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THE ADVOCATE

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OAJ intends for this magazine to represent a cross-section of the views of members of the trial bar. OAJ encourages suggestions about and, more importantly, contributions to this magazine. Correspondence, manuscripts and letters to the editor should be sent to the Editorial offices, Oklahoma Association For Justice, 323 NE 27th Street, Oklahoma City, OK 73105, or by email to editor@otla.org.

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THE ADVOCATE

VOL. 39 NO. 1

TABLE OF CONTENTS

President's Message **5**
by Guy Thiessen

Insurance Policies **8**
by Rex Travis

Barrister's Column **10**
by Greg Haubrich

Court Rules 2008 ..... **13**
by Bryce Hill

Book Review **16**
by Garvin Isaacs

Products Liability **20**
by John Merritt

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Since its founding in 1943, OAJ has grown to become one of Oklahoma's most respected associations and is recognized as one of the most effective trial bars in the nation.

OAJ's success is due entirely to the dedicated hard-working individuals whose perseverance and financial support enables the Association to fulfill its goals of preserving the jury system, promoting individual rights and educating the general public.

The Association for Justice is pleased to recognize those individuals whose personal financial commitments help us to serve our members and their clients through effective representation at both the state and national level.

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The following OAJ members have made a special contribution by donating a portion of a substantial fee or award to the Association:

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So far..................
..........where we are headed.

Guy A. Thiessen

First of all, I am grateful and proud to be entrusted by the membership to lead the only State organization that fights to preserve the rights of innocently injured citizens of Oklahoma.

We, as trial lawyers, continue to represent the only hope against the big corporations, insurance companies, nursing home owners, and other health related professional organizations who seek to "reform" the civil justice system for their financial benefit and at the expense of their own customers, policybolders, and patients. These special interest groups have contributed heavily to certain legislators' campaigns in an effort to get them elected. In return, these legislators are using their positions to achieve the goals of these special interest groups, despite it being against the interest of the people who voted them into office.

As trial lawyers, we will continue to fight and expose any group or legislator who seeks to adulterate the civil justice system for financial gain or political power. Who we are is important. But what we do is more important: fighting for and preserving justice.

So far..........

Because what we do is more important that who we are, the board of directors recently voted to change the Association's name. We are now the Oklahoma Association for Justice (OAJ). This decision was not made in haste. It had been discussed and debated for the past few years. What has not changed is our commitment to the citizens of Oklahoma and how we go about fulfilling those commitments. Regardless of the name change, we are still trial lawyers and proud of it.

We have a new leader in the OAJ office. Her name is Angela Little and we are lucky to have her working for our Association. Look for her message in this edition of the Advocate.

We are in the middle of the legislative session. As always, the same groups mentioned above, through certain legislators, are seeking to pass laws that allow these groups to avoid responsibility to innocent victims injured by negligent acts. There are many such bills, including ones which cap damages, give wrongdoers an offset for the injured victims' health and other insurance payments, and a bill which limits the ability of Oklahoma citizens to join together in a class action to right the same wrong against them all. The Legislative Committee, chaired by Terry West and Ted Sherwood, is working with our lobbyist, Steve Lewis, to monitor all such bills as they make their way through the legislature. As always, we will advocate against these so called "tort reform" bills and expose the real agenda of those who are trying to push them through the process.

.........where we are headed.

I am excited about what the rest of the year holds for OAJ. We will return to Las Vegas for our Summer Meeting June 26-29. If you have not done so, block these dates on your calendar so you can plan your practice around them. On Friday of the summer meeting, trial consultant Cliff Atkinson will show us how to enhance our PowerPoint presentations in a way that tells a memorable story and maximizes juror retention of the key issues in any given case. For more details, look in this edition of the Advocate or go to www.otla.org where you can register online.

In addition to Rex Travis' Insurance Law update seminars, our CLE Committee, chaired by Fletcher Handley, is planning some new programs and is considering some repeats of past CLE programs due to popular demand. Details on these programs will follow in the coming weeks.

As you all know, this is a critical election year in Oklahoma. The State Senate is evenly divided by party and currently sharing power. There are several Senate seats "up for grabs" in November. The results will likely

tip the balance of power to one party. Ted Sherwood has organized our members in an unprecedented way in an effort to elect candidates who will work to protect the civil justice system from those who seek to limit or eliminate the rights of innocent victims of negligence. If you have not yet been contacted about how you can help in the upcoming fall elections or simply need information on candidates, please contact Ted or Angela Little at the OAJ office.

We are also embarking upon a new OAJ Communications Plan, spearheaded by Brad West. Our goal will be to educate the public about the civil justice system, how the work of trial lawyers benefits our citizens, and to expose the true motivations of those who seek to "reform" the system. This plan was unveiled last December at the Winter board meeting. If you did not hear the details then, you will very soon.

Our Winter meeting is set for October 24 & 25 in Oklahoma City. We are planning a golf tournament that Friday afternoon to be held at Rose Creek Golf Club in Edmond. On Saturday, there will be a CLE program in the morning, a board meeting immediately following to elect new officers, and the banquet Saturday night. Details will follow.

Always remember that, as a trial lawyer association, our strength comes from the fact that we have banded together, focused our resources, supported each other, and have taken and will continue to take action when called upon. I encourage all of you to get as involved as your time will allow in supporting the most important association for the preservation of justice in Oklahoma. See you soon.

MEMBER-ABILIA PARTY

Come join us to go through old photos, issues of advocates, press releases, and more. Sit back, share some laughs and have some drinks.

Friday, May 30, 2008
3 o'clock pm

Hors D'oeuvres and Cocktails

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Long Term Care Insurance Policy Does Not Afford Coverage Where Nursing Care is Provided in Assisted Living Center Instead of Nursing Home

by Rex Travis

Milburn v. Life Investors Ins. Co. of America 511 F3d 1285 (10th Cir. 2008) holds that a long term care insurance policy does not provide for nursing home care when the care is provided in an assisted living center, even if the assisted living center provides all the nursing care required by the policies definition of "nursing care."

The 89-year-old plaintiff lived in an assisted living center in Lawton. Because she did not need skilled nursing care, she made no claim for benefits under the long term care policy she has owned for several years. However, after she was hospitalized for several physical ailments, she required daily care in dressing, walking, bathing, getting in an out of bed and taking medication. Her assisted living center had a nurse on staff and provided this care. She made a claim for benefits under her long term care policy.

The insurance company denied benefits, claiming that it provided only nursing home benefits and the assisted living center did not qualify since it was not licensed as a nursing home. (Oklahoma does not have a licensing category for nursing homes.) The policy provided the requirements for a facility to qualify under the policy and said its requirements were typically met by, among other things, "intermediate nursing care facilities."

Plaintiff sued for $36,500 in benefits plus consequential and punitive damages for bad faith for denying the claim. The trial court, Judge Cauthron, granted plaintiff's summary judgment as to the coverage and denied the insurance company's summary judgment as to bad faith. The Tenth Circuit Court of Appeals reversed, in a per curiam opinion.

The opinion noted that, since the district court decision, the Tenth Circuit had decided Gillogly v. 2430 F.3d 1284 (10th Cir. 2005). That case held there was no long term health care coverage for care provided in a "residential care home" which was not licensed to provide nursing care. On the basis of Gillogly, the Tenth Circuit reversed in the present case.

The basis for the opinion seems a little cloudy. The Court seems to feel Gillogly requires that the facility must be licensed to provide 24-hour nursing care in order to fall within the policy term "nursing home" even though the policy provides it covers nursing care, even in an "intermediate nursing care facility," such as an assisted living center.

The problem with this opinion is a structural one dealing with federal appellate procedure. Two of the three judges on the panel (Chief Judge Henry and Circuit Judge Murphy) are critical of Gillogly but appear to feel it is controlling and they must follow it. Chief Judge Henry writes in a concurring opinion that there is a serious problem with tying coverage under long term care policies to a particular licensing scheme since these policies are often in force over a long period of time, during which nursing care and licensing may change, leaving someone uninsured at the time they need the care where they may have been covered at the time the policy was issued. The concurring opinion "urges" insurance companies to "provide clearer definitions of crucial terms." (Yeah, right.!)

It is also somewhat surprising that an experienced and well-respected federal district court judge found the policy to unambiguously provide coverage while the court of appeals found it unambiguously did not provide coverage and yet found the policy was not ambiguous. That is truly remarkable!

The problem is that a panel of a federal court of appeal cannot reverse a wrong decision of another panel of the court of appeal. Only the court en banc can do that. And en banc rehearings are seldom granted. Motions for en banc rehearings are specifically not viewed with favor.

This circumstance often results in what we see here, a different result depending on whether the issue is 32007 OK CIV APP 8, 176 P.3d 1232. litigated in state or federal court. The "take home" message from this case is that if you are to pursue a claim on a long term care policy, you should do so in state court and not sue for bad faith so as to keep damages at or below the $75,000 federal jurisdictional limit. After all, you can't get bad faith damages if you can't get a holding that you are entitled to the coverage.

Deteriorated Roof Constituting Sub-Roof for Damaged Roof Was Part of Roof Requiring Insurance Company to Replace It

Gutkowski v. Oklahoma Farmers Union Mut. Ins. Co. 2008 OK Civ. App 8m 176 P.3d 1232 holds that a homeowner's insurance policy required the insurance company to replace an old, deteriorated wood shingle roof over which a hail-damaged composition roof had been nailed because the wood roof, while not damaged by hail, constituted a "nailable surface" for the replacement roof and would be destroyed by taking off the composition shingles.

Mr. and Mrs. Gutkowski owned a home with a composition roof nailed over an old, deteriorated wood shingle roof. Hail damaged the composition roof but not the wood shingle roof. However, the proof was that removal of the composition roof would destroy the wood shingle roof.

The insurance company, Oklahoma Farmers Union (OFU), paid for the new composition shingle roof but refused to pay for replacement of the wood shingle roof with decking. The insureds sued on the contract and for bad faith.

The jury returned a verdict for the insurance company. The insureds appealed the verdict as to the contract damages but not the bad faith claim. The Court of Civil Appeals reversed, in an opinion by Judge Robert Dick Bell.

Both the insureds and the insurance company claimed the policy was unambiguous. The insureds claimed the policy required the insurance company to replace the roof with a useable roof, less a deduction for depreciation. The insurance company claimed there was no coverage for the wood shingle roof because it was in a deteriorated and inadequate condition before the hail loss and because the policy required "direct physical loss," which the wood shingle roof did not sustain.

The Court of Civil Appeals held that the policy unambiguously required the insurance company to replace the entire roof, including the wood shingle roof not physically damaged by the hail. The Court noted that the entire roof, consisting of composition shingles over the wood shingle roof, was insured so that the insureds were entitled to have the whole roof replaced. The Court noted that Oklahoma law requires an insurance policy to clearly and distinctly reveal it is doing so if the policy excludes liability under the policy. This policy did not do so.

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Some Suggestions for "Minimal Property Damage" Cases

by Greg Haubrich

I was visiting with my friend Bobbie. She could never vote for John Edwards. Why? He's supported by the trial lawyers. I said: "Bobbie, I'm a trial lawyer." In fact, Bobbie had once asked me to represent a family member over a burn injury.

I asked some more questions. Bobbie watches Fox News. She hates lawyer advertising, particularly the kind that encourages people to file "frivolous lawsuits". She believes that most people that file cases are overcompensated; that we have an "entitlement society" in which people who are injured imagine themselves as victims who "deserve" to be compensated.

Gals and Guys, Bobbie is your typical Oklahoma juror, or at least the secret agent against you in the jury room. She already has her mind made up against your client before she hears one fact. So how are we going to recover decent compensation for injured people, when "typical jurors" believe that we are a RICO gang intent on destroying the American economy and starving those poor insurance companies to death, not to mention driving up working Americans' insurance rates through "frivolous litigation"?

I offer suggestions only, because I'm still searching for the answers. (Ideology is determined belief; philosophy is the search for truth.) The last several cases I tried involving "minor property damage" didn't come out so hot, so I'm not claiming I can tell you how to do this. What I know, though, is that many of our clients have been severely injured in crashes that resulted in little or no damage to either vehicle involved. How do we represent those people, when we know that jurors will think they are just trying to get a fast buck and are in collusion with their lawyers who sent them to medical hacks to incur unnecessary medical bills in order to blackmail those poor weak insurance companies into settling for exorbitant sums?

1. Evaluate your client

Good clients make good cases. Look at your clients' past medical, criminal, and driving history. Meet them face to face and spend a couple hours getting to know them and what their injuries have done to them. Read their medical records and see whether their complaints are verified by history, progression of medical care, and objective findings of injury. Insurance companies dehumanize people because a corporation has no soul and cares not about people. If someone's case is worth having, it is worth caring about that person. If you don't trust or like the client, ditch the case.

2. Investigate the case

Go to the accident scene. Take photographs. Take statements from the opposing driver and any witnesses. Get the medical records and bills early, and read them yourself. Consult the doctor; talk to the physical therapist. Get educated to the medicine that applies to the case: it's easy to look up on the net just by googling or yahooing. I used to pass over medical terms in records because they made my eyes bulge out and my head hurt. Kind of a speed reading thing, but without the comprehension. "Foraminal compression", "adhesive capsulitis", "neuroencephalopathy". These all translate into English: bones in neck pressing directly on exposed nerves, frozen shoulder, swelling of the brain. Knowledge is power.

3. Let the insurance company take a statement (sometimes)

We shrink away from providing statements when we don't have to, for good reason. Statements a party makes are admissions of a party opponent, and can be used to impeach in deposition or trial. However, a good recorded

statement can significantly affect settlement offers. I often contact a liability adjuster and offer him an opportunity to meet and record my client in person (after, of course, I have prepared my client to be a witness). I put a stipulation on the record that the statement is made in furtherance of settlement negotiations, and may not be used to cross examine or impeach my client in deposition or trial. These statements need to be in person, not over the phone, so the adjuster has to deal with and see a real person. Recently I called an adjuster and offered a recorded statement. Her response was "I was afraid to ask." She took the statement, trusted my client, saw that there were serious injuries and decent liability, and made an offer my client could not refuse.

Another neat technique is to take the statement yourself, and send the adjuster a CD-ROM of your conversation with your client. Same stipulations apply: not to be used except for settlement negotiations. This way you can control the statement, get the story out the way you want to, edit the tape if necessary, and give the adjuster the chance to see what your client's direct testimony will look like at trial.

4. Keep your costs down

An $8000.00 verdict at the cost of $6000.00 in expenses is not a making proposition. 12 OS 2403(24) allows you to stipulate that your client's total claim is less than $25,000.00, and present the case on medical reports instead of video trial depositions. It typically costs $2500.00 or more to have a doctor testify, including her fees, deposition transcript, and video reporter. If your client's medical bills are $4200.00 and the property damage is "minor", in today's Bobbie climate you are not giving up anything by claiming less than $25,000.00.

File a Motion to Enter for non-jury trial. Be willing to try the case to a judge, especially if you know the judge is usually fair. If the defense wants a jury trial, they have to pay the $350.00 jury fee.

Take short depositions. Depositions are expensive. There is no reason to torture the poor souls just because the defense lawyers take 8 hour depos of our clients. An 8 hour depo costs $1000.00. A fifteen minute deposition might cost $150.00. Which would you, or your client, rather pay? In most car accident cases you can learn everything you need to know about the defendant in less than half an hour.

5. Limine "minimal property damage" evidence.

There is no proven connection between crash damage and crash injury. In fact, there is a tremendous amount of valid scientific data that collisions with little or no property damage can cause serious injuries including death. It has been known since the early 1950s that a low-speed rear-end collision can generate tremendous g-forces on the head, and cause serious neck and back injuries. The striking vehicle is the bullet; the struck vehicle is the target. Moving objects carry kinetic energy (you learned this is grade school and so did most of your jurors). Force equals mass times velocity squared. (You learned that in grade school, too, didn't you?). If there is no property damage, and there was a significant collision, all of the kinetic energy that the striking vehicle contained was imparted to the struck vehicle in the collision. Since vehicle bumpers are reinforced metal, all of that force is transmitted through the neck and spine. For every action there is an equal and opposite reaction (okay, that one might have come in middle school).

Photographs of "minor property damage" are poison. They are unfairly prejudicial and have no relevant value, since they say nothing about the likelihood of injury to a specific individual and tend to mislead the factfinder into thinking there cannot have been much injury since there wasn't much property damage.

It is improper for the defendant to refer to the collision as a "minor fender bender". It is unfairly prejudicial to show photos of "minor property damage" as evidence of little or no injury. A defense doctor cannot say the collision was similar to stepping off a curb or sitting down in a chair, because the scientific evidence proves that variables of impact, kinetics, and individual susceptibility belie the popular notion that property damage correlates to injury. It does not.

I recently published on the listserver our Motion in Limine to prevent a) testimony that collision was minor; b) photographs or damage estimates/invoices

regarding "minimal property damge"; or c) physician's or other expert's testimony that collision was minor and/or insufficient to cause injury. Authored by our law clerk, Jake Pipinich, the brief is filled with data and case authority that will help you keep out of evidence or argument the scientifically flawed but often successful tactic that this was a minor fender bender in which no one got hurt. We sent this brief to all of you so you can use it as a template to get the judiciary educated to the scientific facts and legal authority they need in order to stop the common defense tactics that destroy our client's valid cases.

6. Keep out the Bobbies

Bobbie is not unique. She is a compassionate and beautiful person who married a Navy pilot, listens to right wing talk radio, and watches Fox News. I listen to Rush too, but for a different reason: you can't understand the psychology of the poisoned jury panel if you do not know what they are thinking and hearing.

The sole purpose of voir dire is to identify negative jurors and strike them. Remember to tell jurors to tell you what they're thinking. In voir dire you are not selling your case; you are listening to the key words and code words that tell you this person needs to go. I love Bobbie, but I could never leave her on my jury panel. Yet how do I know, if I haven't asked her how she feels about lawyers and advertising; about lawsuits and compensation; about whether and how she thinks that her decision in this case might affect her or her community; or about what media she gets her primary news from?

We are trial lawyers, not litigators. We know our clients in minor damage collisions suffer the consequences of being targets of bullets. Many of us have given up the fight and refuse to accept or try whiplash cases resulting from "minor impact" collisions. But if we do our own legwork, keep our costs down, select and support good clients, and keep going to the courthouse, the pendulum will swing back because people, including Bobbie, ultimately do believe that the jury system is the real foundation of democracy in America.

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by Bryce Hill

On February 7, 2008 the Supreme Court of Oklahoma adopted the Court Rules of the Workers' Compensation Court as amended and approved by the Workers' Compensation Court on July 20, 2007. In Re: The Court Rules of the Workers' Compensation Court – Year 2008 Amendments, 2008 OK 11. These new rules became effective on February 7, 2008, the date of adoption by the Oklahoma Supreme Court.

This article will give a brief synopsis of the changes to the amended rules.

Rules 1 through 4: No Changes.

Rule 5: Date of Filing – Stamping – Time Computation - The amendment to this rule inserts the word "computed" in place of the word "calculated" for determining time limits from the date of filing and then adds new language that states if the time prescribed for filing is 10 days or less, all holidays and days the court clerks office is not open until the regularly scheduled closing time are to be excluded from the time computation.

Rule 6: Correspondence with the Court; Prohibited Communications with the Court and Court Appointed Professionals – Paragraph B of this rule has about two-thirds of the prior language stricken regarding parties and attorneys communicating with court appointed medical examiners, vocational evaluators or case managers. In place of the stricken language is an entirely new and lengthy paragraph "C." The new paragraph "C" essentially sets out that no direct or indirect ex parte communications are allowed for any court appointed professional, which includes medial examiners, vocational counselors, case managers, psychologists and anyone else appointed by the trial judge. This prohibition also extends to the office staff of the court appointed professional and also any physician to whom the Claimant is referred by the court appointed professional. Treating physicians selected through the Form A procedure of Title 85 O.S. §14(G) are not subject to the prohibitions of this sub paragraph.

Communication with court appointed professional is permitted for: (a) joint letters of the parties after approval of the assigned judge; (b) scheduling or verifying appointments, authorizing testing, treatment or surgery with the staff of a physician or psychologist; (c) communicating with a case manager regarding light duty and work restriction issues; (d) any necessary communication between the Claimant and the professional and (e) communication between court appointed professionals.

Failure to comply with this new paragraph "C" could result in the imposition of costs, contempt citations or sanctions against any offending party and applies not only to attorneys representing the parties, but also to agents, employees of the parties and anyone acting on their behalf. Should prohibited communication take place, the court appointed professional is to advise the trial judge and all counsel in writing.

Rules 7 through 14: No Changes.

Rule 15. Termination of Temporary Compensation – Paragraph (A)(2) has been amended to specify that written notice of termination of TTD must be received "by the claimant's attorney of record or by the claimant if unrepresented" before the start of the 15 days in which an objection must be filed under §14(A)(2) or the start of the 20 days

in which an objection must be filed under §17(D)(10). Paragraph (A)(3) has added language requiring a court appointed independent medial examiner to provide a Form 5 to the trial judge and all parties when it is determined the claimant can return to work; that TTD will stop when claimant has reached MMI on all body parts in dispute or is released to full time regular or restricted duty as set out in a Form 5.

Paragraph (B) has been amended to include language that a Court Independent Medical Examiner's Form 5 Release for modified light duty work requires a court order for the termination of TTD.

Rule 16: No Changes.

Rule 17: Scheduling Conflicts Involving Matters Set Before This Court – This rule has been stricken in it's entirety and replaced with the following single paragraph: "Any attorney with a scheduling conflict shall provide three (3) days notice in writing to opposing counsel and all assigned judges along with a proposed resolution of the conflict. The judges affected may confer and require the parties to appear earlier than scheduled, or strike and reschedule any affected hearing, all as justice may require. Scheduling conflicts between this court and other courts is governed by the Guidelines for Resolving Scheduling conflicts adopted by the Oklahoma Supreme Court at 1998 OK 117."

Rule 18: Scheduling Conflicts Between This Court and Other Courts – This rule has been stricken in its entirety.

Rule 19: No changes.

Rule 20: Medical Evidence – Paragraph (F)(1) has been stricken and replaced with similar language that gives any party 10 days to give written notice of an objection to the report of a treating physician or an independent medical examiner on grounds of (a) the hearsay nature of the report; (b) an objection to the treating physicians report by filing a Form 13 requesting appointment of an court appointed IME; or a completely new paragraph (c) which allows objections pursuant to 85 O.S. Section 17(A)(2) and Section 17(D)(3), both of which call for the appointment of a Court IME by agreement or random selection by the trial judge. Paragraph H has been deleted from this rule altogether.

Rules 21 through 24: No Changes.

Rule 25: Vocational Rehabilitation and Case Management Evidence. This is a one word amendment in paragraph B where the party offering has been replaced with requesting in the phrase "... the party requesting the deposition testimony of any such evaluator or case manager shall be responsible for the reasonable charges ...". Although small, this is significant change and shifts the cost of deposing vocational and case management experts to the party requesting the deposition.

Rules 26 through 42: No Changes.

Rule 43: Independent Medical Examiners – Requests for Assignment – This amendment consists of the complete elimination of paragraphs B(1), B(2) and B(3) and a re-lettering all subsequent paragraphs. The eliminated paragraphs concerned the appointment of Court IME's pursuant to Title 85 O.S. §§17(A)(2); 17(D)(10); and 201.1(B)(5).

Rules 44 through 51: No Changes.

Rule 52: Mediation – The amendments to this section are primarily directed to the removal of the initial language making OBA members licensed since 2003 and having education and experience in Oklahoma workers' compensation law eligible as workers' compensation mediators until January 1, 2007. Since that time has passed, this portion of paragraph C was stricken. The only other notable change was the deletion of the requirement that a mediator must have a minimum of six hours mediation training specifically in workers' compensation law to be eligible for appointment by the Court. A minimum of 6 hours of general mediation training will now suffice.

Rules 53 through 54: No Changes.

Rule 55: Joint Petition Settlements – This amendment involves the deletion of paragraph (A)(2) and the renumbering of subsequent sub paragraphs. The significance of this amendment

is that it rids us of the attorney fee language and the boxes on the Joint Petition itself that the claimant must initial concerning payment of the attorney fee or the request for a fee hearing with a judge. Although I've never had a client request a fee hearing on a joint petition, nor have I heard of anyone else actually having had such a hearing, it was a time consuming process to explain why the client was initialing one of the boxes and then explain it again in the record of the joint petition. I believe all of us will be happy to have this amendment take effect.

Rules 56 through 62: No Changes.

Rule 63: Certificate of Coverage for Insurance – This rule has added a new paragraph directing every CWMP to file with the Court Administrator a current list of its network providers and dispute resolution forms for public disclosure or the CWMP is allowed to provide its website address where the provider list and dispute resolutions forms may be accessed by the public.

Rules 64 through 65: No Changes.

Rule 66: Effective Date – These rules, as amended, shall become effective on February 7, 2008.

And with that, we conclude this scintillating discussion of the latest edition of the Court Rules of the Workers' Compensation Court.

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John Grisham's The Innocent Man

by Garvin Isaacs

TheInnocentManbyJohnGrisham tells the story of Ron Williamson, a 1971 All State baseball player who as a child dreamed of playing in the big leagues like his idol Mickey Mantle. Grisham does an excellent job of revealing to the reader who Ron Williamson is. Grisham tells of Williamson's childhood in a religious environment - Pentecostal Holiness - and about the close family ties which surrounded his upbringing. Williamson's father, Roy, worked as a door to door salesman for Rawleigh Home Products Company. Juanita, his mother, worked at the Ada hospital. Grisham's understanding of the impact sports can have on young children provides the reader with a keen insight into the psychological makeup of Ron Williamson in his passionate quest to become a major league baseball player. Grisham tells us that Williamson "erected a shrine to Mickey Mantle, the greatest Yankee and the greatest Oklahoman in the major leagues."

We follow Ron Williamson from Little League to Byng High School "where he first exhibited obsessive qualities." As a good student he made As and Bs and became a "demanding egocentric" and was self absorbed to the point everybody did what Ron wanted. Every member of his family sacrificed for him so he could continue his dream of playing big league baseball.

The Williamson family moved to Asher, Oklahoma, so Ron could play baseball for Murl Bowen his senior year. Murl Bowen won more high school baseball games than anyone in the nation for the past forty years. In Asher, Ron Williamson met Bruce Leba, another highschool baseball player who aspired to become a big leaguer. They became friends, chased girls, drank beer, smoked marijuana and won two high school state championships. Williamson hit .500, five home runs and forty-six RBIs his senior year at Asher. The big league scouts were impressed. Williamson was named to the All State team and was runner-up as Oklahoma Player of the Year. Williamson signed a $50,000 contract with the Oakland Athletics, but like many who dream of the big leagues, Williamson winds up dreaming about what he could have been. He spirals into mental illness and is twice acquitted of rape charges, and then charged with the murder of Debbie Carter. Grisham has a keen insight into the thinking and psychology of an athlete. Grisham's insight reminds me of "The Eighty Yard Run," Irwin Shaw's short story about a college football player who makes an eighty yard run once in practice and never did anything outstanding on the field again.

From Williamson's moment of glory as an All State baseball player who signed a big league contract, everything is downhill. Failing at baseball, failing in marriage and finally cut by the New York Yankees, the team he idolized as a boy, Williamson plunged into depression and alcoholism.

When interrogated by Ada police officers about the murder of Debbie Carter, Williamson gave a dream confession which leads to his arrest and trial. Williamson's only alibi witness is his mother who died before the trial. Prosecuted by Bill Peterson, District Attorney of Pontotoc County, Williamson is convicted.

Grisham takes us to death row where Williamson meets another innocent man who was wrongfully convicted of murder, Greg Wilhoit. Wilhoit and Williamson become friends. Sitting on death row, Williamson has no money to pay for a lawyer. The office of Oklahoma Indigent Defense assigned Mark Barrett who was successful in attacking the bite mark testimony used to convict Greg Wilhoit. Mark Barrett represented Williamson on the direct appeal and the conviction is affirmed by the Oklahoma Court of Criminal Appeals. The post conviction relief work is taken over by Janet Chesley.

Five days before Williamson's scheduled execution, United States

District Judge Frank Seay granted a stay based upon the habeas petition of Janice Chesley. In the petition, Janet Chesley makes a powerful argument for relief:

"This case is a bizarre one about a dream that turned into a nightmare for Ronald Keith Williamson. His arrest came nearly five years after the crime after Mr. Williamson's alibi witness was dead - and was based almost entirely on the 'confession,' related as a dream, of a seriously mentally ill man, Ron Williamson."

Grisham tells how Chesley's advocacy and choice of language in referring to the dream confession was so effective it saved Williamson's life and led to a 100-page opinion from United States District Judge Frank C. Seay granting a new trial. Grisham calls Judge Seay's opinion "a masterpiece of judicial analysis and reasoning."

For the conviction of Williamson the prosecution relied on the testimony of informants. One of the informants, Glen Gore, turned out to be the true killer. Another key prosecution witness was OSBI chemist Melvin Hett. Serving a life sentence for the murder of Debbie Carter along with Williamson was his co-defendant Dennis Fritz. Fritz asked his lawyers to contact Berry Scheck and Peter Neufeld of the Innocence Project.

In 1988, Melvin Hett testified that of the seventeen hairs found at the Debbie Carter crime scene, thirteen were microscopically consistent with the hair of Dennis Fritz, and four were microscopically consistent with the hair of Ron Williamson. Hett testified Glenn Gore was excluded in the hair comparisons. According to Grisham, Hett's expert testimony "was the only direct 'credible' proof the state offered against both Ron and Dennis, and had much to do with their convictions."

After DNA testing, it was revealed that none of the hairs came from either Fritz or Williamson and that one scalp hair found under the body and one pubic hair found in the bedding had been left by Glenn Gore. Most astonishingly the semen recovered from Debbie Carter during the autopsy was tested. Its source was Glen Gore.

Grisham's book is a snapshot of Oklahoma injustice. It is a look at one case and limited to one defendant, Ron Williamson. Dennis Fritz survived his ordeal and wrote "My Journey Toward Justice." Ron Williamson died of cirrhosis of the liver shortly after his release from death row.

We all owe John Grisham a debt of gratitude for telling this story. Let it serve as a reminder to all of us that we should never take for granted our duty as officers of the court to protect the innocent.

Recently District Attorney Bill Peterson filed a defamation lawsuit against John Grisham, Barry Scheck, Dennis Fritz, publishers of "The Innocent Man," and publishers of "My Journey Toward Justice." The case is pending in the United States District Court for the Eastern District of Oklahoma.

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Preserving Defective Glazing Claims in Automobile Litigation

The U. S. Court of Appeals for the Fifth Circuit held that federal motor vehicle safety regulations do not bar state law claims seeking to hold a car maker liable for failing to use advanced glazing in side windows. O'Hara v. General Motors Corp., 508 F.3d 753 (5th Cir. 2007) (pet. for rehearing en banc denied Dec. 19, 2007, mandate issued Dec. 27, 2007). This is the first and only federal appellate court to address the issue.

In the majority of vehicle rollover cases involving significant roof crush, the side windows, which are usually made of tempered glass, will shatter into thousands of tiny pieces, leaving ejection portals for occupants to be thrown from the interior of the vehicles usually resulting in catastrophic injuries or death. The use of alternative advanced glazing will hold the side windows in place and will prevent the occupants from being ejected from the vehicle and prevent their heads (or other appendages) from being permitted to extend outside of the window and make contact with the ground. These safer glazing alternatives include: laminated glass (two or more pieces of sheet, plate, or float glass bonded together by an intervening layer or layers of plastic material, which will crack or break under sufficient impact, but the pieces of glass tend to adhere to the plastic.); high penetration resistence "HPR" glass (multiple layers of laminated glass); and/or glass-plastic glazing (a laminate of one or more layers of glass and one or more layers of plastic in which a plastic surface of the glazing faces inward when the glazing is mounted in a vehicle, which, when broken at any point, the entire piece breaks into small pieces that have relatively dull edges as compared to those of broken pieces of annealed glass and are held in place by the layers of plastic).

This author has conducted a rollover crash test with a 1996 Volvo, retrofitted with laminated glass in the roll down side windows, with 4 dummies in the vehicle. While the rollover violently threw the dummies against the laminated glass, the lamination remained in place restraining the dummies from ejection.

In the O'Hara case, Chad and Michelle O'Hara sued GM after their nine year old daughter was severely injured when she was partially ejected from a 2004 Chevrolet Tahoe during a rollover accident. Claiming that GM could have prevented their daughter's injuries by installing advanced glazing (laminated glass, HPR, or other glass-plastic glazing), the O'Haras argued that the Tahoe's tempered glass windows were defective under state law. GM moved for summary judgment arguing that because it had complied with FMVSS 205 (the safety standard for glazing materials), the O'Haras' claims were preempted by federal law. GM argued under Geier v. American Honda Motor Co., 529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000), which found that FMVSS 208 (the safety standard for occupant crash protection–seatbelts and airbags) preempted a claim that the manufacturer was negligent in failing to equip an automobile with driver's side airbag, should similarly preempt the O'Haras' claim that the manufacturer was negligent in failing to install advanced glazing in the vehicle's side windows. In Geier, the Plaintiffs argued that

Honda should have installed airbags (or other passive restraints) instead of simply installing manual lap and shoulder belts. The Geier Court concluded that since Congress had given the manufacturers the ability to select from a variety of several passive restraint systems, to be gradually phased in over time, then the manufacturers could not be faulted for selecting one option over another option, as the federal policy behind the safety standard (FMVSS 208) would thereby be "frustrated".

The Texas district court agreed with GM's argument that the O'Haras' glazing claims were preempted under Geier and dismissed the case. On appeal, the Fifth Circuit Court of Appeals reversed. The Court first distinguished the holding in Geier by recognizing "that FMVSS 205 differs significantly from FMVSS 208 and does not establish a federal policy which would be frustrated by a state common law rule requiring advanced glazing in side windows", thus concluded "the O'Haras' suit is not preempted". Id. at 758. The Court also stated: "FMVSS 205's text and history are straightforward" and "(o)n its face, FMVSS 205 is a materials standard that sets a safety 'floor' to ensure that the glazing materials used by manufacturers meet certain basic requirements." Id. at 760. The Court expanded upon this point:

There is no language in the Glazing Materials Final Rule commentary indicating that NHTSA intended to "preserve the option" of using tempered glass in side windows, or that preserving this option would serve the safety goals of FMVSS 205. Both the text of FMVSS 205 and the Final Rule commentary support the conclusion that it is a minimum safety standard. Id. at 761.

After thoroughly analyzing the text and history of the glazing standard, the Court held:

Because the text and commentary on FMVSS 205 show that it is best understood as a minimum safety standard, we hold that the O'Haras' common law negligence and strict liability claims are not preempted. See Geier, 529 U.S. at 870. The marketing and failure to warn claims which are dependent on them are also not preempted.Id. at 763.

The Court thus rejected the preemption defense and allowed the case to proceed concluding:

We hold that FMVSS 205 does not preempt the O'Haras' common law tort claim against GM for failing to use advanced glazing in the side windows of the Tahoe. We hold that the O'Haras' marketing and failure to warn claims are also not preempted. Id. at 765.

The O'Hara case represents a huge legal victory in defective glazing cases and will likely help to turn the tide against the manufacturers offensive use of federal preemption against victims in automobile litigation.

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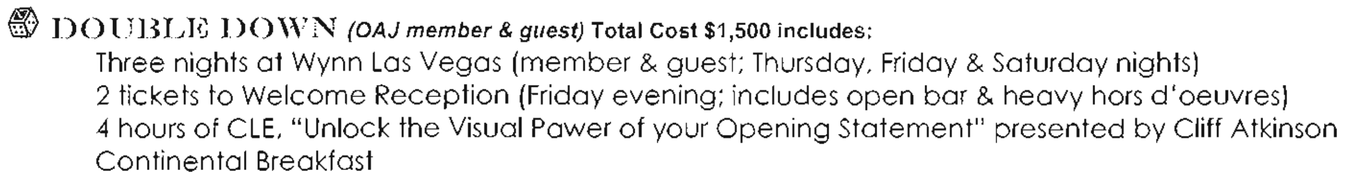

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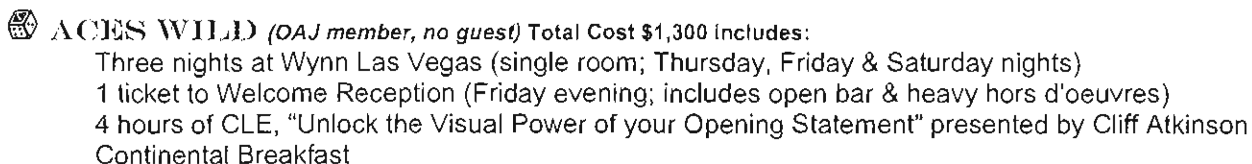

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Address: ____ City : ____________State : __

Zip:__________

Phone: ____________________ Fax: ________________ Email : ____________________

MEETING OPTIONS:

___$1,500 Double Down ____$1,300 Aces Wild

Name of Guest: ______________________ Total Amount Due: ____________

A **NON-REFUNDABLE DEPOSIT** of 50% is due to OAJ by April 1, 2008. The non-refundable balance is due May 1, 2008.

Method of Payment: ___Check Enclosed ___American Express ___Visa ____MC ____Discover

Cardholder name: __________________________ Card Number: ______________________

Exp. Date: _______

Amount of Initial Deposit: ____________ Amount to be charged May 1: ____________

Signature: ____

Return Registration Form & Payment to:

Oklahoma Association for Justice

323 NE 27th Street, Oklahoma City, OK 73105

Phone: 405-525-8044;

Fax: 405-528-2431

Register online @ WWW.OKFORJUSTICE.ORG

QUESTIONS? Contact Angela Little, OAJ Director of Operations -- alittle@okforjustice.org or visit WWW.OKFORJUSTICE.ORG

OKLAHOMA ASSOCIATION FOR JUSTICE

323 N.E. 27th Street, Oklahoma City, OK 73105 • 405/525-8044 • Fax 405/528-2431 • www.okforjustice.org

Membership Application *(please type or print)*

Name ______________________ OBA# ______________

Firm ______________________ Date of Bar Admission ______________

Address ______________________

City ______________________ State ________ Zip ______________

Phone ( ) ______________ Fax ( ) ______________ E-mail ______________

Name of Recruiting Member ______________________

Primary area(s) of practice

1. ______________ 2. ______________ 3. ______________

***Law Student Information**

Law School ______________________ Anticipated Graduation Year ______________

Membership Category	❐ Student $30	❐ Judicial $80	❐ Assoc. Member $80
Regular Membership:	❐ 1-2 yrs. $100	❐ 3-4 yrs. $200	❐ 5+ yrs. $500
Special Regular Membership:	❐ Advocate $1,000	❐ Sustaining $1,500	❐ President's Club $5,000 Minimum portion to OAJ $2,500
Remittance Preference	❐ Annually	❐ Quarterly	❐ Monthly
Method of Payment	❐ Bank Draft	❐ Credit Card	❐ Invoice

Pre-Authorized Payment Agreement *(Please complete preauthorization for Automatic Bank Drafts and Credit Card Payments)*

Automatic Bank Draft

Member/Firm Name ______________________ SS# or Federal ID# ______________

I (We) hereby authorize the Oklahoma Association forJustice, hereinafter called COMPANY, to initiate automatic withdraw entries to my/our: *(Check one of the following):* ❐ **Checking Account** ❐ **Savings Account**

Depository Name ______________________ Branch ______________

City ______________________ State ________ Zip ______________

Transit/ABA Routing # ______________________ Account # ______________

Signature ______________________ Date ______________

This authority is to remain in full force and effect until OAJ and DEPOSITORY has received written notification from me (or either of us) of its termination in such time and manner as to afford OAJ and DEPOSITORY a reasonable opportunity to act on it. I acknowledge that the origination of ACH transactions to my account(s) must comply with provisions of U.S. law.

I hereby direct and authorize the above named to transfer from my account as directed above, beginning (Month) ______________, 2008.

Credit Card Agreement ❐ VISA ❐ MasterCard ❐ Discover ❐ AMEX *(a 3% service charge will be applied to credit card charges.)*

Cardholder Name ______________________

Card # ______________________ Exp. Date ______________

Signature ______________________ Date ______________

I hereby direct and authorize the above named to charge by credit card as directed above, beginning (Month) ______________, 2008.

No person shall be eligible for, or continue his/her membership in this association who, for the most part, represents the defense of personal injury litigation.

THE JAMES STREET GROUP

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Robert Foster

800-765-1660

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OAJ
323 NE 27th Street
Oklahoma City, OK 73105