury defendants to cases brought by living-and-injured plaintiffs could take some comfort that non-economic damages, which historically are difficult to predict and often bear little relationship to the economic damages suffered, would be reined in by the cap. That comfort is gone. Given how the *Beason* Court defined the class at issue, it is difficult to see how the Legislature could craft a remedy to reinstate the cap absent a constitutional amendment. Whatever its deeper meaning, Article 23, § 7 undoubtedly bars limits on recovery in wrongful death cases; the Legislature could not, therefore, expand the cap to all personal injury claims, wrongful death or otherwise.

Second, in our perhaps quixotic search for a silver lining, the Court's decision in *Beason* does suggest the special-law provision is not a categorical bar on so-called special laws, but instead subjects them to *some* standard of review. *Beason* cites *Ponca Iron & Metal, Inc. v. Wilkinson* for the proposition that a classification violates the special-law ban when the classification is "arbitrary and capricious and bears no reasonable relationship to the object of the legislation." *Beason*, 2019 OK 28, ¶ 7 (citing *Ponca Iron & Metal*, 2010 OK 75, ¶ 6, 242 P.3d 534, 536). The *Beason* Court later notes that "no good reason exists to treat a person who survives the harm-causing event differently with respect to recovery for the very same detriment." *Id.* ¶ 8. This language runs contrary to what the Beasons argued, which was that the special-law provision is a categorical ban *akin* to strict liability. That does not, based on *Beason*'s language, appear to be the case. Perhaps a classification that is *not* arbitrary and capricious

and bears a reasonable relationship to legislation, or a classification that presents a "good reason" to treat groups differently, could survive the special-law analysis.

Third and almost equally important to the elimination of the cap itself is the fact that 12 O.S. § 3009.1 was held not to apply to future damage claims in personal injury lawsuits. Thus, grossly inflated "future damage models" will likely begin to appear in virtually every lawsuit without any reduction or consideration of the fact that due to insurance write-downs and agreements little to none of the claimed "future damages" will actually be paid. In effect, the personal injury bar has been given a vehicle to circumvent, in part, the evidentiary limitations found at 12 O.S. § 3009.1 by claiming that the bulk of medical expenses will be incurred in the future. Of course, traditional challenges to future damage models, such as through expert witness testimony, remain viable. Unfortunately, the assurance that hypothetical medical costs can be kept out of the state's courtrooms by the operation of law does not. Still, the silver lining to this situation, at least as far as 12 O.S. § 3009.1 is concerned, is that the *Beason* Court's single-line treatment seems to leave the door open for the Legislature to amend the statute to expressly apply to past and future medical expenses.

In any event, counsel should immediately notify clients of this very important change to Oklahoma's tort scheme. In particular, clients in industries that often face personal injury claims, such as insurance coverage, healthcare, and transportation, should be aware of *Beason* and the immediate effects it will have on liability exposure. Just ask I.E. Miller Services.

## Four Seasons
4150 North MacArthur Boulevard
Irving, Texas 75038

# Summer Meeting
Four Seasons Resort & Club
Dallas at Las Colinas
June 6 - 9, 2019

# Agenda and Continuing Legal Education

### Thursday, June 6 ( 3.5 CLE)

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|---|---|
| 1:30 - 2:30 | **Understanding Medicare as a Second Payer without needing ESP** - DRI, Catherine Goldhaber |
| 2:30 - 3:30 | **Ethical Concerns of Using Social Media in the Practice of Law** - LexisNexis - David V. Dilenschneider, Esq. |
| 3:30 - 3:45 | Break |
| 3:45 - 4:45 | **Wearable Technology inthe Evolving Social Climate** - Legal Concerns & Responsibilities - Exponent Scott McLean |
| 5:30 - 6:30 | Cocktail Reception |

### Friday, June 7 (3.5 hours CLE includes 1hour Ethics)

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| 7:45 - 8:45 | Continental Breakfast |
| 8:00 - 8:30 | Board Meeting |
| 8:45 - 9:45 Daniels | **Legislative Update** - Senator Julie and Representative Terry O'Donnell |
| 9:45 - 10:45 | **Enhance Your Legal Reserarch with Westlaw Edge** - Thomson Reuters - Sarah Buchanan & Ron Sharp |
| 10:45 - 11:00 | Break |
| 11:00 - 12:00 | **Panel Discussion - Corporate Clients & Issues that Arise in Litigation, Corp. Rep. Depositions etc.** - Tom Manning, Jennifer Annis, Mike Maloan, Malinda Matlock, and Phil Richards |

### Saturday, June 8

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|---|---|
| 6:30 | Cocktails |
| 7:00 | Dinner |