

# DIGEST OF INSURANCE LAW

## OKLAHOMA

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Tulsa, Oklahoma

### CIVIL JUDICIAL SYSTEM

#### Courts of Original Jurisdiction

District Courts. The District Court is the only trial court under Oklahoma judicial system. Original jurisdiction of district courts extends to all cases, probate, civil and criminal, except where exclusive jurisdiction is by constitution or law conferred on some other court. OKLA. CONST. art. 7, § 7. There is at least one District Judge for each of Oklahoma's 26 judicial districts and at least one Associate District Judge for each county. OKLA. STAT. tit. 20, §§ 92.1-92.27 (1980). Special Judges with jurisdiction to hear matters involving \$10,000 or less are appointed by District Judges. OKLA. STAT. tit. 20, §§ 122, 123 (2006). District Judges and Associate District Judges are elected from their respective areas. It is the practice for the District Court in more populated counties to be divided into divisions for probate, juvenile, criminal, and domestic relations matters.

District Courts have a Small Claims Division where procedure is greatly simplified. Small claims procedure is not available in controversies exceeding \$6,000. OKLA. STAT. tit. 12, § 1751 *et seq.*

Municipal Courts. There are various Municipal Courts created for enforcement of municipal ordinances. Municipal Courts do not have any civil jurisdiction. OKLA. CONST. art. 7, § 1.

#### Appellate Courts

Court of Civil Appeals. The Oklahoma Court of Civil Appeals is intermediate appellate court composed of twelve judges and separated into four divisions of three judges each. Two divisions sit in Oklahoma City and two in Tulsa. All appeals from trial courts are taken directly to the Oklahoma Supreme Court. OKLA. STAT. tit. 20, § 30.1-30.2 (1996). The Supreme Court can assign the appeal to the Court of Appeals. Decisions of the Court of Appeals are final unless reviewed by Supreme Court under writ of certiorari. *See* Rules on Practice and Procedure in the Court of Appeals and on Certiorari to that Court, OKLA. STAT. tit. 20, § 30.1 (1996).

Supreme Court. The Oklahoma Supreme Court is highest civil appellate court. The Supreme Court has appellate jurisdiction of cases from district courts and has original jurisdiction to impose superintending control of district courts and to issue remedial writs as provided by law, and to hear and determine same. The Supreme Court has jurisdiction over state commissions, boards and agencies. The Supreme Court is composed of nine Justices and sits in Oklahoma City. *See* OKLA. CONST. art. 7, §§ 1-6; OKLA. STAT. tit. 20, § 1 (1917).

Court of Criminal Appeals. The Oklahoma Court of Criminal Appeals has exclusive appellate jurisdiction in all criminal cases. OKLA. STAT. tit. 20, § 31 *et seq.* The Court sits at Oklahoma City and has five judges, three of whom constitute a quorum. The concurrence of three judges is necessary to render a decision.

### LAW

#### Abbreviations

F. Supp. – Federal Supplement.  
F.2d – Federal Reporter, Second Series.  
F.3d – Federal Reporter, Third Series.  
O.B.J. – Oklahoma Bar Journal.  
Okla., OK or OK CIV APP – Oklahoma Reports.  
OKLA. STAT. tit. – Oklahoma Statutes.  
P. – Pacific Reporter.  
P.2d – Pacific Reporter, Second Series.  
S.L. – Sessions Laws.

### ACCIDENT AND HEALTH INSURANCE

See “ACCIDENTAL MEANS”; “DISABILITY.”

Contract Law. Terms / Cancellation / Rescission / Renewal.

For required provisions for individual accident and health policies, *see* OKLA. STAT. tit. 36, §§ 4404-4406.

Each renewal constitutes separate contract for specific period. *Bowling v. Aetna Life Ins.*, 1936 OK 196, 55 P.2d 1023.



Death benefits under group accident policy. Court held that certificate given to individuals that provided broader coverage than the group policy itself controls, and such individual certificates are binding on insurer. *Martin v. Okla. Farmers Union*, 1981 OK 34, 622 P.2d 1078.

Despite failure to include two-year incontestability clause in policy pursuant to statute requirements, insurer still precluded from asserting fraud after two years. *Bankers Sec. Life Ins. v. Killingsworth*, 1955 OK 166, 284 P.2d 734.

In action seeking recovery on group life insurance policy, incontestability clause precludes defense that deceased is not employee. Defenses, excluded from operation of incontestability clause under OKLA. STAT. tit. 36, § 4015 (1957), are limited to exclusions from or restrictions on coverage after it is originally provided. *Hulme v. Springfield Life Ins., Inc.*, 1977 OK 108, 565 P.2d 666.

Representations in Applications. Misrepresentations in application will bar recovery if fraudulent or if material to risk or if insurer would not have issued policy if truth had been known, but the insurer must show intent to deceive by policy holder. OKLA. STAT. tit. 36, § 3609 (1957); *Hays v. Jackson Nat'l Life Ins.*, 105 F.3d 583 (10th Cir. 1997).

Insurer's liability for failure to act in good faith and deal fairly with its insured does not extend to third parties making claims against insurer; insurer has no actionable duty of good faith with regard to strangers to insurance contract. *McWhirter v. Fire Ins. Exch. Inc.*, 1994 OK 93, 878 P.2d 1056. An insurer's duty of good faith does not flow to the third-party in the absence of a contractual or statutory relationship. *Gianfillippo v. Northland Cas. Co.*, 1993 OK 125, 861 P.2d 308.

Disease Induced by Accident. No recovery on accident policy, where disability is caused by concurrence of bodily injury and pre-existing disease. *Vowell v. Great Am. Ins.*, 1966 OK 229, 428 P.2d 251.

An insured's "sickness" originates when it first becomes manifested by a symptom which an expert can diagnose with measurable accuracy. *Richards v. Am. Sec. Life Ins.*, 1956 OK 300, 303 P.2d 1110.

Excepted Risks. For required provisions for individual accident and health policies, see OKLA. STAT. tit. 36, §§ 4404-4406. Where insured was shot by another who mistook his identity, his estate could recover although policy limited liability in case of "injury intentionally inflicted upon insured by another person." *Nat'l Life & Accid. Ins. v. May*, 1934 OK 719, 39 P.2d 107. Insured intentionally killed by another not covered by

policy excluding liability for death resulting from such act. *Lincoln Health & Accid. Ins. v. Cooper*, 1935 OK 940, 52 P.2d 1049. To bring insured's death within "violation of law" clause, insurer must prove causal connection between violation and death. Violation need not have been proximate cause of death. *Waters v. Nat'l Life & Accid. Ins.*, 156 F.2d 470 (10th Cir. 1946).

Intoxication prevents recovery under policy excluding liability for injury to insured while under influence of liquor, though intoxicated condition did not contribute to injury. *Order of United Comm. Travelers v. Greer*, 43 F.2d 499 (10th Cir. 1930).

Notice and Proof of Loss. Requirement of immediate notice of death in case of accidental death means notice to company within reasonable time, under circumstances. *Provident Life & Accid. Ins. v. Henson*, 1940 OK 139, 101 P.2d 838.

Damages. Double Indemnity. See *Am. Fid. Co. v. Echols*, 1916 OK 280, 155 P. 1160 (recovery was had on accident insurance policy containing double indemnity clause).

Bad Faith. In bad faith action against insurer, insured must show culpability at level higher than negligence but not as high as recklessness; recklessness is required to receive punitive damages. *Badillo v. Mid Century Ins. Co.*, 2005 OK 48, 121 P.3d 1080.

## ACCIDENTAL MEANS

Definition. An accident is an event from unknown cause, or an unusual or unexpected event from known cause. *St. Louis Mining & Smelting Co. v. State Indust. Comm.*, 1925 OK 728, 241 P. 170. Where one who does not voluntarily subject himself to intense heat suffers from sunstroke, it is accident. *Provident Life & Accid. Ins. v. Green*, 1935 OK 695, 46 P.2d 372. Injury inflicted upon insured is accidental although intentionally inflicted by third person if it is unprovoked and unintentional on part of insured. *Cont'l Cas. Co. v. Goodwin*, 1938 OK 190, 77 P.2d 742; see *Willard v. Kelley*, 1990 OK 127, 803 P.2d 1124. Burden upon plaintiff to show death resulted from external, violent and accidental means. *S. Sur. Co. v. Jones*, 57 F.2d 851 (10th Cir. 1932). Where injury is external and violent, means of death presumed accidental. *Fed. Life Ins. v. Maples*, 1951 OK 45, 228 P.2d 363. Death from infection or disease following accident and attributable thereto, held caused by accidental means. *Cent. States Life Ins. v. Jordan*, 1939 OK 13, 86 P.2d 640. Death caused by unanticipated result of intentional act is produced by accidental means. *Mid-Continent Life Ins. v. Dunnington*, 1936 OK 493, 60 P.2d 1047. Injuries not reasonably anticipated, although inflicted while insured engaged in



quarreling or fighting, are covered unless excepted by policy. *Nat'l Life & Accid. Ins. v. Reese*, 1939 OK 452, 96 P.2d 1058. Death from automobile collision presumed to have been caused by accidental means if it was unusual, unexpected, and unintentional by the insured. *Prudential Ins. v. Tidwell*, 1933 OK 102, 21 P.2d 28. Exclusionary clause in accidental death benefit supplement of life insurance policy excepting "homicide, intentional or unintentional," carries with it requirement that act, whether intentional or unintentional, which results in death of insured be culpable and unlawful in nature. *Fehring v. Universal Fid. Life Ins.*, 1986 OK 39, 721 P.2d 796.

Liability policy defining "accident" to include assault and battery not committed by or at direction of insured covered partner where co-partner committed assault and battery on patron, despite clause making partner additional insured. *Employer's Surplus Lines v. Stone, Okla.*, 1963 OK 279, 388 P.2d 295.

### ADJUSTERS

Definition. "Insurance Adjuster" means any person, firm, association, company or legal entity who investigates claims, adjusts losses, negotiates claim settlements, or performs incidental duties arising under insurance contracts on behalf of an insurer. OKLA. STAT. tit. 36, § 6202(3) (2011).

Licensing Requirements. See Insurance Adjusters Licensing Act, OKLA. STAT. tit. 36, § 6201, *et seq.*

### AGE

See "AUTOMOBILES; "LIABILITY INSURANCE"; "NEGLIGENCE."

In general - Age of Majority - 18. See OKLA. STAT. tit. 10, § 91 (1973).

### AGENTS AND BROKERS

Definition. Insurance producer means a person required to be licensed under the laws of Oklahoma to sell, solicit or negotiate insurance. OKLA. STAT. tit. 36, §1435.2(7) (2001). A producer is not an agent unless so appointed. *Id.* at § 1435.15(A).

Soliciting agent has authority only to solicit insurance, submit applications to company, and perform such acts as are incidental to that power. *Turner v. Supreme Lodge K.P.*, 1933 OK 244, 27 P.2d 612. Where insured has knowledge of limitation of agent's authority, an alleged oral representation by agent does not bind insurer. *Travelers Indem. Co. v. Collier*, 1951 OK 291, 237 P.2d 153. One who contracts with agent with knowledge of agents limited authority cannot rely on acts with agent in

excess of that authority. *Hartford Fire Ins. v. McAvoy*, 1935 OK 933, 57 P.2d 242. Soliciting agent is without authority to waive payment of first premium. *Atlas Life Ins. v. Schrimsher*, 1937 OK 117, 66 P.2d 944. However, policy writing agent may make binding oral insurance agreement. *Metro. Cas. Ins. v. Heard*, 1936 OK 585, 63 P.2d 720. A general agent has authority to make new oral contracts with insured and substitute it for existing policy, thus binding company to increase in policy coverage. *Federated Mut. Implement & Hardware Ins. v. Fairfax Equip. Co.*, 261 F.2d 207 (10th Cir. 1958).

Agent Represents Insurer. OKLA. STAT. tit. 36, § 1435.3(A) (2001) provides that every insurance producer, customer service representative, or limited lines producer who solicits or negotiates an application for insurance of any kind shall, in any controversy between the insured and the insurer, be regarded as representing the insurer. Where an agent is involved in multi-party transaction, and where there are several competing claimants of whom he has timely knowledge, agent acts at his peril when paying out proceeds without interpleading funds, but agent will not be held liable in tort. *Shebester v. Triple Crown Insurers*, 1992 OK 20, 826 P.2d 603.

Fraud by Agent. Fire insurance policies void where agent wrote policy for corporation in which he was stockholder and officer without knowledge of insurance company. *Great Am. Ins. v. Farmers' Warehouse Co.*, 1923 OK 417, 217 P. 208. Notice to agent is not notice to principal where agent interested adversely to his principal or is engaged in scheme to defraud it. *Okla. Aid Ass'n v. Pecinosky*, 1934 OK 37, 30 P.2d 167.

Knowledge of Agent. Soliciting agent of insurer is insurer's agent in taking applications, with power and authority as to such applications, and acts performed or knowledge received and acted upon by him in connection with applications are binding on insurer, in absence of fraud or collusion between agent and applicant. *Lumbermen's Mut. Cas. Co. v. Iowa Home Mut. Cas. Co.*, 1965 OK 87, 405 P.2d 160.

Liability of Agent. Cancellation or reduction of policy. Insurance agent ordered to cancel policy has duty to exercise reasonable diligence to execute order, and is liable to insurer for proximate damages resulting to insurer from his neglect to do so. *Wash. v. Mechanics & Traders Ins.*, 1935 OK 836, 50 P.2d 621. Failure of insurance company to immediately cancel agency contract, require accounting and cancel policies issued by agent, on insurance agent's default in payment of premiums collected, held not to discharge surety on insurance agents' bond, where bond specified agency might be continued after such breach without affecting surety's liability. *Springfield Fire & Marine Ins. v. Douglas*, 1935 OK 957, 49 P.2d 1073. Where insurer wired agent

on April 9th to cancel fire policies which provided for cancellation upon five days' notice, agent who received wire following day, but failed to notify insured of cancellation, held not liable to insurer which paid on policies for loss sustained by fire on April 14th. *Am. Ins. v. Blake*, 1935 OK 843, 49 P.2d 506. Insurance agency contract and bond held to require agent to cancel policies as requested by insurer without expense to the latter. *Capps v. Ins. Co. of N. Am.*, 1931 OK 642, 6 P.2d 1041.

**Failure to Procure Policy.** Oklahoma at least tacitly recognizes tort liability of an insurance agent for failure to procure requested insurance. *A-Ok. Const., Inc. v. McEldowney, McWilliams, Deardeuff & Journey, Inc.*, 1992 OK CIV APP 66, 844 P.2d 182. Insurance company having solicited and obtained application for insurance and received premium exacted therefore, must pass upon application within a reasonable time denying insurance or writing and delivering policy to applicant, and is liable for damage occasioned by unreasonable delay in acting upon application or negligence of its agent in failing to communicate its rejection thereof to applicant within reasonable time. *St. Paul Fire & Marine Ins. v. Creach*, 1947 OK 341, 186 P.2d 641.

**Licensing and Regulation.** See OKLA. STAT. tit. 36, § 1435.1 *et seq.* for Oklahoma's Producer Licensing Act.

### ARBITRATION

Oklahoma has adopted the Uniform Arbitration Act. See OKLA. STAT. tit. 12, § 1851 (2006).

### ATTORNEYS

**Appointment and Authority.** Attorney-client relationship is one of agency and as such, attorney is empowered with real and apparent authority to bind client within scope of employment, absent proof that a third party had actual notice of limitation on that apparent authority. *Crisp, Courtemanche, Meador & Assoc. v. Medler*, 1983 OK CIV APP 11, 663 P.2d 388. An attorney employed to prosecute an action has no general or implied authority to compromise or dismiss the action with prejudice or to stipulate in such manner as to surrender substantial rights. *Whitebird v. Eagle-Picher Co.*, 258 F. Supp. 308 (N.D. Okla. 1966).

**Conflict of Interest.** See Oklahoma Rules of Professional Conduct, Rules 1.7 - 1.9; OKLA. STAT. tit. 5, ch. 1, App. 3-A (2008).

**Legal Malpractice.** Action for legal malpractice, though based on employment contract, is a tort action governed by two year statute of limitations, which begins to run from date plaintiff should have known of the act complained of; however, period may be tolled by concealment by attorney of the negligent acts which

have injured client. *Funnell v. Jones*, 1985 OK 73, 737 P.2d 105.

**Fees.** Attorney may contract for contingent fee up to 50% of net recovery. OKLA. STAT. tit. 5, § 7 (1953). Standards to be followed in awarding reasonable attorneys' fees set out in *State ex rel. Burk v. City of Oklahoma City*, 1979 OK 115, 598 P.2d 659; See OKLA. STAT. tit. 12, §§ 928-41 (1968) for statutes setting forth situations where attorneys' fees may be recovered.

### AUTOMOBILES

See "LIABILITY INSURANCE"; "NEGLIGENCE"; "NO-FAULT."

**Age.** Minimum age for license is 16 years. See OKLA. STAT. tit. 47, §§ 6-103, 6-105 (2010). In operation of automobile, minor is required to exercise same standard of care as adult. *Baxter v. Fugett*, 1967 OK 72, 425 P.2d 462.

**Agency.** Owners are liable if operator was his agent or servant. *Whitehorn v. Mosier*, 1925 OK 794, 245 P. 553 (1926). Owner not liable for negligence of his servant unless such servant was acting within scope of his employment at time of accident. *P. & S. Taxi & Baggage Co. v. Cameron*, 1938 OK 391, 80 P.2d 618. (This rule is not explicitly stated in the opinion. As defense, defendant did allege their employee was not acting as their agent at time of accident and court found this issue was properly submitted to jury. However, the case does not explicitly state rule cited in the document.)

**Comparative/Contributory Negligence.** Oklahoma's comparative negligence statute, OKLA. STAT. tit. 23, § 13 (1979), provides: In all actions hereafter brought, whether arising before or after the effective date of this act, for negligence resulting in personal injuries or wrongful death, or injury to property, contributory negligence shall not bar recovery, unless any negligence of the person so injured, damaged or killed, is of greater degree than any negligence of the person, firm or corporation causing such damage, or unless any negligence of the person so injured, damaged or killed, is of greater degree than the combined negligence of any persons, firms or corporations causing such damage. Additionally, OKLA. STAT. tit. 23, § 14 (1979) provides: Where such contributory negligence is shown on the part of the person injured, damaged or killed, the amount of the recovery shall be diminished in proportion to such person's contributory negligence.

**Compulsory Liability Insurance Coverage.** Limits are 25,000/50,000/25,000. OKLA. STAT. tit. 47, § 7-103 (2009).

Family Purpose Doctrine. Not recognized in Oklahoma. *Gallagher v. Holcomb*, 1935 OK 456, 44 P.2d 44; *Schmitt v. Kier*, 1925 OK 350, 238 P. 410. However, owner who permits her car to be driven by her minor son, known to her to be incompetent driver, is chargeable with negligent entrustment. *Coker v. Moose*, 1937 OK 67, 68 P.2d 504.

Guest Cases. Guest in car is not guilty of contributory negligence if he had no control over its operation. *Aydelotte & Young v. Sanders*, 1938 OK 22, 77 P.2d 50. However, guest has no duty to warn driver of impending danger where if warned driver would not have sufficient time to act, or, if driver is warned by another guest. *Ellis v. Race*, 1965 OK 13, 398 P.2d 805. Automobile driver sued by passenger to recover personal injuries sustained in accident is entitled to credit, in reduction of damages, for payments made to passenger under medical payments clause in driver's automobile liability insurance policy. *Overturff v. Hart*, 1975 OK 13, 531 P.2d 1035.

Minors may recover against parent for personal injuries suffered as a result of the negligence of the parent up to the limits of available insurance. *Unah v. Martin*, 1984 OK 2, 676 P.2d 1366; *but cf. Turnbull v. Missouri Pac. R. Co.*, 1992 WL 570984 (W.D. Okla. Jan. 21, 1992) (where both parent and child are deceased, there is no basis for limitation based on public policy, therefore, this limitation does not apply). In contrast, the Supreme Court refused to extend abrogation of parental immunity to cases involving negligent supervision by parents in *Sixkiller v. Summers*, 1984 OK 14, 680 P.2d 360; *Nation v. State Farm Ins.*, 1994 OK 54, 880 P.2d 877. Insurance company may limit liability for family members through household exclusion clause only if it expressly provides for payment of the statutory minimum to injured family member. *Hartline v. Hartline*, 2001 OK 15, 39 P.3d 765.

Imputed Negligence/Joint Enterprise. Proof of ownership of automobile, without more, is not sufficient to impute negligence of driver to owner. *Gilbert v. Walker*, 1960 OK 218, 356 P.2d 346. Owners are not liable for the driver's negligence unless at the time of injury the driver was the owner's agent or servant acting within the scope of employment, *Heard v. McDonald*, 1935 OK 155, 43 P.2d 1026, or owner negligently entrusts vehicle to the driver. The test for agency is whether the owner has a right to control and direct driver's conduct. One who drives owner's car at owner's request and for his purposes is owner's servant or agent. *Cartwright v. Ries*, 1954 OK 141, 270 P.2d 957. Owner of automobile is not liable for negligent entrustment unless owner knew or should have known driver was incompetent or reckless. *Barger v. Mizel*, 1967 OK 38, 424 P.2d 41; *Green v. Harris*, 2003 OK 55, 70 P.3d 866. Employer held liable for employee's negligence while using

his own car on mission for employer. *Bready v. Tipton*, 1965 OK 158, 407 P.2d 194. Contributory negligence of a driver is not imputed to passengers unless there was a principal and agent or joint enterprise relationship between the passenger and driver. *Reeves v. Harmon*, 1970 OK 173, 475 P.2d 400; *Banta v. Hestand*, 1938 OK 23, 75 P.2d 415.

Ownership/Title. Oklahoma Vehicle and License Registration Act, OKLA. STAT. tit. 47, § 1101, *et seq.*

Pedestrians. It is the duty of the driver of a motor vehicle to use ordinary care to prevent injury to themselves or other persons. *Roberts v. Cain*, 1961 OK 231, 365 P.2d 1014.

No-Fault. Not applicable in Oklahoma.

Motor-driven Cycles. Defined, OKLA. STAT. tit. 47, § 1-136 (2004); License fee, OKLA. STAT. tit. 47, § 1114.1 (1990).

Seat Belts. Mandatory Seatbelt Use in Motor Vehicles, OKLA. STAT. tit. 47, § 12-416, *et seq.*; OKLA. STAT. tit. 47, § 12-413 (1965). Evidence of non-use not permitted to show negligence.

Service of Process. Service on non-resident motorists is subject to same rules and procedures as serving any other defendant in a civil suit. OKLA. STAT. tit. 12, §§ 2004, 2005.

Speed Limit. *See* OKLA. STAT. tit. 47, § 11-801 (2008), for applicable speed limits.

Trailers/Weight Limits. For various weight limits and requirements, *see* OKLA. STAT. tit. 47, § 14-101 (2009).

Uninsured/Underinsured. Oklahoma law does not place an affirmative duty upon insurers to provide an explanation of uninsured motorist coverage to named insureds as an indispensable precondition for a statutorily effective rejection. All that is required by OKLA. STAT. tit. 36, § 3636(G) (2009) for an effective rejection is a writing signed by the named insured. *Silver v. Slusher*, 1988 OK 53, 770 P.2d 878. The statute prescribes the required form to be used by insurers when offering UM coverage. OKLA. STAT. tit. 36, § 3636 (2009).

An insurance carrier is estopped from asserting a written rejection of uninsured motorist coverage which is signed only by the rental agency proprietor as a bar to a claim for uninsured motorist coverage benefits by ultimate insured. *Moon v. Guarantee Ins.*, 1988 OK 85, 764 P.2d 1331. The rights of recovery under the Uninsured Motorist Act are governed by the statute in effect on the date of issuance or last renewal against which an uninsured motorist claim is made. *May v. Nat'l Union Fire. Ins.*, 1996 OK 52, 918 P.2d 43. When determining

whether tortfeasor's vehicle is uninsured, the UM carrier must evaluate its insured's injuries and compare the per person limit of a tortfeasor's bodily injury liability insurance coverage to the injured insured's damages. *Cofer v. Morton*, 1989 OK 159, 784 P.2d 67. The insurer has a duty, when the pre-conditions to coverage exist, to pay the entire amount of the injured insured's damages, beginning with the first dollar of damages, up to the policy limits without regard to other insurance. *Burch v. Allstate Ins.*, 1998 OK 129, 977 P.2d 1057. The *Burch* case disapproved certain language in earlier cases stating that a UM insurer owed only the amount of the claim in excess of available liability insurance proceeds. The UM carrier cannot reduce its payment by the amount of available liability coverage, *id.*, and cannot require exhaustion of available liability coverages. *Buzzard v. Farmers Ins.*, 1991 OK 127, 824 P.2d 1105. The UM insurer also cannot reduce its coverage limits by amounts of available liability insurance. *Barnes v. Okla. Farm Bureau*, 2000 OK 55, 11 P.3d 162.

Insurance policy provisions that exclude from uninsured motorist coverage either named insured, residents of insured's household, or insured automobile violate public policy underlying Oklahoma's uninsured motorist coverage and are void. *State Farm Mut. Auto Ins. v. Wendt*, 1985 OK 75, 708 P.2d 581. Mandatory uninsured motorist coverage required under OKLA. STAT. tit. 36, § 3636 (2009) does not apply to umbrella liability policy designed to provide excess liability coverage to insured. *Moser v. Liberty Mut. Ins.*, 1986 OK 78, 731 P.2d 406.

"Stacked" limits of liability are to be calculated by multiplying per person limit of liability of insured's uninsured motorist coverage by number of vehicles insured under the policy for which a separate premium is charged. *Cofer v. Morton*, 1989 OK 159, 784 P.2d 67. Stacking of uninsured motorist policies is allowed to the extent of premiums paid for each vehicle. *Wilson v. Allstate Ins.*, 1996 OK 22, 912 P.2d 345. Occupants of uninsured motor vehicle involved in accident, who are entitled to uninsured motorist coverage solely because of their status as passengers, may not stack uninsured motorist coverage under separate policies purchased by owner of vehicle for non-involved vehicle or vehicles unless those passengers also qualify as insureds under those separate policies. *Babcock v. Adkins*, 1984 OK 84, 695 P.2d 1340. In Oklahoma, the named insured (class I) is allowed to stack insurance policies and receive coverage under the policies regardless of the vehicle or the circumstances; however, occupant (class II) covered under a policy solely because of the policy provision covering permissive use or occupancy, may not stack uninsured motorist coverage. *Rogers v. Goad*, 1987 OK 59, 739 P.2d 519. An employee, insured because he was driving a vehicle under a business fleet policy, cannot

stack uninsured motorist coverage for every vehicle covered under his employer's policy. However, he can recover the uninsured motorist coverage of his personal automobile insurance policy with that of his employer's insurance for the single vehicle in which he was injured. *Stanton v. Am. Mut. Liab. Ins.*, 1987 OK 118, 747 P.2d 945. Stacking of uninsured motorist coverage is not required under Oklahoma law when more than one vehicle is insured by the insurance policy but only a premium for one vehicle is collected on the policy, for uninsured motorist coverage. *Scott v. Cimarron Ins.*, 1989 OK 26, 774 P.2d 456. Only Class I insureds may "stack" or aggregate the uninsured motorist coverage on a fleet of commercial vehicles covered by a single insurance policy. Class II insureds are only entitled to single vehicle coverage. *Aetna Cas. & Sur. Co. v. Craig*, 1989 OK 43, 771 P.2d 212.

Loss of spousal consortium is not a separate "bodily injury" from the injured spouse's injuries insofar as it relates to the "each accident" limits of an uninsured motorist insurance contract. Therefore, claim by spouse who was not involved in automobile accident was payable under "each person" policy limit rather than "each accident" policy limit. *Littlefield v. State Farm Fire & Cas. Co.*, 1993 OK 102, 857 P.2d 65.

The UM coverage runs with the person, not the automobile. *Rose v. State Farm Mut. Auto. Ins.*, 1991 OK CIV APP 124, 821 P.2d 1077.

Personal representative of deceased covered as a "family member" under a UM policy is limited to the "per person" amount in the insurance policy. Neither the number of survivors, nor the wrongful death statute, OKLA. STAT. tit. 12, § 1053(A) (2005), expands the damages recoverable under the insurance policy. *White v. Equity Fire & Cas. Co.*, 1991 OK CIV APP 131, 823 P.2d 953.

Deceased, who was killed by uninsured motorist, and who was stepbrother of named insured, whose father was married to stepbrother's mother, and who lived in same household as stepbrother, was covered as a "family member" under stepbrother's UM policy. *Flitton v. Equity Fire & Cas. Co.*, 1992 OK 2, 824 P.2d 1132. Group health insurer is not entitled to reimbursement from amounts that insured collected under the uninsured motorist provision of her automobile policy, *Provident Life & Accid. Ins. v. Ridenour*, 1992 OK CIV APP 93, 838 P.2d 530, unless "uninsured/underinsured motorist coverage" is specifically referenced in the plan. *Sollars v. Healthcare Recoveries*, 2006 OK CIV APP 140, 147 P.3d 289, 295. Provision in automobile policy excluding the insured vehicle from definition of "underinsured vehicle" is unenforceable as against public policy. *Lewis v. State Farm Mut. Auto. Ins.*, 1992 OK CIV APP 106, 838

P.2d 535, *but see*, *Bernal v. Charter County Mutual Ins. Co.*, 209 OK 28, 209 P.3d 309. Payment of punitive damages from uninsured motorist insurance coverage contravenes the public policy of Oklahoma. *Aetna Cas. & Sure. Co. v. Craig*, 1989 OK 43, 771 P.2d 212. After an insurer denies a claim for uninsured motorist coverage, it is estopped from later invoking the defense of a loss of subrogation rights when insured collects from tortfeasor's liability insurance. *Sexton v. Cont'l Cas. Co.*, 1991 OK 84, 816 P.2d 1135; *Buzzard v. Farmers Ins.*, 1991 OK 127, 824 P.2d 1105.

Because uninsured motorist carrier is contractually obligated to pay damages, carrier is further liable under OKLA. STAT. tit. 23, § 22 (1910) and OKLA. STAT. tit. 12, § 727 (2004) for prejudgment interest, but only for that part of prejudgment interest attributable to non-payment of that obligation, i.e., prejudgment interest on damages payable by the carrier under the uninsured motorist provision of the insured's policy. *Mellenberger v. Sweeney*, 1990 OK CIV APP 85, 800 P.2d 747 (1990). Pre-judgment interest is proper pursuant to OKLA. STAT. tit. 12, § 727(A)(2) (2004) under an U.M. endorsement. *Torres v. Kansas City Fire & Marine Ins.*, 1993 OK 32, 849 P.2d 407. However, interest is proper only up to limits of insurance, absent showing of bad faith by insurer. *Carney v. State Farm Mut. Auto Ins.*, 1994 OK 72, 877 P.2d 1113.

Intentional acts of an uninsured tortfeasor causing injury to an insured may be considered an "accident" for purposes of uninsured motorist protection when viewed from the viewpoint of the injured person. *Stucky v. Long*, 1989 OK CIV APP 75, 783 P.2d 500. However, injuries must arise out of the operation, maintenance or use of an uninsured motor vehicle establishing causal connection between the uninsured motor vehicle and the plaintiff's injuries. Oklahoma Uninsured Motorist Statute, OKLA. STAT. tit. 36, § 3636 (2009).

### AVIATION

Engaging in, excepted risk. Where insured was passenger for purpose of obtaining information in preparation for application for insurance on airplane, insured was held to be "participating in aeronautics" within exception in policy. *Head v. N.Y. Life Ins.*, 43 F.2d 517 (10th Cir. 1930) (applying New York law).

Limits to Liability. Airworthiness certificate exclusion is not contrary to Oklahoma public policy; insurer need not prove link between crash and the absence of certificate. *Avemco Ins. v. White*, 1992 OK 147, 841 P.2d 588.

### BROKERS

See "AGENTS AND BROKERS."

### CANCELLATION

See "ACCIDENT AND HEALTH INSURANCE, Contracts"; "LIABILITY INSURANCE" and "FIRE INSURANCE, Contracts."

Attempted notice of cancellation of workers' compensation insurance not effective unless received. *Rasberry v. R.O. Knost & Sons*, 1930 OK 459, 293 P. 778. Where policy provides for cancellation at any time on request of insured, unequivocal request by insured for cancellation is sufficient to terminate policy. *Atlantic Fire Ins. v. Smith*, 1938 OK 211, 80 P.2d 216. Physical surrender of policy not necessary to effect valid cancellation. *Great Am. Life Ins. v. Stephenson*, 1936 OK 51, 55 P.2d 56. Authorized agent for company cannot change companies for insured. *Ins. Co. of Am. v. Burton*, 1930 OK 496, 294 P. 796. Mere physical surrender of policy does not terminate contract. Effect of surrender depends on parties' intent. *Farris v. Comm'l Union Fire Ins.*, 1936 OK 111, 55 P.2d 432. If company wrongfully declares forfeiture of policy of member and gives notice thereof, member excused from further performance and may treat contract as terminated and sue for damages. *Lincoln Health & Accid. Ins. v. Coslow*, 1932 OK 525, 12 P.2d 875. Where insurance company wrongfully repudiates health and accident policy, plaintiff may recover for all benefits that have accrued under contract up to time of filing suit. *Mid-Continent Life Ins. v. Christian*, 1932 OK 280, 23 P.2d 672. Auto liability policy held canceled by mailing of notice to insured's address as stated in policy where notice returned undelivered marked "Unknown," particularly if insured is in arrears in payments. *Midwestern Ins. v. Cathey*, 1953 OK 169, 262 P.2d 434.

Where insurance agent advised insured in writing of new policy, but had no authority from insured to cancel policy, attempted cancellation of policy by agent with insurance company did not give company right to cancel flat without checking with insured or one authorized to approve immediate cancellation. *Western Cas. & Sur. Co. v. Lund*, 132 F. Supp. 867 (W.D. Okla. 1955). Policy of insurance not voided by misrepresentation, unless false statements relied on. Burden on insurer to plead and prove facts. *Adams v. Nat'l Cas. Co.*, 1957 OK 6, 307 P.2d 542.

Insurance contracts can be reformed only upon a clear showing of fraud, inequitable conduct, misrepresentation or mutual mistake of fact. Equity and good conscience are not applicable in a contracts case without

such a showing. *Roll Form Prod., Inc. v. State Ins. Fund*, 1987 OK CIV APP 2, 733 P.2d 426.

### CONSTRUCTION OF POLICY

**Ambiguity of Terms.** Insurance policy, like every other contract, should be construed according to its terms where it is not ambiguous. *Carraco Oil Co. v. Mid-Continent Cas. Co.*, 1971 OK 50, 484 P.2d 519. Contracts of insurance will be liberally construed in favor of object to be accomplished, and if provisions of policy are capable of being construed in two ways, that interpretation should be placed on such provisions which is most favorable to insured. *Aetna Ins. v. Zoblotzky*, 1971 OK 20, 481 P.2d 761.

**Application for Insurance.** Where application for automobile liability policy was signed, premium paid, and binder issued, and insurer accepted application and executed policy, policy took effect and delivery was not essential to its enforceability. *Richardson v. Brown*, 443 F.2d 926 (10th Cir. 1971). Whether insured was in good health, as that term is used in its ordinary meaning, at time of delivery of life policy must depend upon the facts and circumstances of each particular case and cannot be determined by any general rule. *Atlas Life Ins. v. Eastman*, 1957 OK 245, 320 P.2d 397. Under Oklahoma law, an application for insurance is not itself a contract but a mere proposal which requires acceptance by insurer through someone actually or apparently authorized to accept the same to give it effect as a contract. *Inola Mach. & Fabricating Co. v. Farmers New World Life Ins.*, 631 F.2d 712 (10th Cir. 1980).

**Inconsistent Policy Terms and Endorsements.** If separate clauses of contract appear to conflict, they must be reconciled if possible by reasonable construction. If, however, latter clause is irreconcilable with former clause, and repugnant to the general purpose and intent of the contract, the clause must be disregarded. OKLA. STAT. tit. 15, § 168 (1910); *Fairbanks Morse & Co. v. Miller*, 1921 OK 22, 195 P. 1083. Reasonable construction is preferred, and where contract language is contradictory, ambiguous or susceptible to two constructions, it will be interpreted in a fair and rational sense. *Mortgage Clearing Corp. v. Baughman Lumber Co.*, 1967 OK 232, 435 P.2d 135.

**Contract Policy. Binder.** In determining whether terms embodied in insurance application and conditional receipt form create a contract under Oklahoma law, court must follow principle that an insurance policy must be construed to give effect to all its provisions, where possible, and that its terms and provisions are to be accepted in their usual and ordinary sense. Only in cases of ambiguity are terms to be strictly interpreted against insurer.

*Inola Mach. & Fabricating Co. v. Farmers New World Life Ins.*, 631 F.2d 712 (10th Cir. 1980).

Issuance of automobile liability policy terminates previously issued binder. *See* OKLA. STAT. tit. 36, § 3622(A) (1957) (“Binders or other contracts for temporary insurance may be made orally or in writing, and shall be deemed to include all the usual terms of the policy as to which the binder was given together with such applicable endorsements as are designated in the binder, except as superseded by the clear and express terms of the binder”).

### CONTRIBUTION

*See* “FIRE INSURANCE”; “LIABILITY INSURANCE.”

Right of contribution among joint tortfeasors, etc., OKLA. STAT. tit. 12, § 832 (1995).

Where action involves multiple defendants, each defendant may be jointly and severally liable for all damages resulting from the joint negligence. *Berry v. Empire Indem. Ins.*, 1981 OK 106, 634 P.2d 718. However, under Oklahoma comparative negligence law, if the plaintiff is also found negligent (less than 50%), then each defendant is liable only for the percent of damages caused by his negligence. *Laubach v. Morgan*, 1978 OK 5, 588 P.2d 1071, *superseded by statute as stated in Smith v. Jenkins*, 1994 OK 43, 873 P.2d 1044.

Plaintiff found to have been nine percent negligent may recover against party defendant found to have been one percent negligent if combined negligence of that party defendant and any other persons, firms or corporations, whether or not they are parties to action, is equal to or greater than degree of fault assessed against plaintiff. *Bode v. Clark Equip. Co.*, 1986 OK 21, 719 P.2d 824.

The Political Subdivision Tort Claims Act, OKLA. STAT. tit. 51, § 154 (2003), abrogates the common law rule governing joint and several liability insofar as it relates to political subdivisions. Such entities covered by the Act are severally (not jointly) liable in tort for the percentage of total damages corresponding to their percentage of total negligence, and recovery under the Act is limited to the percentage of negligence attributed to the governmental tortfeasor. *Fuller v. Odum*, 1987 OK 64, 741 P.2d 449.

*See also* “NEGLIGENCE.”

### DAMAGES

Generally, *see* Title 23 OKLA. STAT.

**Appellate Review. Excessive Verdicts.** Each case with excessive verdict issue must be reviewed upon its

own facts and circumstances. *Whiteley v. OKC Corp.*, 719 F.2d 1051 (10th Cir. 1983).

**Comparative Negligence.** Oklahoma's comparative negligence statutes, OKLA. STAT. tit. 23, §§ 13-14 (1979), provide that plaintiff's contributory negligence shall not bar recovery unless it is of a greater degree than the defendant's negligence or the combined negligence of the persons causing the injury. The negligence of absent or non-party tortfeasors is taken into account. Thus, plaintiff may recover unless his or her negligence is greater than 50%. The plaintiff's recovery is reduced in proportion to the degree of his or her contributory negligence.

**Measure for Breach of Contract.** Generally, *see* OKLA. STAT. tit. 23, §§ 21-22, 25-28, and 36-40 (1910). General rule for measure of damages for breach of obligation arising from contract is amount which will compensate party aggrieved for all detriment proximately caused thereby. *Id.* § 21. Injured person has duty to mitigate damages. *Consolidated Cut Stone Co. v. Seidenbach*, 1937 OK 701, 75 P.2d 442. However, if injured person does not mitigate damages, they are not absolutely barred from recovery; failure to mitigate is only relevant to amount they can recover. *Id.* at 451. No recovery can be had for damages which are uncertain, contingent, and remote. *Nance v. Menefee*, 1925 OK 712, 242 P. 224. Lost profits are recoverable where loss was contemplated at formation, loss flows directly or proximately from the breach, and loss is capable of reasonably accurate measurement or estimate. *Florafax Internat'l, Inc. v. GTE Mkt. Res., Inc.*, 1997 OK 7, 933 P.2d 282. Oklahoma law allows for the recovery of reasonable estimated lost future profits resulting from breach of contract, regardless of whether the business was well established. *Specialty Beverages v. Pabst Brewing Co.*, 537 F.3d 1165 (10th Cir. 2008).

**Arbitration Awards.** Courts favor arbitrator's exercise of broad discretion in fashioning remedies. *Campo Mach. Co., Inc. v. Local #1926, Int'l Assoc. of Machinists & Aerospace Workers*, 536 F.2d 330 (10th Cir. 1976).

**Psychological Injuries - Mental Pain and Suffering.** Mental anguish of itself cannot be treated as independent ground of damages and recovery may not be had for mental anxiety and anguish which is not produced by, connected with, or the result of some physical suffering or injury to person enduring mental anguish. *Thompson v. Minnis*, 1949 OK 29, 202 P.2d 981. Oklahoma does not allow recovery of emotional harm under the "bystander theory," but will allow recovery for emotional harm even without bodily injury where the plaintiff is directly involved in the accident, and witnesses a close family member receive injury. *Kraszewski v. Baptist*

*Med. Cent.*, 1996 OK 141, 916 P.2d 241. Oklahoma also allows recovery for emotional harm without corresponding injury when caused by intentional or reckless conduct that is extreme and outrageous. *Breeden v. League Serv. Corp.*, 1978 OK 1374, 575 P.2d 1374. Recovery for emotional harm is available in wrongful termination/retaliatory discharge cases. *William v. ABS Enters.*, 1987 OK CIV APP 7, 734 P.2d 854. Recovery for emotional harm available in case involving insurer's breach of the duty of good faith. *Christian v. Am. Home Assur. Co.*, 1977 OK 141, 577 P.2d 899.

**Punitive Damages.** Under Oklahoma law, punitive damages fall into three categories and are limited as follows:

**Category I.** If the defendant acted with reckless disregard for rights of others, or an insurer recklessly disregarded its duty to deal fairly in good faith with its insured, the punitive damages cannot exceed the greater of \$100,000 or the amount of the actual damages awarded.

**Category II.** If the defendant acted intentionally and with malice towards others, or an insurer intentionally and with malice breached its duty to deal fairly and act in good faith with its insured, the award cannot exceed the greatest of \$500,000, twice the amount of actual damages awarded, or the increased financial benefit derived by the defendant or insurer as a direct result of the conduct causing injury.

**Category III.** If the defendant acted intentionally and with malice towards others, or an insurer has intentionally and with malice breached its duty to deal fairly and in good faith with its insured, and the court finds that there is evidence beyond a reasonable doubt that the defendant or insurer acted intentionally and with malice and engaged in conduct life-threatening to humans, the jury may award punitive damages in any amount the jury deems appropriate. OKLA. STAT. tit. 23, § 9.1 (2002).

The jury considers the following factors using the standard of clear and convincing evidence: 1) the seriousness of the hazard to the public arising from defendant's misconduct; 2) the profitability of the misconduct to defendant; 3) the duration of the misconduct and any concealment of it; 4) the degree of defendant's awareness of the hazard and of its excessiveness; 5) the attitude and conduct of defendant upon discovery of the misconduct or hazard; 6) where defendant is a corporation or other entity, the number and level of employees involved in causing or concealing the misconduct; and 7) the financial condition of defendant. OKLA. STAT. tit. 23, § 9.1(A) (2002).

Punitive damage awards must also comport with due process requirements. Only when an award is "grossly excessive" in relation to the State's interests in

punishment and deterrence will it be viewed as a violation of the Due Process Clause of the Fourteenth Amendment. *BMW of North Am., Inc. v. Gore*, 517 U.S. 559 (1996).

Insurance coverage of punitive damages generally contravenes public policy; exception exists, however, where damages are imposed by vicarious liability, and insured did not know of his servant's propensity to commit wrongful act. *Dayton Hudson Corp. v. Am. Mut. Liab. Ins.*, 1980 OK 193, 621 P.2d 1155.

Insurers have implied duty to act in good faith toward their insured, and breach of this duty will give rise to tort action for consequential damages, including emotional distress and punitive damages. *Christian v. Am. Home Assur. Co.*, 1977 OK 141, 577 P.2d 899. Attorney fees are not available in actions to recover uninsured motorist (UM) benefits. *Barnes v. Okla. Farm Bureau Mut. Ins.*, 2000 OK 55, 11 P.3d 162.

Collateral Source Rule. Where an injured person receives payment for injuries from a source not connected with the tortfeasor, the tortfeasor remains liable for all damages. *Weatherly v. Flournoy*, 1996 OK CIV APP 109, 929 P.2d 296. Automobile driver, sued by passenger for personal injuries and medical expenses sustained in accident, was entitled under medical payment provisions of driver's automobile policy to have payments made to plaintiff credited against amount of verdict for medical expenses. *Overturff v. Hart*, 1975 OK 13, 531 P.2d 1035.

Other Cases and Statutes. Generally, see OKLA. STAT. tit. 23, §§ 1-98. Damages in General. Any person who suffers loss or harm in person or property due to unlawful act or omission of another may recover from that person compensation therefore in money as damages. OKLA. STAT. tit. 23, §§ 3-4 (1910). Damages may be awarded for detriment resulting before and after commencement of proceedings or certain to result in future. OKLA. STAT. tit. 23, § 5 (1910). Where damages are certain, or capable of being made certain by calculation, any person who is entitled to recover damages is entitled also to recover interest from accrual of cause of action, except during such time as debtor is prevented by law or by act of creditor from paying debt. OKLA. STAT. tit. 23, § 6 (1910). Although claim may be in sense unliquidated, interest thereon will generally be allowed where amount due can be readily ascertained by mere computation. *Frankfurt v. Bunn*, 1965 OK 189, 408 P.2d 785. Interest may also be allowed, in discretion of jury, in action for breach of obligation not arising from contract, and in every case of oppression, fraud or malice. *Investors Preferred Life Ins. v. Abraham*, 375 F.2d 291 (10th Cir. 1967); OKLA. STAT. tit. 23, § 7 (1910).

Uninsured motorist insurers are liable for pre-judgment interest as an element of damages. *Mellenberger v. Sweeney*, 1990 OK CIV APP 85, 800 P.2d 747.

Torts and Obligations Not Arising From Contract. Generally OKLA. STAT. tit. 23, §§ 61-72. In general, measure of damages for breach of obligation not arising from contract is amount which will compensate party for all detriment proximately caused thereby, whether it could have been anticipated or not. *Denco Bus Lines v. Hargis*, 1951 OK 11, 229 P.2d 560; OKLA. STAT. tit. 23 § 61 (1910). All elements of damage must be brought in single suit or are barred. *Retherford v. Halliburton Co.*, 1977 OK 178, 572 P.2d 966. Future pain and suffering, as incident to physical injuries, is proper element of damage. *Tulsa Expo. & Fair Corp. v. Joyner*, 1953 OK 171, 257 P.2d 1077. Future damages may be recovered if proof renders it reasonably certain that such damages will accrue in future. *Id.* One who is injured by another's acts must do that which ordinarily prudent person would do under similar circumstances to mitigate or lessen his damages. *Smith-Horton Drilling Co. v. Brooks*, 1947 OK 154, 182 P.2d 499.

Contractual Limitation of Damages. Contractual limitation of consequential damages for personal injury in case of consumer goods is prima facie unconscionable. *Tuttle v. Kelley-Springfield Tire Co.*, 1978 OK 134, 585 P.2d 1116.

Attorney Fees. Attorneys' fees are recoverable in all actions on insurance policies, except uninsured motorist insurance. OKLA. STAT. tit. 36, § 3629 (1985).

OKLA. STAT. tit. 12, § 940(A) (1979), granting attorneys' fees to prevailing parties in civil action to recover damages for negligent or willful injury to property contemplates only those actions for damages for negligent or willful physical injury to property. *Woods Petroleum Corp. v. Delhi Gas Pipeline Corp.*, 1984 OK 94, 700 P.2d 1011.

## DEATH

Abatement and Survival. Survival. OKLA. STAT. tit. 12, § 1051 (1910). In addition to the causes of action that survive at common law, actions for injury to the person, or to real or personal property, and for fraud also survive. *Id.* Only actions for libel, slander and malicious prosecution abate upon death of claimant. OKLA. STAT. tit. 12, § 1052 (1965).

Action for Wrongful Death. Damages. See OKLA. STAT. tit. 12, § 1053 (2005). Damages recoverable include medical and burial expenses, pecuniary loss to survivors, mental pain and anguish suffered by decedent, loss of consortium, companionship, services, support, and the grief of surviving spouse, parents and children,



and, in proper cases, punitive damages. *Id.* In wrongful death action, damages are limited to pecuniary benefits lost by one or more persons specified in statute. *Rogers v. Worthan*, 1970 OK 22, 465 P.2d 431. Pecuniary loss includes anything of monetary value to claimant and may be of something which it was merely probable claimant would have received had decedent lived. *Id.*; but see *Clark v. Jones*, 1983 OK 10, 658 P.2d 1147, 1149 (damages expanded to include loss of companionship, loss of child, and loss of parent/child relationship.) Law implies damages of substantial character to minor children in action for wrongful death of parent, but adult children must prove their pecuniary loss. *Belford v. Allen*, 1938 OK 335, 80 P.2d 671.

Parties in Interest. OKLA. STAT. tit. 12, §§ 1053(A), 1054 provide that a wrongful death action must be brought by the personal representative of the decedent unless there has not been one appointed or the deceased was not a resident of Oklahoma, in which case the surviving spouse or next of kin may bring the action.

Statute of Limitations. OKLA. STAT. tit. 12, § 1053(A) (2005). The action must be commenced within two (2) years of death.

Unexplained Absence—Presumption of. Person is presumed to be dead after seven-year unexplained absence from his home. *Northwestern Mut. Life Ins. v. Rutledge*, 1935 OK 1130, 51 P.2d 521. Not necessary to show that missing insured was subjected to some specific danger or peril, likely to cause death. *Gaylor v. Atlas Life Ins.*, 1939 OK 196, 90 P.2d 661. Death may be presumed to have occurred before expiration of seven-year period from evidence of facts and circumstances such as character, habits, conditions of life, affection and attachment. *Id.* Provision against presumption valid in Oklahoma if valid in state of company's domicile. *Modern Woodmen of Am. v. Crudup*, 1935 OK 985, 51 P.2d 718.

## DISABILITY

Total Disability. Recovery under total disability clause does not require complete incapacity. Disability held total if insured unable to perform substantial part of his duty. *Cont'l Cas. v. York*, 1965 OK 82, 402 P.2d 878. Where group disability policy is of "non-occupational" variety, it must be shown that claimant is unable to pursue occupation of comparable dignity, permanence and remuneration before claimant can be "totally disabled" under terms of policy. *Genzer v. Ins. Co. of N. Am.*, 1981 OK CIV APP 27, 633 P.2d 1267. In action on "non-occupational" disability insurance policy, factors such as insured's education, experience and ability, together with dignity, permanency and amount of income which can be earned from substituted or alternative occupation

should be considered to determine if insured is unable to follow "any occupation." *Metro. Life Ins. v. Fisher*, 1962 OK 260, 382 P.2d 434.

Proof of Condition. Requirement in disability policy that insured be confined to house is evidentiary and not prerequisite to recovery. *Mass. Bonding & Ins. v. Springston*, 1955 OK 142, 283 P.2d 819. Insured could not recover accrued disability benefits and premiums paid prior to furnishing proof of disability. *Franklin Life Ins. v. Fisher*, 1933 OK 397, 23 P.2d 151. Disability is question of fact for jury. *Metro. Life Ins. v. Brown*, 1941 OK 266, 123 P.2d 255.

Where one who is insured under group disability policy is injured, provisions of policy which were in effect at time of accident control. No subsequent modification, made retroactive to date prior to accident, is effective to deprive insured of benefits which vested at time accident took place, since insured is third party beneficiary of contract between employer and insurer. *Christian v. Metro. Life Ins.*, 1977 OK 132, 566 P.2d 445.

Workers' Compensation Court cannot find higher percentage of disability than that assessed by any expert medical witness. *Yuba Heat Transfer v. Wiggins*, 1981 OK 72, 630 P.2d 783.

Plaintiff's disability must be direct and independent result of accidental injury. *Metropolitan Life Ins. v. Richter*, 1937 OK 682, 78 P.2d 307. Loss of use of hand will not bring injury within policy insuring against dismemberment. *Great N. Life Ins. v. Tulsa Cotton Oil Co.*, 1938 OK 111, 76 P.2d 913.

Oklahoma recognizes cause of action for wrongful refusal to pay proceeds of disability insurance policy; insurers have implied duty to act in good faith toward their insured, and breach of this duty will give rise to tort action for consequential damages, including attorney fees expended in prior lawsuit to recover proceeds, and for punitive damages as well. *Christian v. Am. Home Assur. Co.*, 1977 OK 14, 577 P.2d 899. Failure to furnish proof does not estop insured where company suffers no detriment. *Metro. Life Ins. v. Richter*, 1935 OK 819, 49 P.2d 94. Complete incapacity of insured excuses failure to furnish proof. *Columbian Nat'l Life Ins. v. Zammer*, 1936 OK 16, 62 P.2d 63. Notice of disability not given until more than a year after claimed disability does not comply with policy requiring immediate notice. *Metro. v. Smith*, 1945 OK 137, 158 P.2d 335.

Held, clause involved did not make furnishing of proof condition precedent to liability. *Mid-Continent Life Ins. v. Harrison*, 1935 OK 1020, 53 P.2d 266. Receipt of proof condition precedent to assumption of liability. *Gunter v. Prudential Ins.*, 1940 OK 151, 100 P.2d 851. Proof within six months after default in pre-

mium held condition precedent to recovery of disability benefits and to continuance of policy in force. *N.Y. Life Ins. v. Naifeh*, 1939 OK 487, 98 P.2d 1101. Sufficient proof may be made by letter until Company requires formal proof. *N.Y. Life Ins. v. Morgan*, 1940 OK 126, 101 P.2d 826.

Recovery of disability installments, due and matured, not included in original suit, will be barred in subsequent suit. *Metro. Life Ins. v. Richter*, 1937 OK 682, 78 P.2d 307. However, court may permit amendment to include installments coming due between date of filing suit and date of trial. *Fed. Life Ins. v. Bartlett*, 1938 OK 357, 80 P.2d 587. Dismissal of suit with prejudice, for accrued benefits does not bar subsequent action for damages for fraudulent procurement of release of all future benefits. *Cont'l Cas. Co. v. Derrick*, 1939 OK 38, 86 P.2d 798.

Policy held not to cover disability resulting from disease or illness manifesting itself and disabling insured prior to its issuance. *Ill. Bankers Life Assur. Co. v. Speak*, 1939 OK 535, 97 P.2d 763. Recovery allowed under accident policy for total and permanent disability which would have resulted regardless of preexisting arthritis. *N. Am. Ins. v. Allentharp*, 164 F.2d 9 (10th Cir. 1947). Annual disability benefits apportionable. *N.Y. Life Ins. v. Sullivan*, 1942 OK 295, 129 P.2d 71.

When premiums have been paid, incontestable provision in group policy precludes insurer from asserting that alleged insured was not covered because not employed by employer holding policy. *Baum v. Mass. Mut. Life Ins.*, 1960 OK 225, 357 P.2d 960.

Hospitalization policy providing for expenses "resulting from sickness, cause of which originates while policy is in force," sickness has inception when first manifest or active as cause of hospital confinement, not time of origin of medical cause. *Reserve Life Ins. v. Lyle*, 1955 OK 274, 288 P.2d 717.

## FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables; "AUTOMOBILES, Compulsory Coverage."

## FIRE INSURANCE

Arson. Negligence of insured is no defense to his right to recover for loss falling within coverage of fire policy, where there is no fraud or gross negligence on part of insured. *Central Mfrs. Mut. Ins. v. Elliott*, 177 F.2d 1011 (10th Cir. 1949). Insured's fraud in procuring fire insurance policies and destruction of insured property by fire and making false statements as to value of property in proofs of loss vitiates contract between par-

ties to policies. *Hargrove v. Am. Cent. Ins.*, 125 F.2d 225 (10th Cir. 1942).

Appraisal. Award will not be set aside except for fraud, gross mistake, misconduct of appraiser or failure to perform duties. *Aetna Ins. v. Murray*, 66 F.2d 289 (10th Cir. 1933), holding limited by *Massey v. Farmers Ins. Group*, 1992 OK 80, 837 P.2d 880. Insured has right under appraisal provision of policy to introduce evidence before appraiser as to extent of loss. If right denied, award is not binding on him. *Mercantile Ins. v. Murray*, 1935 OK 279, 43 P.2d 451, holding limited by *Massey v. Farmers Ins. Group*, 1992 OK 80, 837 P.2d 880. By demanding that insured comply with appraisal clause and reserving right to litigate question of liability, reservation waives provisions of appraisal clause as condition precedent for action by insured. *Fidelity-Phoenix Fire Ins. of N.Y. v. Penick*, 1965 OK 34, 401 P.2d 514.

Assignment. Assignment of fire policy to purchaser of insured property with written consent of company's issuing agent creates new contract. *Springfield Fire & Marine Ins. v. Simmons*, 1938 OK 64, 87 P.2d 941. Where policy prohibited assignment without consent of insurer, held no liability for loss to assignees where consent not given. *Niagara Fire Ins. v. Aebischer*, 1934 OK 684, 44 P.2d 5. Where property is jointly owned, and loss is caused by one of co-owners by arson, no recovery may be had by other owner under policy of fire insurance, even though other owner had nothing to do with loss. *Short v. Okla. Farmers Union Ins.*, 1980 OK 155, 619 P.2d 588. Fire insurance policy, being personal contract with insured, does not pass to purchaser simply by sale of insured property. *Shadid v. Am. Druggist Fire Ins.*, 1963 OK 146, 386 P.2d 311.

Where agent of insurer had general authority to bind company and homeowner testified that agent had represented that homeowner was completely covered with the signing of policy application and payment of premium, there was an effective oral binder and that new policy was in force at time of fire which occurred approximately one week before insurer under new policy gave notice that it would not issue policy. OKLA. STAT. tit. 36, § 3622 (1957); *Nat'l Investors Fire & Cas. Ins. v. Pac. Indem. Co.*, 359 F.2d 203 (10th Cir. 1966).

Where intent of policyholders and insurer fixed effective date of binder, agent's omission of effective date did not invalidate binder. *Poteete v. MFA Mut. Ins. Co.*, 1974 OK 110, 527 P.2d 18.

Whether jury concluded that agent inadvertently omitted effective date from binder or that parties to policy had orally agreed on effective date, there was binding contract in either event. *Id.*

Binder was not invalid because of agent's inability to compute amount of premiums and his failure to write in effective date on binder. *Id.*

A "binder" is a written contract by insurance company's authorized agent recognizing liability on a forthcoming contract during negotiations therefore. *Hayes v. Charter Oak Fire Ins.*, 1944 OK 83, 145 P.2d 941. Moreover, a binder may be the only contract of insurance between parties if a loss occurs before the permanent policy is issued. *Midwestern Ins. Co. v. Rapp*, 1956 OK 136, 296 P.2d 770, 777.

**Cancellation.** If insurer elects to cancel a fire policy for breach of the occupying clause, it must notify insured accordingly in clear and unequivocal terms prior to loss. *Sec. Ins. v. Cook*, 1924 OK 618, 227 P. 402. Where, after cancellation of fire policy, property was sold and amount of premium and application for transfer were delivered to insurer, destruction of property before insurer had consented to assignment exempted it from liability. *Niagara Fire Ins. v. Aebischer*, 1934 OK 684, 44 P.2d 5. Where fire policy provided for cancellation at any time by insurer giving insured five days written notice of cancellation and that policy should continue in force for benefit of mortgagee for ten days after notice of mortgagee, giving of notice in manner and for length of time specified and return of offer to return unearned portion of premium were essential prerequisites to an effective exercise of right of cancellation (except by mutual consent). *Boston Ins. v. Read*, 166 F.2d 551 (10th Cir. 1948).

**Mortgage Clause.** Mortgagee entitled to fire policy proceeds, notwithstanding payment of claim to mortgagor for repairs that actually increase the subject property's value; double payment is consequence of insurer's failure to honor mortgage clause. *First State Bank of Idabel v. State Farm Fire & Cas.*, 1992 OK CIV APP 33, 840 P.2d 1267. Mortgagee entitled to proceeds of policy to extent of mortgage debt; surplus payable to mortgagor. *Savings Bldg. & Loan Ass'n v. Seaman-Packard Lumber Co.*, 1935 OK 48, 40 P.2d 660. Standard mortgage clause creates independent contract between company and mortgagee. *Farmers Ins. Co., Inc. v. Smith*, 1998 OK CIV APP 28, 957 P.2D 125. Mortgagor's negligence does not affect mortgagee's interest under standard mortgage clause. *Id.* Standard mortgage clause protects mortgagee during pendency of foreclosure action. *Id.* Company's retention of premium is not waiver of rights under clause. *Fidelity-Phenix Fire Ins. Co. of N.Y. v. Blackwell*, 1937 OK 642, 73 P.2d 401. Judgment lienor not entitled to proceeds of fire insurance policy unless owner was required by contract to insure for lienor's benefit. *Welch v. Montgomery*, 1949 OK 80, 205 P.2d 288. Condition in automobile fire insurance policy

prohibiting encumbering insured property without consent of insurer is valid. *Motors Ins. Corp. v. Stowers*, 1952 OK 232, 246 P.2d 341. "Loss payable" clause does not create independent contract for benefit of mortgagee. *Aetna Ins. v. O.E. Woods Lumber Co.*, 1938 OK 80, 76 P.2d 273. Mortgagee may maintain action on fire insurance policy in his own name. *Aetna Ins. v. Ralls*, 1948 OK 6, 190 P.2d 787. No delivery of policy to mortgagee is necessary for mortgagee to recover under mortgage clause. *Great Am. Ins. v. Williams*, 1926 OK 191, 251 P. 1012. Where policy void, mortgagee may still recover under loss payable clause; the rights of the mortgagee are not affected. *Nat'l Fire Ins. Co. v. Dallas Joint Stock Land Bank*, 1935 OK 865, 50 P.2d 326; *Western Assur. Co. v. Hughes*, 1936 OK 621, 66 P.2d 1056. "Union" or "standard" mortgage clause allowing loss to be paid to mortgagee as to mortgagee's interests, with insurance and not invalidated by any act or neglect of mortgagor, forms independent contract of insurance for separate protection of mortgagee; and claim under such provision is valid as to mortgagee even if mortgagor would be unprotected by reason of absence of insurable interest. *Great Am. Ins. v. Southwestern Fin. Co.*, 1956 OK 149, 297 P.2d 403.

A mortgagee is not bound by a settlement agreement between the mortgagor and the insurance company when the mortgagee was unaware of the settlement agreement. *Conner v. Northwestern Nat'l Cas. Co.*, 1989 OK 85, 774 P.2d 1055.

Loss payee's right to proceed against an insurer cannot be defeated by settlement between the insured and insurer made without knowledge and consent of loss payee. *Perfect Invest., Inc. v. Underwriters at Lloyd's, London*, 1989 OK 148, 782 P.2d 932.

**Reformation.** May be had to show correct insured where inaccuracy is fault of agent. *British Am. Assur. Co. v. Shores*, 1952 OK 63, 243 P.2d 343; or where agent given wrong name by mistake. *Home Ins. v. McClaran*, 1946 OK 109, 168 P.2d 306; or to correct date of commencement of coverage. *Prudential Fire Ins. v. Stanley*, 1942 OK 393, 131 P.2d 88; or to correct description of insured property. *Pac. Nat'l Fire Ins. v. Smith Bros. Drilling*, 1945 OK 272, 162 P.2d 871. Where showing of mutual mistake is clear and convincing, fire policy may be reformed after loss to describe property according to intention of parties. *First Nat'l Ins. Co. of Am. v. Norton*, 238 F.2d 949 (10th Cir. 1956).

**Severable Contracts.** Where policy insures different classes of property, contract is divisible, and three-fourths clause should be applied to loss of each class of property. *Springfield Fire & Marine Ins. v. Simmons*, 1938 OK 647, 87 P.2d 941.

Standard Policy Provisions. Standard policy provided by law for use. OKLA. STAT. tit. 36, §4803 (2003). Terms of farm policy issued in approved short form, will govern instead of terms of statutory standard form. *Gordon v. Cont'l Ins.*, 1938 OK 53, 76 P.2d 1055.

Damages. Excepted Risks. Explosions. Despite provision under fire policy exempting it from liability for loss occurring by explosion, insurer held liable for damage by explosion, where explosion was caused by preceding hostile fire. *Springfield Fire & Marine Ins. v. Oliphant*, 1931 OK 327, 300 P. 711.

Proof of Loss. Complete inventory of personal property stating cost, quantity, cash value and amount claimed, to be submitted. Sworn statement required of insured, stating knowledge and belief of origin of fire, owner of property, insurance carried, encumbrances and other relevant matters. If required, insured shall submit verified plans of buildings and other information. OKLA. STAT. tit. 36, §§ 4803 (2003), 4805 (1957). Provision of fire policy requiring proof of loss is condition precedent to right of action thereunder. *Cont'l v. Portwood*, 1938 OK 567, 84 P.2d 435. Proof of loss may be waived. *Id.*, *Aetna Ins. v. Jackson*, 1936 OK 432, 60 P.2d 210. Waived where insurer had actual notice of loss and complete investigation had been made. *Home Ins. v. McClaran*, 1946 OK 109, 168 P.2d 306. Insurer waives formal proof of loss requirement where it does not protect informal statement submitted. *Conn. Fire Ins. v. Youngblood*, 1947 OK 227, 184 P.2d 792. Waived where adjuster's investigation would lead reasonable person to believe that further proof not required. *Aetna v. Ralls*, 1948 OK 6, 190 P.2d 787.

Replacement Value. Actual cash value under fire insurance policy is determined by all factors and circumstances existing at time of loss. *Rochester Am. Ins. v. Short*, 1953 OK 4, 252 P.2d 490. Actual cash value of damaged building may be determined from all relevant factors, including cost of reproduction, age, condition of maintenance, and functional obsolescence. *First Nat'l v. Norton*, 238 F.2d 949 (10th Cir. 1956).

## HOSPITALS

Evidence-Records. For Oklahoma law concerning a patient's access to medical records and waiver of physician patient privilege in medical malpractice cases, see OKLA. STAT. tit. 76, §§ 19 (2011) and 20 (1976).

Liens. Hospital liens in personal injury cases - Priority - Exception. See OKLA. STAT. tit. 42, § 43 (2008).

## HUSBAND AND WIFE

See Law Digest Tables.

Community Property statutes have been repealed. See OKLA. STAT. tit. 43, § 215 (1989).

Interspousal Immunity. There is no interspousal tort immunity. *White v. White*, 1980 OK 142, 618 P.2d 921.

Loss of Consortium. Husband may recover compensation for loss of services, society and companionship of wife due to negligence of another. *Howard v. Mansell*, 1967 OK 150, 430 P.2d 9.

Husband cannot recover from physician and hospitals for damage to marital relationship resulting from operation on wife, consented to by her, without evidence of negligence. *Murray v. Vandevander*, 1974 OK CIV APP 18, 522 P.2d 302. Wife has right to sue for loss of husband's consortium. OKLA. STAT. tit. 43, § 214 (1989). Husband's right to recover special damages for loss of his wife's services, or for medical and hospital expenses arising out of her injuries, is derivative only. *Laws v. Fisher*, 1973 OK 69, 513 P.2d 876.

## INFANTS

See "AUTOMOBILES, Age"; "NEGLIGENCE, Age."

Unemancipated minor may recover to extent of parent's liability insurance coverage for injuries caused by parent's negligent operation of motor vehicle. *Unah v. Martin*, 1984 OK 2, 676 P.2d 1366, limited by *Sixkiller v. Summers*, 1984 OK 14, 680 P.2d 360, overruling, *Tucker v. Tucker*, 1964 OK 89, 395 P.2d 67 and *Workman v. Workman*, 1972 OK 74, 498 P.2d 1384, in which Oklahoma Supreme Court had upheld doctrine of parental immunity from tort suits by minor child. *But cf.*, *Turnbull v. Missouri Pac. R. Co.*, 1992 WL 570984 (W.D. Okla. Jan. 21, 1992) (where both parent and child are deceased, there is no basis for limiting recovery to insurance proceeds based on public policy).

Limited abrogation of parental immunity recognized in *Unah v. Martin*, 1984 OK 2, 676 P.2d 1366 does not extend to suits involving negligent parental supervision short of willful misconduct. *Sixkiller v. Summers*, 1984 OK 14, 680 P.2d 360.

Parent may be liable for act of his child if parent's conduct was such as to render parent principle tortfeasor, or, in other words, if parent's own negligence was proximate cause of injury. *Vance v. Thomas*, 1986 OK CIV APP 3, 716 P.2d 710.

Parent may be liable for acts of minor child if he or she is negligent in entrusting dangerous weapon or instrumentality to child who, because of age or inexperience, might use instrumentality in such way as to endanger another. *Id.*

To determine parental liability for acts of minor child under theory of negligent entrustment some factors to be considered are 1) age and maturity of child, 2) whether child understood or had been taught danger of instrumentality, and 3) whether any instructions as to use or care of instrumentality were given. *Id.*

Parents may be liable for tortious acts of their child, not because child's acts are imputed to them, but because of their own negligence in failing to exercise reasonable care to control child. *Id.*

Parent is under duty to exercise reasonable care to control his minor child and prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to him if parent 1) knows or has reason to know that he has ability to control his child, and 2) knows or should know of necessity or opportunity for exercising such control. *Vance v. Thomas*, 1986 OK CIV APP 3, 716 P.2d 710.

### LIABILITY INSURANCE

**Cancellation.** Where insured took out second policy during term of first policy, the original of which was in possession of mortgagee who was never notified of steps towards cancellation nor asked to return policy to insured or insurance company, there was no manifestation of purpose to effect immediate termination of first policy notwithstanding insured's statement to adjuster that he intended to cancel first policy and jury finding that second policy was intended to replace first policy. *Ins. Co. of State of Pa. v. Smith*, 435 F.2d 1029 (10th Cir. 1971).

Where special agent for insurer picked up policy for cancellation, but neither insured nor mortgagee consented thereto, and insurer did not give requisite notices required by cancellation clause of policy and did not offer to return unearned portion of premium, and property was destroyed by fire less than five days after policy was placed in hands of special agent, which period was less than period of notice prescribed in cancellation clause, policy was not cancelled at time of fire. *Boston Ins. v. Read*, 166 F.2d 551 (10th Cir. 1948).

Where accident policy provided for cancellation by insurer by notice of cancellation and return of unearned premium, return by insurer, on or before expiration date, of premium tendered by insured for ensuing year with statement that policy would not be renewed beyond expiration date, terminated policy at expiration of period for which premium had been paid. *Bowling v. Aetna Life Ins.*, 1936 OK 196, 55 P.2d 1023.

Physical delivery and surrender of policy to insurer was not necessary for valid cancellation of life policy. *Great Am. Life Ins. v. Stephenson*, 1936 OK 51, 55 P.2d 56.

Where some other person had access to a life insurance policy, and without insured's knowledge or consent delivered it to the insurer's agent, who transmitted it to insurer, insurer's attempt to cancel such policy without insured's consent is a nullity, and the policy remains in full force, in view of OKLA. STAT. tit. 15, §238 (1910); *Reliance Life Ins. v. Thayer*, 1921 OK 431, 203 P. 190.

Insurer's handling of policy on one of insured's automobiles as to notice of cancellation and reinstatement without omitting intervening period would have no bearing on effectiveness of notice of cancellation of policy on one of insured's other vehicles. *Farmers Ins. Exch. v. Lewis*, 316 F. Supp. 1260 (E.D. Okla. 1970), *declined to follow by Equity Insurance Co. v. City of Jenks*, 2008 OK 27, 184 P.3d 541.

Notice of cancellation cannot be given prior to occurrence of the event that triggered the insurer's option to cancel. *Equity Ins. Co. v. City of Jenks*, 2008 OK 27, 184 P.3d 541.

Notice sent to named insured showing cancellation date, premium due and policy number was sufficient to constitute cancellation of public liability and property damage policy under provision of policy that policy might be cancelled by mailing to named insured at address shown a written notice stating in not less than ten days thereafter such cancellation would be effective, and subsequent notice mailed to named insured advising him that his policy had been cancelled was nothing more than a courtesy notice. *Farmers Ins. Exch. v. Lewis*, 316 F. Supp. 1260 (E.D. Okla. 1970). Effective notice of cancellation cannot be given before the premium is due and unpaid because the notice must reflect that the policy is cancelled, not that it may be cancelled. *Equity Ins. v. City of Jenks*, 2008 OK 27, 184 P.3d 541.

Owners-landlords-tenants liability policy, which provided that it could be cancelled by insurer's mailing of written notice to insured at address shown in policy and provided that mailing should be sufficient proof of notice, was cancelled by insurer's mailing of notice to that address even though address was incorrect, insured never received it, and insured claimed that insurer knew the correct address through its agents. *Gilmore v. Grand Prix of Tulsa Corp.*, 1963 OK 138, 383 P.2d 231.

Automobile liability policy, containing provision for cancellation by mailing written notice to insured at address stated in policy, was effectively cancelled when insured mailed notice, notwithstanding fact that envelope containing notice was subsequently returned by postal authorities as undeliverable, particularly in view of fact that insured was then approximately six months in arrears with premium payments and should have an-

anticipated cancellation. *Midwestern Ins. v. Cathey*, 262 P.2d 434 (1953).

Compensation insurance policy held not sufficiently cancelled by notice sent insured by registered mail, marked "return in five days," where such notice was not received by insured. OKLA. STAT. tit. 85, § 64 (2011); *Rasberry v. R.O. Knost & Sons*, 1930 OK 459, 293 P. 778.

Where automobile liability policy provided that insurer could cancel policy by written notice mailed to address shown in declarations, insurer which sent notice of cancellation to address declared by insured in his application to be his mailing address was not liable for damage sustained in accident involving insured after notice was sent, notwithstanding fact that letter was returned to insurer with note that it had not been delivered to insured, and that insured received no actual notice of cancellation and insurer was not required to send notice to other address insured had used in communications to insurer. *State Farm Mut. Auto. Ins. v. Chaney*, 272 F.2d 20 (10th Cir. 1959).

Agent, on receiving insurer's notice to cancel fire policy, held without authority to place risk with another without insured's knowledge. *Ins. Co. of N. Am. v. Burton*, 1930 OK 496, 294 P. 796.

Where fire policy provided for cancellation at any time by insurer giving to insured five days' written notice of cancellation and that in such case policy should continue in force for benefit of mortgagee for ten days after notice to mortgagee, giving of notice in manner and for length of time specified and return or offer to return unearned portion of premium were essential prerequisite to an effective exercise of right of cancellation except by mutual consent. *Boston Ins. v. Read*, 166 F.2d 551 (10th Cir. 1948).

Under ordinary policy of insurance the return or tender to insured of the unearned premiums is a condition precedent to cancellation of the policy by the company unless the policy provides otherwise or unless such return or tender is waived. *Shanks v. Travelers Ins.*, 25 F. Supp. 740 (N.D. Okla. 1938).

Owners-landlords-tenants policies providing for insurer's keeping, in event of cancellation of coverage, as earned, a pro rata portion of premium charged and endorsements to policies providing for separate and distinct coverages for different periods of time required separate proration of the separate premiums for policy and endorsement rather than computing the earned premium pro rata as if premium charge was for one coverage and for the same period. *Price v. Guar. Nat'l Ins.*, 1969 OK 94, 456 P.2d 108.

Owners, landlords and tenants liability policy providing for computation of earned premium pro rata in event of insurer's cancellation but further providing that payment or tender thereof was not condition to cancellation was cancelled by proper mailing of cancellation notice by insurer although insurer failed to return or tender unearned premium. *Gilmore v. Grand Prix*, 1963 OK 138, 383 P.2d 231.

Return of unearned premium is essential to cancellation by insurer, where policy provided for cancellation upon notice it should retain only pro rata premium. *Comm'l Union Fire Ins. of N.Y. v. Miller*, 1926 OK 405, 248 P. 1112.

Rule that return of unearned premium is essential to cancellation of policy held not applicable, where insured waives right to receive it. *Great Am. Ins. v. Allen*, 1925 OK 752, 243 P. 194.

Actual notice to insured of cancellation of automobile public liability policy was essential to effective cancellation, and mere proof of mailing of notice of cancellation was insufficient, and insurance company has burden of proving that notice was in fact delivered to insured. *Farmers Ins. Exch. v. Taylor*, 193 F.2d 756 (10th Cir. 1952), called into doubt by *State Farm Fire & Cas. Co. v. Van Horn*, 1998 WL 58187 (10th Cir. 1998) (unpublished opinion) ("Oklahoma law does not necessarily require that an insurance company prove that the insureds received notice of cancellation of a fire insurance policy. Where the insurance company strictly complied with the terms of the policy for cancellation, including mailing a notice of cancellation to the insureds at their address shown on the policy, the risk of non-receipt falls on the insureds.")

Automobile insurer has burden of proving fact of mailing cancellation notice to insured at address shown in policy. *Oaks v. Motors Ins. Corp.*, 1979 OK 77, 595 P.2d 789.

In action on life policy on which insured had borrowed maximum loan value, which provided that such a policy might be cancelled, on notice, for default in payment of principal or interest and that notice of cancellation would be complete when mailed, whether notice of cancellation had been mailed, as contended by insurer on ground of clerk's performance of routine duty, held for jury, where beneficiary, who was insured's husband, testified that neither he nor insured had received notice. *Keeling v. Travelers Ins.*, 1937 OK 208, 67 P.2d 944.

Where the terms of the policy provided for cancellation by mailing written notice of intent to cancel, evidence proving such a mailing was sufficient to provide notice to the insured and to cancel the policy. *Midwestern Ins. v. Cathey*, 1953 OK 169, 262 P.2d 434.

**Compromise of Claims.** Indemnity insurer who stands to lose only part of litigated claim if he refuses to settle, while insured stands to lose balance, must give interests of insured at least as much consideration as it does its own in determining whether or not to settle. *Nat'l Mut. Cas. Co. v. Britt*, 203 Okla. 175, 200 P.2d 407 (1948); *Am. Fid. & Cas. Co. v. G.A. Nichols Co.*, 173 F.2d 830 (10th Cir. 1949).

**Duty to Act in Good Faith.** Reversing recent precedent, Oklahoma recognizes that a common law tort action exists for an insurance carrier's bad faith in refusing to pay a workers' compensation award. *Sizemore v. Cont'l Cas. Co.*, 2006 OK 36, 142 P.3d 47. Insurer's appeal of workers' compensation order and its delay in paying award once mandate was of record did not amount to bad faith necessary to subject insurer to liability, even assuming a cause of action exists for bad faith refusal to pay workers' compensation award in a timely manner. *Goodwin v. Old Republic Ins.*, 828 P.2d 431 (1992). Enacted Unfair Claims Settlement Practices Act found at OKLA. STAT. tit. 36, § 1250.1 (1997), *et seq.* Action for breach of duty of good faith and fair dealing was first announced in *Christian v. Am. Home Assur. Co.*, 1977 OK 141, 577 P.2d 899, *holding limited by Bankers Trust Co. v. Brown*, 2005 OK CIV APP 1, 107 P.2d 609. Insurance company held liable where its agent misrepresented his identity to insured, apparently suppressed evidence and asserted grounds for denying payment that company knew or should have known were unfounded. *Timmons v. Royal Globe Ins.*, 653 P.2d 907 (1982). A subsequent judgment for tortfeasor did not relieve uninsured motorist insurer of all possible bad-faith claims. *Brown v. Patel*, 2007 OK 16, 157 P.3d 117.

**Right of Insurer to Settle.** Company failing to exercise good faith to protect insured, may become liable for amount in excess of policy limits. *Boling v. New Amsterdam Cas. Co.*, 173 Okla. 160, 46 P.2d 916 (1935). Even though liability insurance company may be in error in denying its duty to defend action, it is not liable for amount of judgment in excess of limit of policy if provisions afforded substantial basis for denial of liability and refusal to defend action. *State Farm Mut. Auto. Ins. v. Skaggs*, 251 F.2d 356 (10th Cir. 1957). Primary insurer not required to settle within policy limits if liability is questionable. *St. Paul Mercury Indem. Co. v. Martin*, 190 F.2d 455 (10th Cir. 1951). If insurer is guilty of bad faith in handling claim or proffered settlement, it may be liable for entire amount of judgment. *Am. Fid. & Cas. Co. v. L.C. Jones Trucking Co.*, 321 P.2d 685 (1957); *see Badillo v. Mid Century Ins. Co.*, 2005 OK 48, 121 P.3d 1080.

Insurance company defending insured in liability action is required to exercise good faith in determining

whether offer of settlement should be accepted or rejected, at risk of incurring liability beyond policy limits, although such duty does not require insurer to profit by results of litigation at its peril or to correctly interpret its coverage for purpose of settlement at risk of liability beyond policy limits. *Moore v. U.S. Fid. & Guar. Co.*, 325 F.2d 972 (10th Cir. 1963).

**Contribution Among Joint Tortfeasors.** 1) Indemnity is not available to one who paid damages caused by the primary negligence of another unless there existed between them an enforceable contract or vicarious liability; 2) under Oklahoma's contribution statute, each tortfeasor's share of contribution would be apportioned according to his degree of fault; 3) there is no recovery of attorneys fees under Oklahoma contribution statutes; and 4) in the contribution statute, settlement agreements not releasing liability of other tortfeasors bar settlor from obtaining any contribution from unreleased tortfeasors in contribution action. Of particular significance is the Court's defining language regarding OKLA. STAT. tit. 12, §832 (1995) and the tortfeasor's "pro rata share" as proportionate based on one's degree of fault. *Nat'l Union Fire Ins. v. A.A.R. W. Skyways, Inc.*, 784 P.2d 52 (1989).

**Cooperation of Insured.** Material misstatement respecting accident held breach of policy condition requiring cooperation. *U.S. Fid. & Guar. Co. v. Wyer*, 60 F.2d 856 (10th Cir. 1932). Cooperation clause is not broken by mistaken false representation concerning who was driving vehicle, but may be broken by deliberate false representation on driver's identity. *Comm'l Standard Ins. v. Readnour*, 241 F.2d 14 (10th Cir. 1956).

**Coverage.** Construction of Terms. Policy covering only members of insured's family held not to include son-in-law on temporary visit. *Indemnity Ins. Co. of N. Am. v. Sanders*, 169 Okla. 378, 36 P.2d 271 (1934). The court invalidates, on public policy grounds, an automobile insurance policy excluding coverage for liability insurance for youths operating the vehicle unless they are related to the insured or living in his household. *Young v. Mid-Continent Cas. Co.*, 1987 OK 88, 743 P.2d 1084.

Provision in liability policy covering losses from operation of truck under permit issued by Corporation Commission to State of Oklahoma, for benefit of persons injured makes, in effect, state real beneficiary and makes insurer liable to person injured. *U.S. Fid. & Guar. Co. v. Hubatka*, 172 Okla. 117, 44 P.2d 66 (1935).

Exclusion provision in automobile liability policy against liability for injury to insured's employee while said employee performs insured's business does not preclude liability where automobile insurance policy held to cover injuries incurred when guest attempted to leap

from automobile to escape assault. *Columbia Cas. Co. v. Abel*, 171 F.2d 215 (10th Cir. 1948).

For insurer to be liable on policy stating any person operating vehicle with permission of insured shall be covered, there must be express or implied permission. *Okla. Farm Bureau Mut. Ins. v. Bryant*, 1957 OK 254, 318 P.2d 430.

Ambulance service's employee's refusal to transport patient to hospital is not within exclusion in endorsement to general automobile policy which excluded coverage for bodily injuries due to performance of or failure to render any service of professional nature. *Gulf Ins. v. Gold Cross Ambulance Serv. Co.*, 327 F. Supp. 149 (W.D. Okla. 1971).

Where driver used insured vehicle for purposes other than those for which he was granted permission, driver was not additional insured under policy. *Employers Cas. Co. v. Williamson*, 179 F.2d 11 (10th Cir. 1950). Bailor's liability insurer may be required to pay damage caused by third party driving with permission of bailee, where permission is impliedly authorized by bailor. *United Servs. Auto Ass'n v. Preferred Acc. Ins. of N.Y.*, 190 F.2d 404 (10th Cir. 1951). Where automobile liability policyholder has not been required to show financial responsibility under statute and policy has not been certified as "motor vehicle liability policy," defense based on exclusion may be relied upon by insurer although statute prohibits such provision in "motor vehicle liability policy," *U.S. Fid. & Guar. Co. v. Walker*, 1958 OK 145, 329 P.2d 852.

Liability insurance applies where insurer, with notice of named insured's death more than 60 days earlier, investigates accident, advises family results will be available to them and later after refusal to defend damage actions and filing of declaratory judgment, ultimately returns unearned premium, having waived its right to assert non-liability on ground of death of named insured more than 60 days prior to accident. *Security Ins. Co. of New Haven v. White*, 236 F.2d 215 (10th Cir. 1956).

Recovery for death of named insured may be had within liability coverage extending to additional insured actually operating named insured's vehicle at time of accident producing death, and exclusion from coverage did not apply to minor daughter of deceased who was not member of his household at time of his death and filed suit therefore. *Heltcel v. Skaggs*, 234 F.2d 66 (10th Cir. 1956).

Standard Provisions. Under liability policy issued to Class "B" Motor Carrier, it is sufficient to establish liability if operation or use from which loss occurs has proximate and necessary connection with actual "opera-

tion or use" of vehicle upon highway. *Comm'l Standard Ins. v. Bacon*, 154 F.2d 360 (10th Cir. 1946).

Where department of state purchases liability insurance pursuant to legislative authority, state has consented to be sued and waives its governmental immunity to extent of insurance coverage only. *Schrom v. Okla. Indus. Dev.*, 536 P.2d 904 (1975).

Common carriers liability insurance coverage, required by OKLA. STAT. tit. 47, § 169 (2009), to be filed by motor carriers, covers carriers' employees injured in course of their employment. *Stanley v. Mowery*, 201 Okla. 480, 207 P.2d 277 (1949).

Omnibus Provisions. Once express or implied permission to use insured automobile is granted, omnibus coverage is fixed, barring criminal theft. Slight deviation from permissive use of automobile is within coverage of omnibus clause. Where driver commits material deviation, insurer only liable for minimum limits of compulsory insurance. *O'Neill v. Long*, 2002 OK 63, 54 P.3d 109. Where endorsement of policy made omnibus clause with broad definition of "insured" inapplicable to non-owned automobiles, insurer was not liable for damages arising from use of truck not owned by named insured but engaged by him for hauling operation in course of his construction business. *Fid. & Cas. Co. v. Reece*, 223 F.2d 114 (10th Cir. 1955). Omnibus clause under casualty policy not applicable where policy issued to adult, when in fact car owned by minor, and company did not issue policies to minors. *Didlake v. Standard*, 195 F.2d 247 (10th Cir. 1952).

Direct Action Against Insurer. Rights of Injured Party. Motor carrier and his liability insurance bondsman, under OKLA. STAT. tit. 47, § 169 (1995), are jointly liable and joint action may be maintained against them. *Jordan Bus v. Garnand*, 203 Okla. 623, 225 P.2d 173 (1950).

OKLA. STAT. tit. 15, § 426 (1971), does not authorize joining as co-defendants physician and his insurer in malpractice suit. *Eckels v. Traverse*, 1961 OK 139, 362 P.2d 683.

Insured may not maintain a direct action against an unserved tortfeasor's insurance company under the motor carrier coverage statute, OKLA. STAT. tit. 47, § 7-601 (2009); *Daigle v. Hamilton*, 1989 OK 137, 782 P.2d 1379.

Rights of Injured Party Against Insurer. Liability insurer not liable in garnishment to third person, until liability against it is established. *Ohio Cas. Ins. v. Goodman*, 163 Okla. 243, 22 P.2d 997 (1932). Judgment creditor is not proper party to bring suit against insured to recover amount in excess of policy limits for bad faith

refusal to settle claim prior to trial. *Cue v. Cas. Corp. of Am.*, 1975 OK CIV APP 33, 537 P.2d 349.

**Rights of Insured Against Insurer.** Where provisions of policy require certain method of determining liability, named insured cannot recover against insurance company prior to determination of liability according to method so provided. *Seaborn v. Preferred Acc. Ins. Co.*, 206 Okla. 626, 246 P.2d 365 (1952).

Insured may sue insurer directly under uninsured motorist coverage without first obtaining judgment against uninsured motorist, even where uninsured motorist's identity is known and he is subject to process. *Associated Ind. Corp. v. Cannon*, 1975 OK 87, 536 P.2d 920.

Substitute automobile provision gives coverage even though original automobile is not unfit for all uses. *Mid-Continent Cas. Co. v. West*, 1959 OK 245, 351 P.2d 398.

**Duty to Defend.** If class action is covered claim under plain meaning of liability policy's term, insurer has duty to defend, absent statement specifically excluding non-monetary judgments. *St. Paul Fire & Marine v. Pioneer*, 1993 OK CIV APP 24, 852 P.2d 795.

Insurer's defense duty is determined on information gleaned from the petition (and other pleadings), from the insured and from other sources available to insurer at the time defense is demanded. Correctness of insurer's decision to defend depends on facts known or knowable. *First Bank of Turley v. Fid. & Dep. Ins. Co.*, 1996 OK 105, 928 P.2d 298.

**Liability Between Insurers.** Apportionment of loss between two insurers in proportion to maximum coverage afforded by each of policies was proper, where both policies were applicable, although nature of coverage of policies was different in that one was a specific automobile policy and the other was a general liability or comprehensive policy covering all of insured's activities. *Indus. Indem. v. Cont'l*, 375 F.2d 183 (10th Cir. 1967).

Where two policies are excess policies, proration is ordinarily done on basis of respective amounts of coverage. *St. Paul Mercury v. Underwriters at Lloyds*, 365 F.2d 659 (10th Cir. 1966).

Where one of two excess insurers had issued one policy covering excess from \$25,000 to \$125,000 and another policy covering excess from \$125,000 to \$525,000, fact that coverage was divided into two policies was not significant in prorating liability where proration was made on basis of amount of coverage for risk. *Id.*

Where one policy provides only for prorated liability and the other policy for excess insurance, latter pol-

icy will be in excess of policy limits of the former and proration of the loss between the insurers is not authorized. *Thurston Nat'l v. Zurich*, 296 F. Supp. 619 (W.D. Okla. 1968).

When concurrent policies have "other insurance" clauses which cancel each other, they are mutually repugnant and are to be disregarded, with loss shared by insurers on pro rata basis. *Equity Mut. v. Spring Valley*, 1987 OK 121, 747 P.2d 947, *not followed as dicta State Farm Mut. Ins. Co. v. Schwartz*, 933 F.2d 848 (10th Cir. 1991).

Absent agreement between owner of commercial vehicle and permissive user, when one or more policies provide primary coverage for same loss, loss is to be shared by insurers. *Id.*

Absent concurrent provisions in vehicle liability policies for apportionment, each insurer's share shall be based on ratio each policy limit bears to cumulative limit of all concurrent policies. *Id.*

When one policy provides pro rata coverage and another provides only excess coverage, pro rata policy is to be treated as primary. *Id.*

When one policy has escape clause that disclaims any liability if there is other available insurance and another policy provides only excess coverage, "no liability" policy is deemed primary coverage. *Id.*

Between escape clause and pro rata clause, escape clause in policy will prevail and pro rata coverage will be deemed primary. *Id.*

When both vehicle owner's insurer and permissive user's insurer provide primary coverage for same loss and owner and permissive user have agreed that one will provide primary coverage, agreement may be given effect and other primary coverage treated as excess. *Id.*

Where insurer of carrier filed certificate of insurance with Interstate Commerce Commission certifying that it had issued carrier a policy which was amended by attachment of form as an endorsement in order to be in conformity with the Commission's rules and regulations, it would be assumed that policy contained required ICC endorsement and insurer was primary insurer with regard to accident involving truck tractor driven by employee of carrier and leased from another, and insurer could not avoid its responsibility as primary insurer by relying on terms and provisions contained in collateral lease agreement between carrier and the lessor of truck tractor. *Haggans v. Glens Falls*, 465 F.2d 1249 (10th Cir. 1972), *not followed as dicta Empire Fire and Marine Ins. Co. v. Guaranty Nat. Ins. Co.*, 868 F.2d 357 (10th Cir. 1989).

Umbrella liability policy found to be ambiguous because policy could be understood to mean that underlying retained limit must be exhausted or that total damages must exceed the retained limit before policy would pay. *Yaffe v. Great Am. Ins.*, 499 F.3d 1182 (10th Cir. 2007).

Where concurrent policies both provide excess coverage, the other-insurance clause must be disregarded, loss must be shared on a pro-rata basis and defense costs apportioned through equitable contribution. *Am. Casualty v. Health Care Indem.*, 520 F.3d 1131 (10th Cir. 2008).

Typewritten endorsement providing “this insurance shall be secured as excess insurance” vitiated effect of printed “other insurance” provisions of automobile liability policy. *Argonaut v. Nat’l Indem.*, 435 F.2d 718 (10th Cir. 1971).

Interstate Commerce Commission endorsement in liability policy providing “within the limits of liability—it is further understood and agreed that no condition, provision, stipulation, or limitation contained in policy—shall relieve the company from liability hereunder” imposed primary liability insurance, eliminating any need for consideration of effect of identical “other insurance” clauses where recovery was within policy limits. *Id.*

Reference in policy covering employer to possibility of several primary insurance coverages and that policy undertook to cover excess above them all did not alter position of employee’s insurer as excess insurer for its insured and did not place employer’s insurer in more excess position relative to employee’s insurer in action by employee’s insurer to recover sums paid in settlement and costs of defense in suits against employee who was involved in collision while driving employer’s automobile. *St. Paul Mercury v. Underwriters at Lloyds, England*, 365 F.2d 659 (10th Cir. 1966).

Automobile liability insurer’s obligation under policy limiting coverage for temporary use of automobile to excess insurance over any other collectable insurance is for excess coverage but its obligation to defend is not so limited. *W. Am. v. Allstate*, 295 F.2d 513 (10th Cir. 1961).

Insurer has duty to use utmost good faith in disposition of claims made against its insured, and such duty is not lessened by existence of excess insurance, but is extended to include the excess carrier within the shelter of the obligations. *U.S. Fid. & Guar. Co. v. Tri-State*, 285 F.2d 579 (10th Cir. 1960).

Where policy of public liability insurance issued by plaintiff insurer to motor carrier expressly excluded liability for injuries to carrier’s employees, and such li-

ability as did exist for wrongful death of employee of carrier was result of Oklahoma law which read financial responsibility law into policy, and defendant insurer had issued carrier a policy which by its terms purported to cover injuries to employees, liability of defendant insurer was primary, and when plaintiff paid portion of damages for employee’s wrongful death it was subrogated to rights of insured against defendant insurer and was entitled to be indemnified by defendant insurer. OKLA. STAT. tit. 47, § 169; *Bennett v. Preferred Accident*, 192 F.2d 748 (10th Cir. 1951).

Where two automobile liability policies provided, respectively, coverage of owner of an automobile and coverage of passenger in such automobile and where passenger threw a pop bottle which struck a pedestrian and each policy contained an excess insurance clause as to non-owned automobiles, the coverage provided by the passenger’s insurer was excess to that provided by the owner’s insurer. *Home Indem. v. Lively*, 353 F. Supp. 1191 (W.D. Okla. 1972).

A settlement between an insurance company which is primarily liable and its insured, even though a full, final and complete settlement, does not affect the priority of payment as regards other insurance clauses unless the amount of the settlement exhausts the policy limits; to hold otherwise would allow companies primarily liable to transfer liability by making token settlement. *Smith v. Gov’t Employee Ins.*, 1976 OK 190, 558 P.2d 1160.

Although garnisher-owner had made a settlement of his property damage claim with his automobile insurer, such fact did not entitle him to recover under excess coverage clause of borrower’s policy absent showing that the maximum coverage afforded by owner’s policy had been exhausted by the settlement. *Id.*

Exclusions. Intentional Act. Where insured’s employee became involved in argument while unloading and delivering merchandise from insured’s truck and employee thereafter injured plaintiff, there is no “accident” which would bring employee within coverage of insured’s automobile policy. *Culp v. Northwestern Pac.*, 365 F.2d 474 (10th Cir. 1966).

Assault. Liability policy which specifically excluded bodily injury or property damage caused intentionally by or at direction of insured excluded liability for injuries due to assault and battery by insured, even though insured did not intend to inflict upon victim specific injuries sustained. *Pendergraft v. Comm’l Standard*, 342 F.2d 427 (10th Cir. 1965).

Where policy insuring partnership against liability for “accident” defined “accident” as including assault and battery unless committed by or at direction of in-



sured, and “insured” as including partner with respect to his liability of such, assault and battery by one partner was not “accident” as to him but it was “accident” as to other partner, who was “additional insured,” and other partner’s liability as partner was within coverage. *Employers Surplus Lines v. Stone*, 1963 OK 279, 388 P.2d 295.

Violations of Law. Where insured has misrepresented a material fact in connection with submitted proofs of loss or has intentionally and deliberately submitted false statements as to amount of loss or has caused or knowingly permitted fire to be set, insured cannot recover on fire policies. *Buffalo v. Amyx*, 262 F.2d 898 (10th Cir. 1958).

Insured’s fraud in procuring fire insurance policies and destruction of insured property by fire and making false statements as to value of property in proof of loss vitiates contract between parties to policies. *Hargrove v. Am. Cent.*, 125 F.2d 225 (10th Cir. 1942).

Spouse was not answerable for arson of her husband simply because of their marriage, but she was bound by contract of insurance, under which jointly insured party owning property jointly with arsonist would be precluded from recovery under the contract without regard to his or her status as spouse. *Short v. Okla. Farmers Union*, 1980 OK 155, 619 P.2d 588.

Waiver. Forfeiture clause in insurance policy may be waived by insurer. *Exch. Trust v. Capitol Life*, 49 F.2d 133 (10th Cir. 1931).

Stipulation limiting insurer’s liability may be impliedly waived, and if insurance company has notice of breach and fails to cancel policy it will be deemed to have waived stipulation. *Security Ins. Co. v. Greer*, 1968 OK 2, 437 P.2d 243.

A “non-waiver agreement” entered into between insurer and insured reserves to insurer every right under fire policy not previously waived, and to the insured every right which had not been forfeited, but such agreement does not prevent insurer from thereafter waiving any requirements of the policy nor does it forfeit any right of the insured which he then has under the policy. *Aetna v. Powers*, 190 Okla. 116, 121 P.2d 599 (1942).

Provisions in policy made for benefit of insurer may be waived by it. *Nat’l Life v. Clayton*, 70 Okla. 116, 173 P. 356 (1917). Stipulation in insurance policy defeating or limiting insurer’s liability for loss of property fully within excepted risk may be impliedly waived; if insurer has notice of insured’s breach of condition provided in stipulation and fails to cancel policy it will be deemed to have waived such condition. *Security Ins. Co. v. Greer*, 1968 OK 3, 437 P.2d 243.

Insurer may by his action or conduct be estopped from denying that his policy affords coverage for risk which insured has been led honestly to believe was assumed under terms of policy. *Id.* An accepted or covered risk with a condition subsequent is subject to waiver as distinguished from an excepted risk which takes a new contract to cover the risk. Stipulation, limiting insurer’s liability, may be waived. *Kerr v. Aetna*, 124 Okla. 112, 254 P. 105 (1926).

Infants. See “AUTOMOBILES, Guest Cases.”

Jury. Where plaintiff driver sued defendant driver and also sued plaintiff’s uninsured motorist insurance carrier alleging that defendant driver was underinsured, plaintiff’s insurer was proper party to lawsuit, but evidence as to names of both insurers and terms of their respective policies was to be withheld from jury and if, after issue of defendant motorist’s negligence and fact and quantum of plaintiff’s damages were fairly submitted to jury, verdict was rendered in favor of plaintiff, trial court, under stipulations entered in case, could properly determine plaintiff’s insurer’s ultimate liability under terms of respective policies and enter judgment accordingly. OKLA. STAT. tit. 36, § 3636; *Tidmore v. Fullman*, 1982 OK 73, 646 P.2d 1278.

Although assignment of life policies appeared to be absolute, whether assignment was made in consideration for repayment of funds advanced to insured by assignee was a question of fact. *Barry v. Hubbard*, 195 Okla. 112, 155 P.2d 512 (1944).

Notice. Failure to comply with notice provision of automobile policy did not remove coverage in absence of proof that insurer was prejudiced by such failure. *Fox v. National Savings*, 1967 OK 27, 424 P.2d 19. Where driver who quit the following day had notice of accident, but was not insured’s agent to give notice thereof to insurer, and insured gave notice as soon as its responsible officers received notice, failure to give earlier notice was excused. *Citizens Cas. v. Jones*, 238 F.2d 369 (10th Cir. 1956).

Punitive Damages. In action involving an oil field pipeline explosion, the Court of Appeals held that the public policy of Oklahoma would be thwarted by permitting insurance proceeds to be applied to the punitive damages award because that would allow the insured to escape the punishment of punitive damages and would allow a party other than the actual wrongdoer to pay the penalty. *Oliver v. Producers Gas Co.*, 1990 OK CIV APP 28, 798 P.2d 1090. Where insurance company offers no credible evidence that it denied plaintiffs’ claim on the grounds of comparative negligence, it may not later use decedent’s contributory negligence to defend its failure to pay a claim. \$2,000,000 in punitive damages arising

from a bad faith failure to pay a \$10,000 underinsured motorist claim is excessive and must be remitted to \$400,000 where plaintiffs already received \$200,000 in actual damages for emotional distress. *Buzzard v. Farmers*, 1991 OK 127, 824 P.2d 1105.

See “LIABILITY INSURANCE, Compromise of Claims”: Duty to act in good faith.

#### LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables. Of Limitations. OKLA. STAT. tit. 12, § 95 (2009).

Limitations in Contract. OKLA. CONST. art. XXIII, §9 prevents abridging by contract of time within which rights under law may be enforced and requiring of any notice as condition precedent to maintaining of action for breach of duty imposed by law. *Gray v. Reliable Ins.*, 26 Okla. 592, 110 P. 728 (1910).

Loss payable sixty days after proof of loss, as provided, is received by company and ascertainment of loss made by agreement with insured in writing or filing with company of award as provided. No action on policy for recovery on claim unless standard policy requirements complied with, and unless commenced within 12 months after inception of loss. OKLA. STAT. tit. 36, § 4803 (2003) (Standard Fire Insurance policy statutory provisions).

Waiver. Insurer’s negotiation with insured for settlement of claim under fire policy does not, alone, establish waiver on part of insurer of policy’s limitation provision unless such negotiations cause insured to delay instituting action during that period. *Oklahoma Farm Bureau Mut. Ins. v. Lay*, 1965 OK 5, 398 P.2d 506.

Actions to recover loss under uninsured motorist coverage are governed by five-year statute of limitations applicable to written contracts and provision in insurance policy which limits time for bringing suit thereunder to less than statutory period is void. *Uptegraft v. Home Ins.*, 1983 OK 41, 662 P.2d 681. However, a cause of action for uninsured motorist benefits accrues, and the five-year statute of limitations begins to run, on the date the insurance contract is breached, not on the date of the motor vehicle accident. *Willie v. GEICO Cas. Co.*, 2000 OK 10, 2 P.3d 888.

Accrual. Generally a statute of limitations begins to run when a cause of action accrues, and a cause of action accrues at time a litigant first could have maintained his action to a successful conclusion. *Sherwood Forest No. 2 Corp. v. City of Norman*, 1980 OK 191, 632 P.2d 368. In a malpractice action against the estate of their deceased accountant, plaintiffs may recover the IRS interest

charge on a delinquent tax payment that resulted from the accountant’s malpractice. The statute of limitations in such a case begins to run when plaintiffs’ damages are fixed, not at the time they learn that the accountant has erred. *Wynn v. Estate of Holmes*, 1991 OK CIV APP 78, 815 P.2d 1231 (overruled on other grounds).

A child’s common law action for loss of parental consortium, recognized in *Williams v. Hook*, 1990 OK 136, 804 P.2d 1131 accrues when the parent is injured. *Williams* applies prospectively to actions accruing after February 15, 1991. *Heston v. People’s Elec. Coop.*, 1992 OK 4, 824 P.2d 1137.

Discovery Rule. A “multiple personality disorder” does not constitute a legal disability tolling the statute of limitations in a personal injury action. *Lovelace v. Keohane*, 1992 OK 24, 831 P.2d 624.

Fraud. OKLA. STAT. tit. 12, § 95 (2009): Two-year fraud statute of limitations runs from date of discovery of the fraud.

Tolling. Tort action for personal injuries barred after two years, and concealment of identity of driver of automobile does not toll statute. Right to refile case within one year after dismissal other than on merits only applicable to cases dismissed in Oklahoma court. *Morris v. Wise*, 1955 OK 297, 293 P.2d 547.

Statute of limitation for claims of minors and other persons under a legal disability is generally tolled until one year after the disability is removed. This tolling rule does not apply to actions for recovery of real property and certain medical malpractice actions. OKLA. STAT. tit. 12, § 96 (1987).

A party who wrongfully conceals material facts, and thereby prevents a discovery of his wrong or of fact that cause of action has accrued against him is not allowed to take advantage of his own wrong by pleading Oklahoma statute of limitations. *Williams v. Borden, Inc.*, 637 F.2d 731 (10th Cir. 1980) (distinguished).

Doctrine of fraudulent concealment tolls Oklahoma three-year period of limitations for action based on statutorily created liability and two-year statute of limitations on actions for fraud. OKLA. STAT. tit. 12, § 95; *Richey v. Westinghouse Credit Corp.*, 667 F. Supp. 752 (W.D. Okla. 1986).

Waiver. Under Oklahoma law and under federal civil procedure rules, the statute of limitations is a matter of affirmative defense which may be waived. OKLA. STAT. tit. 12, §§ 2008(C) (2009), 2012(B) (2004); FED. R. CIV. P. 8(c), 12(b).

In modern law, to “waive” affirmative defense of limitations means to abandon, throw away, renounce,

repudiate, or surrender privilege or right under such statute of limitations. *Smedley v. State Indus. Ct.*, 1977 OK 55, 562 P.2d 847.

General rule relating to statute of limitations does not apply if a person induces another to let the limitations period expire and the inducement is of character making it iniquitous to permit the limitations statute to bar recovery. *Bowman v. Okla. Natural Gas Co.*, 1963 OK 197, 385 P.2d 440.

In action against a school district to recover a money judgment on a so-called open account for merchandise, officials of the district could not waive statute of limitations by failing to plead it when available. *Lowden v. Stephens County Excise Bd.*, 191 Okla. 5, 126 P.2d 1023 (1942).

Action on life policy, wherein plaintiff relied on evidence that insured had disappeared and had not been heard from more than seven years after expiration of seven-year period of disappearance held not barred by limitation, where insurer with knowledge of facts relating to insured's disappearance demanded, received and accepted premiums for full time until action was commenced. *Egan v. Mo. State Life Ins.*, 177 Okla. 348, 59 P.2d 263 (1936).

Where claimant filed petition on claim against estate within time period prescribed by statute after administrator rejected claim by non-action, but claimant failed to issue summons within such time relying on promise of administrator's attorney to respond to petition, administrator held not estopped to plead limitation. OKLA. STAT. tit. 58, §§ 337, 339; *Dikeman v. Graymountain*, 175 Okla. 83, 51 P.2d 529 (1935).

Statute limiting a minor's medical malpractice action to seven years from the infliction of the injury is unconstitutional. *Mowles v. Hillcrest Health Ctr.*, 1991 OK CIV APP 118, 832 P.2d 24.

Products liability suit for wrongful death wherein the court held that OKLA. STAT. tit. 12, § 109 (1978), providing a ten-year limitation for tort action on improvements to real property is constitutional. *Riley v. Brown & Root, Inc.*, 1992 OK 114, 836 P.2d 1298.

Limitations period under construction contract begins to run when the contract is completed, not when a particular subcontract is finished. Also, OKLA. STAT. tit. 12, § 109 (1978), is statute of repose, not limitation; it may thus bar a cause of action that has not accrued. Finally, uncertainty as to the exact source of a particular problem in a structure will not toll the statute of limitations vis-à-vis a claim of builder's negligence. *Samuel Roberts Noble Found., Inc. v. Vick*, 1992 OK 140, 840 P.2d 619.

Plaintiff may refile within one year following dismissal other than on merits. OKLA. STAT. tit. 12, § 100 (1975). This provision applies when Workers' Compensation Court dismisses Workers' Compensation claim. *Williams v. Okla. Nat'l Stockyards Co.*, 1978 OK 21, 577 P.2d 906.

When employee elects to take under Workers' Compensation Law and insurance carrier who pays compensation award acquires that employee's cause of action against negligent third party, insurance carrier is subrogated to right of employee and is governed by two-year statute of limitations concerning personal injury; statute of limitations applies to State Insurance Fund in action brought by it concerning conduct of its insurance business to same extent as to any other private insurance carrier. *State Ins. Fund v. Taron*, 1958 OK 282, 333 P.2d 508 (distinguished and applied narrowly).

Fact that plaintiff had no knowledge that injury was compensable under Workers' Compensation Laws did not prevent statute of limitations from running. *Cinderella Motor Hotel, Inc. v. Wallace*, 1973 OK 8, 506 P.2d 556.

One year limitation period under Workers' Compensation Act does not begin to run until injured plaintiff becomes aware that cumulative effect of recurrent trauma was causally connected to employment. *Eaton v. Herman Van Noy Drilling*, 1981 OK 152, 637 P.2d 1249. Under OKLA. STAT. tit. 85, § 43(A), the statute of limitation is not a bar as a matter of law in all cases. The statute of limitations does not commence until the worker is "aware" of the injury and that the injury is job related. *Ashlock v. Liberty Glass Co.*, 1987 OK CIV APP 19, 739 P.2d 1025.

The voluntary payment of medical expenses by a Workers' Compensation claimant's employer does not toll the three (3) year statute of limitations for the reopening of a Workers' Compensation claim. *Lang v. Erlanger Tubular Corp.*, 2009 OK 17, 206 P.3d 589.

Statute of limitations to be applied to manufacturers' products liability is two (2) years from date of injury. *O'Neal v. Black & Decker Mfg. Co.*, 1974 OK 55, 523 P.2d 614.

Section 2-318 of Uniform Commercial Code does not extend coverage of its implied warranty to employees of purchaser and OKLA. STAT. tit. 12, § 95(A)(3), two year statute of limitations, applies to products liability claims by employee. *Hester v. Purex Corp.*, 1975 OK 48, 534 P.2d 1306.

Prior provision of OKLA. STAT. tit. 12, § 98 which tolled statute of limitations whenever defendant left state, even if defendant could be served under long-arm



statute, was unconstitutional. However, OKLA. STAT. tit. 12, § 98 was revised in 1970 and has been held constitutional. *Wright v. Keiser*, 1977 OK 121, 568 P.2d 1262.

The phrase “period of limitations,” as used in OKLA. STAT. tit. 12, § 105 (1970), which determines the statute of limitations applicable to claims accruing outside of the state, does not include statutes of repose. *Consol. Grain & Barge Co. v. Structural Sys., Inc.*, 2009 OK 14, 212 P.3d 1168.

Special one year statute of limitations prescribed by OKLA. STAT. tit. 36, § 4803 for claims under all fire insurance policies is inapplicable to claim for equitable subrogation after one insurance company pays total claim under its policy and seeks recovery of amount in excess of its pro rata share from another insurer. Applicable statute of limitations is three years under OKLA. STAT. tit. 12, § 95. *Republic Underwriters Ins. v. Fire Ins. Exch.*, 1982 OK 67, 655 P.2d 544.

Time limitations contained in Oklahoma Governmental Tort Claims Act, OKLA. STAT. tit. 51, § 156 control as to cause of action in favor of minor, notwithstanding provisions of OKLA. STAT. tit. 12, § 96; *Johns v. Wynnewood Bd. of Ed.*, 1982 OK 101, 656 P.2d 248. Time limitations prescribed in Oklahoma Governmental Tort Claims Act, OKLA. STAT. tit. 51, § 151 *et seq.*, for bringing action against public trust or municipal corporation acting in its proprietary capacity, are not violative of equal protection and due process rights afforded by United States and Oklahoma Constitutions. These statutes of limitations do not constitute special legislation forbidden by OKLA. CONST. art. V, § 59. *Black v. Ball Janitorial Serv., Inc.*, 1986 OK 75, 730 P.2d 510. Under the Political Subdivision Tort Claims Act, a claimant must file an action within six months after the political subdivision either denies the claim or fails to approve it within 90 days after receiving it. The six month limitation period commences after 90 days and cannot be extended even if the political subdivision subsequently denies the claim after expiration of the six month period. *Trent v. Board of County Comm’rs*, 1988 OK 15, 755 P.2d 615 (distinguished and applied narrowly).

Time limitation of two years contained in OKLA. STAT. tit. 12, § 95(A)(3) governs tort of intentional infliction of emotional distress rather than one year limitation period contained in OKLA. STAT. tit. 12, § 95(A)(4). *Williams v. Lee Way Motor Freight, Inc.*, 1984 OK 64, 688 P.2d 1294. A two-year period of limitations governs actions for false light invasion of privacy. *Colbert v. World Publ’g Co.*, 1987 OK 116, 747 P.2d 286.

Employer who within one year of date of injury of employee, procures signature of employee on form, “Employer’s First Notice of Injury,” which is not subse-

quently placed on file with Workers’ Compensation Court as mandated by statute, is estopped from invoking one year statute of limitations provided by OKLA. STAT. tit. 85, § 43. (Statute, as amended in 1985, provides two-year statute of limitations.) *Bennett v. Scrivner Inc.*, 1985 OK 4, 694 P.2d 932.

Other Cases. Issue was the constitutionality of OKLA. STAT. tit. 12, § 109, the statute that bars tort actions against builders, architects, owners and the like for damages by reason of defective design or construction for injuries occurring more than 10 years after completion of construction of an improvement to real property. Held the statute was constitutional because it treated equally entire classes of similarly situated persons or things and the ten year limit is reasonably related to legislative objective of eliminating open ended liability in the construction industry. *St. Paul Fire & Marine Ins. v. Getty Oil Co.*, 1989 OK 139, 782 P.2d 915.

In a workers’ compensation suit for a single-event injury, the Statute of Limitations commences to run when the accident occurs, and not when the full effects of the injury are made apparent. *McDonald v. Time-D.C. Inc.*, 1989 OK 76, 773 P.2d 1252 (distinguished). A claimant alleging retaliatory discharge for filing a workers’ compensation suit is subject to a three year statute of limitations because the cause of action is one of statutory creation. Therefore, OKLA. STAT. tit. 12, § 95 applies. *Ingram v. Oneok, Inc.*, 1989 OK 82, 775 P.2d 810.

## MALPRACTICE

Medical. Statutory presumption of negligence for medical care found in OKLA. STAT. tit. 76, § 21 is not limited to instances where statute and common law doctrine of *res ipsa loquitur* both apply. Presumption is applicable in any action where following three criteria are met: 1) plaintiff sustained an injury; 2) such injury was proximately caused by an instrumentality solely within the control of defendant; 3) such injury does not ordinarily occur under the circumstances absent negligence on the part of defendant. *Middlebrook v. Imler, Tenny & Kugler, M.D.’s, Inc.*, 1985 OK 66, 713 P.2d 572.

Res Ipsa Loquitur. *Res ipsa loquitur* is a pattern of proof which may be applied when an injury is alleged to have been negligently inflicted and the harm is shown not to occur in the usual course of everyday conduct unless a person who controls the instrumentality likely to have produced that harm fails to exercise due care to prevent its occurrence. *Jackson v. Okla. Mem’l Hosp.*, 1995 OK 112, 909 P.2d 765.

Once the foundation facts for *res ipsa loquitur* are established, negligence may be inferred from the injurious occurrence without the aid of circumstances pointing



to the responsible cause. The burden of producing evidence (but not the ultimate burden of persuasion) is then shifted to the defendant. *Id.*

For *res ipsa loquitur*, the foundational facts to be shown are: (a) an injury that does not occur in the usual course of everyday conduct; (b) the defendant(s) exclusively controlled the instrumentality that caused the injury; (c) evidence of the true explanation for the harm's occurrence is more accessible to the defendant than to the plaintiff; and (d) the circumstances surrounding the harmful event are not likely to produce an injury unless the defendant fails to exercise due care to prevent its occurrence. *Id.*

In the context of health-care litigation, *res ipsa loquitur* may be applied in suits against physicians and hospitals upon proof of the foundation elements, but negligence can never be presumed from showing no more than unsuccessful treatment of a patient. *Id.*

Whether a case is fit for the application of *res ipsa loquitur* presents a question of law. *Harder v. F.C. Clinton, Inc.*, 1997 OK 137, 948 P.2d 298.

The effect of the *res ipsa loquitur* evidentiary rule is merely to raise a rebuttable inference which allows a plaintiff to take the case to the jury and thus avoid a directed verdict for the defendant. *Id.*

Where the proof is conflicting or subject to different inferences, some of which are in favor of and others against the applicability of *res ipsa loquitur*, the question must be left to the jury. It is only when one of the foundation facts is irrefutably negated that the necessary prop may be deemed knocked out from under the *sine qua non* predicate for application of the *res ipsa loquitur* proof pattern. *Id.*

Expert Testimony. Extrajudicial admission may satisfy expert opinion requirement in medical malpractice cases. *Smith v. Karen S. Reisig, M.D., Inc.*, 1984 OK 56, 686 P.2d 285.

If the showing of any foundational fact requires a degree of knowledge or skill not possessed by the average person, expert testimony must be adduced. *Harder v. F.C. Clinton, Inc.*, 1997 OK 137, 948 P.2d 298.

The general rule is expert testimony is ordinarily necessary to establish causation in professional liability cases. *Boxberger v. Martin*, 1976 OK 78, 552 P.2d 370.

The trier of the fact must have sufficient technical and scientific testimony at his disposal to answer a scientific and technical question of fact. *Id.*

When a physician's lack of care has been such as to require only common knowledge and experience to understand and judge it, expert medical testimony is not

required to establish that care. *Id.*; *Benson v. Tkach*, 2001 OK CIV APP 100, 30 P.3d 402. There is a limitation on the rule that expert medical testimony is essential to support a cause of action for negligence where the common knowledge or experience of laymen is extensive enough to recognize or infer negligence from the facts. *Boxberger v. Martin*, 1976 OK 78, 552 P.2d 370; *Norman v. Mercy Mem'l Health Ctr., Inc.*, 2009 OK CIV APP 55, 215 P.3d 841.

Expert medical testimony is not required to establish the cause of an objective injury where there is competent evidence, without such testimony, to establish the cause with reasonable certainty. *Id.*

Need for expert medical testimony in action against physician is limited to establishing proper standard of care physician should have followed. *Id.*

Expert testimony is not required where negligence is so grossly apparent that laymen would have no difficulty recognizing it. *Turney v. Anspaugh*, 1978 OK 101, 581 P.2d 1301; *Benson v. Tkach*, 2001 OK CIV APP 100, 30 P.3d 402.

In all but the extraordinary medical malpractice case, patient has burden of producing expert testimony to support prima facie case of negligence. *Robertson v. LaCroix*, 1975 OK CIV APP 14, 534 P.2d 17.

When all of the expert testimony attributed plaintiff's injury to either of two causes and plaintiff's testimony reasonably tends to exclude the non-negligent cause, a jury could reasonably infer that the injury was caused by a negligently inflicted cut or puncture of her bladder during surgery. *Id.*

Informed Consent. Under doctrine of informed consent, a doctor has the duty to apprise patient of both the risks of, and the alternatives to, proposed medical procedure involving inherent risks of collateral injury, and patient should then be allowed to weigh risks according to his own values and choose procedure he finds most acceptable, or to elect none at all. *Lambert v. Park*, 597 F.2d 236 (10th Cir. 1979).

Under doctrine of informed consent, physician is required to disclose to his patient all material risks of proposed procedure even if other doctors in community or specialty would not have made so full a disclosure. *Id.* Hospitals do not have a duty to inform patients of material risks of a procedure prescribed by patient's physician. *Goss v. Okla. Blood Inst.*, 1990 OK CIV APP 14, 856 P.2d 998.

What is material to a patient's decision is subjective to each patient. *Spencer v. Seikel*, 1987 OK 75, 742 P.2d 1126.

As a defense to cause of action for failure to obtain informed consent, physician may plead and prove that patient knew of the risks or alternatives or show that an emergency existed to prevent consent from being given. *Id.*

Fact that physicians in Oklahoma are held to national standards of care does not impose on physicians a duty to know or disclose the laws of other states which are contrary to the law in the state wherein they practice. *Id.*

Whether physician has breached his duty to inform patient does not depend on professional standard or custom of physicians practicing in community, but, rather, scope of communications must be measured by patient's need to know enough to enable him to make intelligent choice, and full disclosure of all material risk incident to treatment must be made. *Scott v. Bradford*, 1979 OK 165, 606 P.2d 554.

There is no need for physician to disclose risks that either ought to be known by everyone or are already known to patient, and physician's primary duty is to do what is best for his patient, and if full disclosure would be detrimental to patient's total care and best interests, physician may withhold such disclosure, as where disclosure would alarm an emotionally upset or apprehensive patient. *Id.*

Cause of action against physician or surgeon, based on lack of informed consent, consists of duty to inform and causation of injury, and element of causation requires that patient would have chosen no treatment, or different course of treatment, as alternative had material risks of each been made known to him. *Id.*

Reasonable man standard is not applicable in determining, in malpractice action against physician or surgeon, whether patient would have consented to proposed treatment if given full disclosure. *Id.*

If treatment is completely unauthorized and performed without any consent at all, there has been a battery. However, if the physician obtains a patient's consent but has breached his duty to inform, the patient has a cause of action sounding in negligence for failure to inform the patient of his options, regardless of the due care exercised at treatment, assuming there is injury. *Id.*

Standard of Care. The standard of care required of those engaging in the practice of the healing arts within the State of Oklahoma shall be measured by national standards. OKLA. STAT. tit. 76, § 20.1 (2011).

The standard of care applicable to medical provider failing to remove foreign objects from a surgical opening is ordinary care, not strict liability. *Franklin v. Toal*, 2000 OK 79, 19 P.3d 834.

A physician's breach of his medical standard of care, without a resulting medical injury, is insufficient for recovery under a claim of medical malpractice. *Silman v. Whistler*, 1989 OK CIV APP 94, 790 P.2d 1125. Departure from drug manufacturer's recommendations found on package insert is not prima facie evidence of negligence. *Grayson v. Children's Hosp. of Okla.*, 1992 OK CIV APP 116, 838 P.2d 546.

Wrongful Birth/Wrongful Life. A plaintiff in a medical malpractice action for a failed sterilization cannot recover the cost of raising a healthy, unplanned child. *Morris v. Sanchez*, 1987 OK 110, 746 P.2d 184. "Act of God" instruction in a medical malpractice case constitutes reversible error. *Studebaker v. Cohen*, 1987 OK 100, 747 P.2d 274, *aff'g*, *Morris v. Sanchez*, 1987 OK 110, 746 P.2d 184, which states that "under the public policy of this state, a parent cannot be said to be damaged by the birth of a normal, healthy child, and the parent may not recover damages because of the birth of such a child." Court, however, notes that *Morris* does not preclude a claim for other forms of damages, including expenses incurred as a result of unplanned pregnancy, that may arise out of the negligent performance of sterilization operations. *Goforth v. Porter Med. Assocs.*, 1988 OK 63, 755 P.2d 678, *aff'g*, *Morris v. Sanchez*, 1987 OK 110, 746 P.2d 184.

Hospital. Charitable Immunity/Limitations. Charitable corporations are not immune from liability for torts by reason of any exemption accorded them on the basis of the purposes for which they were incorporated. *Gable v. Salvation Army*, 186 Okla. 687, 100 P.2d 244 (1940).

There are statutory limitations on how a trust may be sued. OKLA. STAT. tit. 60, § 179 (2011).

Damages. In medical malpractice cases where application of loss of chance doctrine is appropriate, damages must be limited to only those proximately caused from defendant's breach of duty. *McKellips v. St. Francis Hosp. Inc.*, 1987 OK 69, 741 P.2d 467; *see also Estep v. Ross E. Pope, D.O., P.C.*, 1992 OK CIV APP 77, 842 P.2d 360.

Amount of damages recoverable in wrongful death medical malpractice action under loss of chance doctrine is equal to percent of chance lost multiplied by total amount of damages which are ordinarily allowed in wrongful death actions. OKLA. CONST. art. VII, § 15; OKLA. STAT. tit. 12, § 588; OKLA. STAT. tit. 12, § 1053. *McKellips v. St. Francis Hosp., Inc.*, 1987 OK 69, 741 P.2d 467.

Evidence that patient was totally disabled from participation in gainful employment and that patient's lost future earnings totaled \$1,956,373 was sufficient to support award of 2.3 million dollars, even in absence of fu-

ture medical expenses and past and future pain and suffering. *Middlebrook v. Imler, Tenny & Kugler M.D.'s, Inc.*, 1985 OK 66, 713 P.2d 572.

Where liability in a medical malpractice action is premised upon physician's failure to inform of nonsurgical alternatives, one of the elements of damage is the injury and expense caused by the surgery itself, including any complications which may arise, whether resulting from defective treatment or not, and without regard to whether the complication was a risk required to be disclosed. *Smith v. Karen S. Reisig, M.D., Inc.*, 1984 OK 56, 686 P.2d 285.

Plaintiff brought medical malpractice action to recover damages for permanent injuries he allegedly suffered when his appendix burst following alleged misdiagnosis of condition and negligent treatment and release by emergency room physicians on duty at hospital. Despite independent contractor status of emergency room physicians, hospital held to be liable for their negligence given absence of preexisting patient/physician relationship and fact that plaintiff looked solely to and relied upon hospital for treatment. *Smith v. St. Francis Hosp., Inc.*, 1983 OK CIV APP 58, 676 P.2d 279; *see also Lewis v. Cent. Okla. Med. Grp., Inc.*, 2000 OK CIV APP 26, 998 P.2d 202.

Hospital not held liable for negligence of independent contractor doctor when patient had preexisting patient/physician relationship with doctor and patient looked to doctor rather than hospital to provide health care. *Weldon v. Seminole Mun. Hosp.*, 1985 OK 94, 709 P.2d 1058.

Legal. See "ATTORNEYS."

Other Professionals. Damages. In a malpractice action against the estate of their deceased accountant, plaintiffs may recover the IRS interest charge on a deficient tax payment that resulted from the accountant's malpractice. The statute of limitations in such a case begins to run when the plaintiffs' damages are fixed, not at the time they learn that the accountant has erred. *Wynn v. Estate of Holmes*, 1991 OK CIV APP 78, 815 P.2d 1231 (overruled on other grounds).

Standard of Care. Architects only required to exercise ordinary professional skill and diligence and to conform to accepted architectural standards; their contracts do not guarantee perfect plans or satisfactory results. Architects only liable for failure to exercise reasonable care and professional skill in the preparation and execution of their plans according to their contract. *Smith v. Goff*, 1958 OK 100, 325 P.2d 1061.

## NEGLIGENCE

See Law Digest Tables.

Age. Child who suffers prenatal injury as result of defendant's negligence has common law negligence action against defendant. *Evans v. Olson, M.D.*, 1976 OK 64, 550 P.2d 924.

Attractive Nuisance. *Patsy Oil & Gas v. Odom*, 186 Okla. 116, 96 P.2d 302 (1939). Doctrine applies where premises are sufficiently attractive to allure children and where situation is such as to suggest to landowner probability of harm. *Ramage v. Thomas*, 172 Okla. 24, 44 P.2d 19 (1935). Rule of attractive nuisance not applicable to children over fourteen in absence of evidence of lack of capacity. *Sidwell v. McVay*, 1955 OK 115, 282 P.2d 756.

Assumption of the Risk. There must either be an express agreement, a pre-existing status between the defendant and the plaintiff, or an element of consent to the harm that is known and appreciated by the plaintiff. Anything falling outside of these areas is simply contributory negligence. *Thomas v. Holliday*, 1988 OK 116, 764 P.2d 165.

Comparative/Contributory Negligence. See Oklahoma's comparative negligence statutes OKLA. STAT. tit. 23, §§ 13, 14.

Contributory negligence, as prescribed by Oklahoma Constitution, Art. 23, § 6, is a question of fact, and shall, at all times, be left to the jury. The trial court erred in holding as a matter of law that defendant was wantonly and willfully negligent, and, therefore, that defendant was not entitled to a comparative negligence instruction. *Morris et al. v. Sorrells et al.*, 1992 OK 125, 837 P.2d 913. Although a driver's negligence cannot be imputed to a passenger, passengers have an independent duty to use ordinary care for their own safety. *Snyder v. Dominguez*, 202 P.2d 135, 138-39 (Okla. 2008).

Contributory negligence of 14 year old not necessarily judged by same rules which govern adults, but must be judged according to child's maturity and capacity, his intelligence, alertness, experience and previous training, all in light of danger encountered. *Morris v. White*, 177 Okla. 489, 60 P.2d 1031 (1936).

The court made clear that the repudiation of joint and several liability expressed in *Laubach v. Morgan*, 1978 OK 5, 588 P.2d 1071, only applied in comparative negligence cases, and was inapplicable to "tort litigation in which the injured party is not a negligent co-actor." Within Oklahoma then, in such a case, joint and several liability with the right at common law of the plaintiff to recover all of his damages from any tortfeasor regardless of the degree of negligence that party contributed to the



plaintiff's damages, continues to be the law. *Nat'l Union Fire Ins. Co. v. A.A.R. W. Skyways, Inc.*, 1989 OK 157, 784 P.2d 52. OKLA. STAT. tit. 12, § 832, which provides for contribution among tortfeasors, did not overrule *Laubach*, 588 P.2d 1071, in this regard. *Berry v. Empire Indem. Ins.*, 1981 OK 106, 634 P.2d 718.

Negligence of absent tortfeasors may be considered by jury in determining comparative negligence. *Paul v. N.L. Indus., Inc.*, 1980 OK 127, 624 P.2d 68.

The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury. OKLA. CONST. art. XXIII, § 6. There are exceptions. First, assumption of the risk and contributory negligence need not be submitted to a jury in cases where the plaintiff fails to present evidence tending to show primary negligence on the part of the defendant, and, second, these affirmative defenses need not be submitted to a jury where, upon undisputed facts, reasonable people exercising fair and impartial judgment could not reasonably reach differing conclusions concerning them. *Flanders v. Crane Co.*, 1984 OK 88, 693 P.2d 602. When different inferences must be drawn from uncontroverted facts, the dispute must be submitted for a trier's resolution. *Morales v. City of Okla. City ex rel. Okla. City Police Dept.*, 230 P.3d 869, 881 (Okla. 2010).

In federal court, Oklahoma Constitution making contributory negligence always a jury question is not binding in federal court procedure. *Miller v. Irby*, 227 F.2d 942 (10th Cir. 1955). Trial court may not instruct jury that finding certain facts will require finding that injured plaintiff is guilty of contributory negligence; however, court may outline duty imposed by law on injured plaintiff, but the court may not take from the jury a proper question of fact. *Squyres v. Klick, et al.*, 1953 OK 294, 264 P.2d 325.

If ordinarily prudent person would believe that imminently dangerous condition has been created by defendant's negligence, defendant may be liable for expenses incurred to minimize damages even though his negligence did not in fact create dangerous condition. *Superior Oil Co. v. Griffin*, 1960 OK 249, 357 P.2d 987.

Mitigation of Damages. Injury to owner's property while owner was making prudent effort to minimize damages, where property placed in peril as proximate result of defendant's negligence, actionable as result of original negligence of defendant. *Curtis v. Shell Pipe*, 1953 OK 382, 265 P.2d 488. Where party is injured, his duty of mitigation of damages does not require undergoing major surgery with risk of failure or death, and such person has freedom of choice in matter. *Jones, et al. v. Eppler*, 1953 OK 363, 266 P.2d 451.

Punitive. See OKLA. STAT. tit. 23, § 9.1.

Limitations on Awards. See OKLA. STAT. tit. 23, § 9.1.

Definition/Duty. Care Required. Care required under OKLA. STAT. tit. 76, § 5 is ordinary care or skill, which may take into account characteristics of thing involved, but "high degree of care" may not be imposed by instruction to jury upon defendant where similar care was not by instruction placed upon injured plaintiff in his actions. *Phillips Petroleum v. Price*, 1956 OK 191, 298 P.2d 772. Both licensee and invitee are entitled to duty of ordinary care by proprietor. *Eddy v. Okla. Hotel*, 228 F.2d 106 (10th Cir. 1955).

Storekeeper, not insurer of safety of customers, has duty of maintaining premises in reasonably safe condition for business invitees and duty to warn of dangerous conditions. Duty applies only to hidden dangers not to conditions which are visible and apparent for all to see. *J.C. Penney Co. v. Hoover*, 1966 OK 88, 414 P.2d 293. Tenant can state cause of action against landlord arising out of criminal activity harming tenant where tenant alleges landlord knew of criminal activities and circumstances allowing tenant to be put at risk. *Lay v. Dworkman*, 1986 OK 85, 732 P.2d 455; *Cordes v. Wood*, 1996 OK 68, 918 P.2d 76. But this is limited only to situations where the defendant renders services that it should recognize as necessary for the protection of another. *Frey v. AT&T Mobility, LLC*, 397 F. App'x 727, 729 (10th Cir. 2010). Landlord duty reinforced by *Miller v. David Grace, Inc.*, 212 P.3d 1223, 1228 (Okla. 2009). A business owner is not an insurer against criminal attack. *Lewis v. Wal-Mart Stores, East, L.P.*, 225 P.3d 6, 9 (Okla. Civ. App. 2009). Tenants may pursue common law remedies for negligence. *Stone v. Linden Real Estate, Inc.*, 210 P.3d 866, 871 (Okla. Civ. App. 2009).

One who repairs chattels has duty to exercise reasonable care, not only in repair, but also in inspection and testing; this duty is apart from contractual duties, and liability may be imposed for injuries to third persons not in privity of contract. *Barnhart v. Freeman*, 1968 OK 22, 441 P.2d 993; *Stuckey v. Young*, 1978 OK 128, 586 P.2d 726; see also *Delbrel v. Doenges Bros. Ford, Inc.*, 1996 OK 36, 913 P.2d 1318; *Craft v. Graebel-Okla. Movers, Inc.*, 2007 OK 79, 178 P.3d 170.

Although "customary methods" are not conclusive test of whether due care has been exercised, conformity to such methods is to be considered. *Missouri-Kansas-Texas Ry. Co. v. Ingram*, 322 F.2d 286 (10th Cir. 1963).

Where electric company failed to comply with safety code, traditional rules as to claimant in wrongful death action occupying trespasser status do not apply. Issue becomes one of whether violation of police power stat-

ute or regulation was proximate cause of claimant's injuries. *Woodis v. Okla. Gas & Elec. Co.*, 1985 Okla. 62, 704 P.2d 483 (1985); *Rowell v. El Reno Jr. College Found., Inc.*, 910 P.2d 962 (Okla. 1993). *Woodis* is not applicable to a situation where the question is the duty of a landowner to an entrant of any status, trespasser or otherwise. *Scott v. Archon Group, L.P.*, 191 P.3d 1207, 1212 (Okla. 2008).

**Common Carriers.** Owe duty of exercising very high degree of diligence for safety of their passengers. *A & A Cab v. Drake*, 200 Okla. 229, 192 P.2d 1004 (1948). Where passenger departs from common carrier safely and is then injured by independent agency over which carrier has no control, there is no breach of duty from carrier to passenger. *Sw. Motor Carrier v. Nash*, 195 Okla. 604, 159 P.2d 745 (1945). Although motorist may have right of way, he is not relieved from duty of exercising reasonable care and caution not to injure another motorist. *Lindemann v. Randolph*, 1965 OK 211, 414 P.2d 257. Truck owner liable only for willful or wanton negligence of driver as regards trespassing rider ("No Riders" sign on truck). *Willingham v. Panick*, 161 F.2d 614 (10th Cir. 1947).

**Governmental Immunity.** See Oklahoma Governmental Tort Claims Act Okla. Stat. tit. 51, § 151 *et seq.*

**Imputed Negligence.** Contributory negligence may be imputed to plaintiff where relationship of master and servant exists, *Lafayette v. Bass*, 122 Okla. 182, 252 P. 1101 (1926), where parties are engaged in joint enterprise, *Phillips v. Ward*, 195 Okla. 315, 157 P.2d 450 (1945), or where husband sues for loss of services of wife, *McKee v. Neilson*, 444 P.2d 194 (Okla. 1968). Principal who does not control or have right to control details of another's physical movements is not responsible for other's incidental negligence. *World Publ'g v. Smith*, 195 Okla. 691, 161 P.2d 861 (1945). Negligence of driver of truck imputed to owner where owner is riding in vehicle and both are on joint business journey. *Wagner v. McKernan*, 198 Okla. 425, 177 P.2d 511 (1947). Fire truck driver's negligence not imputable to fire department officer riding with him. *Vogler v. Jones*, 199 Okla. 156, 186 P.2d 315 (1947).

As distinguished from third-party litigation, in *inter se* litigation, negligence of driver of automobile not imputed to owner-passenger who brings action against driver, regardless of whether agency or joint venture relationship exists between parties. *Reeves v. Harmon*, 475 P.2d 400 (Okla. 1970).

Parent's negligence may not be imputed to their children of tender years. *Hostick v. Hall*, 386 P.2d 758 (Okla. 1963).

**Minors.** Child under five years of age is generally incapable of negligence. *Connor v. Houtman*, 196 Okla. 52, 350 P.2d 311 (1960).

**Doctrine of parental immunity,** designed to preserve family unity, does not protect employer from liability for injuries to minor child of employee whose negligence causes child's injuries, when action is predicated on doctrine of respondeat superior. *Hooper v. Clements Food Co.*, 694 P.2d 943 (Okla. 1985).

**Liquor Liability/Dram Shop Act.** Liability is not imposed upon grocery store where one minor unlawfully buys alcohol from store and then gives the alcohol to another minor who gets inebriated and is thereby injured. *Sanders v. Crosstown Mkt.*, 850 P.2d 1061 (Okla. 1993). This is thus a distinction between injured minors and injured adults. *Been v. MK Enterprise, Inc.*, 2011 WL 2453483 at 3 (Okla. Civ. App. 2011). Common law principles of negligence are applicable where commercial vender served, for on-premises consumption, intoxicating beverages to noticeably intoxicated person. Such vender may be held liable to third-party passengers subsequently injured by intoxicated driver if there is casual connection between liquor sale and foreseeable ensuing injury. *Brigance v. Velvet Dove Restaurant, Inc.*, 1986 OK 41, 725 P.2d 300 (Okla. 1986). But this does not extend to imposing a similar duty on a bank. *Public Service Co. of Okla. v. A Plus, Inc.*, 2011 WL 3329181 at 7 (W.D. Okla. 2011). Cause of action against an owner of a tavern does not arise for an adult who voluntarily becomes intoxicated and is injured as a result of his inability to drive a car. *Ohio Cas. v. Todd*, 1991 OK 54, 813 P.2d 508. This does not apply to minors who become voluntarily intoxicated. *Busby v. Quail Creek Golf & Country Club*, 1994 OK 64, 885 P.2d 1326.

**Joint and Several Liability.** See OKLA. STAT. tit. 12, § 832. The exclusive liability of the State to claimants set forth in the Governmental Tort Claims Act bars contribution actions by tortfeasors who may have acted jointly or concurrently with the State in causing a claimant's loss. *Angel v. Cornell Constr. Co.*, 1992 OK CIV APP 65, 841 P.2d 1163.

**Last Clear Chance.** Doctrine stated and applied. *Atchison Topeka & Santa Fe Ry. Co. v. Taylor*, 196 F. 878 (8th Cir. 1912). Doctrine does not apply when defendant did not discover injured person's exposure to peril in time to prevent accident. *Kurn v. Casey*, 193 Okla. 192, 141 P.2d 1001 (1943).

**Negligence Per Se.** One driving automobile on public highway while under influence of intoxicant is guilty of negligence per se. *Western States Grocery Co. v. Mirt*, 190 Okla. 299, 123 P.2d 266 (1942). Violation of

city ordinances constitutes negligence per se. *Burton v. Harn*, 195 Okla. 232, 156 P.2d 618 (1945).

**Premises Liability.** Invitee. Customer entering store for purposes of trade is invitee. Invitee status extends to minor children present with customer-parent and with knowledge and consent of owner. *Hostick v. Hall*, 1963 OK 216, 386 P.2d 758.

**Proximate Cause.** To recover damages for negligence plaintiff must show it was the proximate cause of the injury. *Midland Val. R. Co. v. Mason*, 1962 OK 126, 372 P.2d 40. "Proximate cause of injury must be efficient cause which sets in motion chain of circumstances leading to injury, if negligence complained of merely furnishes condition by which injury was made possible and subsequent independent act caused injury, existence of such condition is not proximate cause of injury." *Transport Indem. Co., et al. v. Page*, 1963 OK 230, 406 P.2d 980.

For act of negligence to be proximate cause of injury it must be such that person of ordinary intelligence would have foreseen that injury was likely to be produced in act. *Chicago R. I. & P. Ry. v. Nagle*, 55 Okla. 235, 154 P. 667 (1916). There may be liability where consequences were natural and probable result of act, although it might not have been specifically foreseeable. *McAlester v. Wheeler*, 205 Okla. 446, 239 P.2d 409 (1951).

Negligence or wrongful act of third person does not absolve defendant when negligence of defendant contributes in some way or concurs with negligence of third persons in causing accident. *Yellow Dime v. Pike*, 195 Okla. 373, 158 P.2d 469 (1944). Though separate acts of different persons combined to cause single injury, each is responsible for result. *All American v. Saxon*, 172 P.2d 424 (Okla. 1946). The essential elements of negligence are provable by circumstantial evidence. *Fletcher v. Meadow Gold Co.*, 1970 OK 135, 472 P.2d 885. Mere fact that automobile accident occurred does not raise presumption of negligence. *Duncan v. United States*, 98 F. Supp. 483 (E.D. Okla. 1951). Speed of automobile may be contributing cause and sometimes proximate cause of accident. *Shead v. Mann*, 199 Okla. 275, 185 P.2d 691 (1947). Merely furnishing condition by which accident was made possible, when a subsequent independent act operates as efficient cause of injury, is not proximate cause of injury. *Billy v. Tex., O. & E. R. Co.*, 1953 OK 280, 263 P.2d 187 (1953).

Original tortfeasor causing personal injuries is not automatically absolved of liability for additional injuries sustained by injured party in ambulance transporting him to hospital. *Atherton v. Devine*, 1979 OK 132, 602 P.2d 634; see *Shadden v. Valley View Hospital*, 1996 OK 140,

915 P.2d 364; *Carmichael v. Beller*, 1996 OK 48, 914 P.2d 1051. For a release, it matters whether or not the party was specifically named in the release. *McKissick v. Yuen*, 2008 WL 4372808 at 8 (N.D. Okla. 2008).

Plaintiff need only show that it is more probable that his injury arose from defendant's negligence than from any other cause and this fact may be established by circumstantial evidence and reasonable inference drawn therefrom. *Wego Perforators v. Hilligoss*, 1964 OK 244, 397 P.2d 113.

**Intervening Negligence.** For intervening cause to free negligent party from liability, intervening cause must have been direct, sufficient, and proximate cause of injury and entirely supersede original act of negligence. *Yellow Transit v. Allred*, 1956 OK 283, 302 P.2d 985. Common carrier would be liable for injury to passenger by reason of its negligence, even though there is concurring negligence by third party. *Peoples v. Dunlap*, 1957 OK 37, 307 P.2d 833. Further discussion of "cause v. condition" distinction. *Long v. Ponca City Hosp., Inc.*, 1979 OK 32, 593 P.2d 1081; see *Graham v. Keuchel*, 1993 OK 6, 847 P.2d 342. *Graham* teaches that a wrongful death action can be predicated on an injury occurring before viability and conception. *Pino v. United States*, 183 P.3d 1001, 1004 (Okla. 2008).

Where original negligence of one party continues to exist at time of injury, concurrent act of negligence of another wrongdoer does not relieve original wrongdoer from liability, but establishes concurrent negligence for which both can be liable. *Mo.-Kan.-Tex. Ry. Co. v. Ingram*, 322 F.2d 286 (10th Cir. 1963).

**Res Ipsa Loquitur.** Although oftentimes labeled a "doctrine," *res ipsa loquitur* is not a rule of substantive law, but is rather a principle of evidence. *Harder v. F.C. Clinton*, 1997 OK 137, 948 P.2d 298.

*Res ipsa loquitur* is a pattern of proof which may be applied to an injury that does not occur in the usual course of everyday conduct unless a person who controls the instrumentality likely to produce injury fails to exercise due care to prevent its occurrence. *Mitchell v. Cox*, 1997 OK 139, 948 P.2d 317. The fundamental element of this evidentiary process is "the control of the instrumentality" which caused the damage. *Id.*

Doctrine of *res ipsa loquitur* is essentially rule of circumstantial evidence where jury in negligence case is permitted, but not required, to infer negligence from happening of accident of kind which experience has shown does not normally occur if due care is exercised. *Boxberger v. Martin*, 1976 OK 78, 552 P.2d 370. This is true when a doctor's negligence is so obvious that it can be seen by a layperson. *Norman v. Mercy Mem. Health Ctr., Inc.*, 215 P.3d 841, 844-45 (Okla. Civ. App. 2009).



Sudden Emergency. Defense of unavoidable accident caused by sudden emergency may be interposed only by one who is free from negligence in connection with emergency. *Peterson v. Sapp*, 1963 OK 203, 385 P.2d 498.

Act of God. Burden of proving defense of Act of God is upon defendant. If defendant's negligence and Act of God were commingled, such negligence was contributing cause, and injury would not have occurred "but for" defendant's negligence; defendant is liable. *City of Enid v. Reeser*, 1960 OK 191, 355 P.2d 407.

### NO-FAULT INSURANCE

Oklahoma is not a no-fault insurance state. The only type of insurance which might be considered no-fault would be the medical payment provision of an automobile insurance policy.

### PENALTY AND ATTORNEY FEES

Statutory provisions for failure to pay policy benefits.

*See* OKLA. STAT. tit. 36, § 3629(B), which is not applicable to UM coverage, providing that insurer must provide offer of settlement or deny claim within ninety (90) days of receipt of proof of loss. In suit between insurer and insured, prevailing party is entitled to costs and attorney fees, and insurer is deemed prevailing party where judgment does not exceed written offer of settlement.

*See* OKLA. STAT. tit. 36, § 1250.1 *et seq.* for Oklahoma's Unfair Claims Settlement Practices Act.

### PRIVILEGED COMMUNICATIONS

Attorney/Client. *See* OKLA. STAT. tit. 12, § 2502.

Insurer/Insured. Oklahoma recognizes no insurer/insured privilege as such.

Clergy/Penitent. *See* OKLA. STAT. tit. 12, § 2505.

Doctor/Patient. *See* OKLA. STAT. tit. 12, § 2503.

Spousal. *See* OKLA. STAT. tit. 12, § 2504.

Waiver. *See generally* OKLA. STAT. tit. 12, § 2511 regarding waiver by voluntary disclosure.

As to waiver of doctor/patient privilege in connection with personal injury lawsuits *see* OKLA. STAT. tit. 12, § 2503(D)(3); *Nitzel v. Jackson*, 1994 OK 49, 879 P.2d 1222. In connection with medical malpractice suits, *see* OKLA. STAT. tit. 76, § 19 (B).

### PRODUCTS LIABILITY

Applicable limitation period is two (2) years, as designated in OKLA. STAT. tit. 12, § 95.

To maintain cause of action in manufacturers' products liability action, plaintiff must prove that product was cause of injury, that defect existed in product at time it left possession and control of manufacturer, assembler or supplier, and that defect made product unreasonably dangerous to user or his property. *Kirkland v. Gen. Motors*, 1974 OK 52, 521 P.2d 1353.

Article sold must be dangerous to extent beyond that which would be contemplated by ordinary consumer who purchases it, with ordinary knowledge common to community as to its characteristics. *Id.*

Plaintiff may prove his cause of action in manufacturers' products liability by circumstantial evidence and proper inferences drawn therefrom, since actual or absolute proof of defect in sophisticated product may be within peculiar knowledge or possession of defendant. *Id.*

Responsibility for defect resulting in harm to plaintiff must be proved by plaintiff and if two or more defendants are named in action for manufacturers' products liability, particular, individual or joint responsibility resulting in harm to plaintiff must be proved and determination of which defendant, if one or more is responsible for defect in processing, assembling or distribution of product, is made subject to proof of fact by trial court and jury. *Id.*

OKLA. STAT. tit. 85, § 12 defines extent of liability and immunity under Workers' Compensation Act. Employee who is injured by defective product manufactured by "another person" engaged in performance of common task may assert manufacturers' product liability claim against other person as manufacturer of product. In *Knowlton v. Tranter, Inc.*, 1983 OK CIV APP 70, 672 P.2d 686, the Court rejected "dual capacity" doctrine and held plaintiff employee limited to Workers' Compensation remedy even if employer is manufacturer of product causing injury. *Id.* Court also held Workers' Compensation Act does not prohibit suit against "co-employee" when tortious acts of "co-employee" occurred prior to time parties became fellow employees. *Id.*

In products liability case, statute of limitations does not begin to run until plaintiff knew or should have known of defect. Plaintiff has duty to pursue claim with diligence. Plaintiff has duty to pursue available information which would reasonably lead to discovery of existence of cause of action. *Daugherty v. Farmers Coop. Ass'n*, 1984 OK 72, 689 P.2d 947.



Successor corporation which merely purchases assets rather than continuing operations is separate entity from its predecessor and is not liable for defective products of predecessor. *Pulis v. U.S. Elec. Tool Co.*, 1977 OK 36, 561 P.2d 68. However, four exceptions to this general rule include: 1) where there is an agreement to assume such debts or liabilities; 2) where the circumstances surrounding the transaction warrant a finding that there was a consolidation or merger of the corporations; or 3) that the transaction was fraudulent in fact; or 4) that the purchasing corporation was a mere continuation of the selling company. *Id.* at 69.

Oklahoma does not recognize a form of collective liability as an alternative theory of relief in an asbestos related injury arising from the ingestion of asbestos fibers where the plaintiff is unable to identify the specific tortfeasor. *Case v. Fiberboard Corp.*, 1987 OK 79, 743 P.2d 1062.

Employee of independent contractor who is injured while manufacturing product according to specifications of contracting defendant has no claim in strict tort products liability for failure to warn of potential hazards in manufacturing process. Products liability creates liability only for defects in design or otherwise which exist in product at time it leaves control of manufacturer, and does not create cause of action before product has entered stream of commerce and reached user or consumer. *Scott v. Thunderbird Indus., Inc.*, 1982 OK CIV APP 31, 651 P.2d 1346.

Warranty. Theory of implied warranty recovery for injuries to person heretofore existing in this jurisdiction is merged into theory and doctrine of manufacturers' products liability, and except for Uniform Commercial Code application, is no longer viable. *Kirkland v. Gen. Motors Corp.*, 1974 OK 52, 521 P.2d 1353. Common law defenses used in connection with negligence and implied warranty recovery such as lack of privity, assumption of risk, and contributory negligence, used in their traditional common law sense are not applicable to manufacturers' products liability recovery. *Id.* at 1365.

Duty to Warn. Suppliers of insulating oil, in a manufacturers' product liability/negligence action, have no duty to warn a knowledgeable user of its oil, who uses it in connection with a switch it manufacturers, of the dangers inherent in a task or of dangers which are created by oversight or negligence of the knowledgeable user or its employees. Oil companies were under no duty to warn plaintiff of danger or potentiality of danger because plaintiff's employer knew or should have known of the dangerous properties of the switches it manufactured. *Duane v. Okla. Gas & Elec. Co., Shell Oil Co. and Chevron USA, Inc.*, 1992 OK 97, 833 P.2d 284.

Manufacturer's duty to warn of possible dangers attendant to use of intrauterine contraceptive device is satisfied by issuing such warning to physician dispensing device. Thus, rule of *Cunningham v. Pfizer*, 1974 OK 146, 532 P.2d 1377, permitting manufacturer to discharge its duty to warn of hazards incident to use of prescription drugs by warning dispensing physician unless FDA regulations require otherwise, is extended to sale of medical "devices." *McKee v. Moore*, 1982 OK 71, 648 P.2d 21.

In drug manufacturer case, adequacy of warning is issue that should generally be decided by trier of fact under specified standards. *Ross v. Jacobs*, 1984 OK CIV APP 17, 684 P.2d 1211.

Damages. Compensatory. One may not recover damages for injury to an allegedly defective product itself nor the consequential economic harm flowing from that injury under the theory of manufacturers' product liability. *Okla. Gas & Elec. Co. v. McGraw-Edison Co.*, 1992 OK 108, 834 P.2d 980.

On an issue of first impression, lower court erred by instructing the jury on manufacturer's products liability when a design defect caused only deterioration in the product itself resulting in purely economic loss. *Wagoner v. Town & Country*, 1990 OK 139, 808 P.2d 649, holding limited by *Dutsch v. Sea Ray Boats, Inc.*, 1992 OK 155, 845 P.2d 187. However, U.C.C. remedies are not adequate with respect to claim for personal injury as well as damage to the product. *Dutsch*, 1992 OK 155, 845 P.2d 187.

Indemnification. Manufacturer is not entitled to credit against plaintiff's judgment for third party's settlement with plaintiff's spouse, absent evidence of bad faith. *Id.*

Products liability plaintiff may collect damages for both personal injury and for the product itself.

The duty of a manufacturer to indemnify may be implied by operation of law and is just as enforceable as if express indemnification agreement had been entered. Indemnification of legal costs is not permissible where an adverse position has been taken by the claimant against party from whom indemnity is sought. *Booker v. Sears Roebuck*, 1989 OK 156, 785 P.2d 297.

The right to indemnity is not contingent upon actual payment. Public policy dictates that the "downstream" party or distributor in a products liability action is entitled to recover its attorneys' fees in keeping with the general principles of indemnity. *Friend v. Eaton Corp.*, 1989 OK CIV APP 74, 787 P.2d 474.

Punitive. Punitive damages may be assessed against manufacturer of product which injures employee if in-

jury is attributable to conduct which reflects reckless disregard for public safety. *Weber v. Armco, Inc.*, 1983 OK 53, 663 P.2d 1221.

Defenses. The proper definition of ordinary consumer in a products liability action is one who would be foreseeably expected to purchase the product involved. *Woods v. Fruehauf Trailer Corp.*, 1988 OK 105, 765 P.2d 770.

Showing that injury to plaintiff or his property was not caused by defective product, but by some conduct of plaintiff is available defense to preclude plaintiff from recovery in manufacturers' products liability action. *See id.* at 774-75.

Injury to plaintiff resulting from abnormal use of product by plaintiff is available defense which precludes plaintiff from recovery in manufacturers' products liability action. Showing that plaintiff knew of defect, unreasonably dangerous in nature, yet voluntarily used product, is available defense to preclude plaintiff from recovery for personal injuries and property damage resulting from such use in manufacturers' products liability action. *See id.*

Defendant's due care and quality control may be rebuttal evidence to conclusions attempted or established by plaintiff's circumstantial evidence. *See id.*

Manufacturer must anticipate all foreseeable uses of his product; in order to avoid being unreasonably dangerous, potentially dangerous product must contain or reflect warnings covering all foreseeable uses. If product is being used for its intended purpose, even careless use of it does not constitute misuse. *Smith v. U.S. Gypsum Co.*, 1980 OK 33, 612 P.2d 251.

## RELEASE

See Law Digest Tables.

Contract Laws - General. A release of "possible future claims" will bar causes of action that are merely "suspected" at the time of release. *Cassity v. Pitts*, 1992 OK 139, 839 P.2d 192.

General release executed in favor of original tortfeasor does not bar recovery against physician for negligent aggravation of injuries, if injured party is not aware of physician's negligence at time original tortfeasor is released. *Birmingham v. Berryhill*, 1976 OK 179, 557 P.2d 910.

Rights of action subsequently accruing are not barred by execution of release unless release so provides. *Haco Drilling Co. v. Hammer*, 1967 OK 71, 426 P.2d 689.

Valid release of servant operates also to release master where derivative liability involved. *Mid-Continent v. Crauthers*, 1954 OK 61, 267 P.2d 568. In construing release, typewritten portions control over printed provisions of instrument. *Great Am. Ins. v. Watts*, 1964 OK 130, 393 P.2d 236.

Consideration. A legal consideration is necessary to support a release, but the adequacy of the consideration is not dispositive of the effectiveness of the release. *St. Louis-S.F. Ry. Co. v. Ferguson*, 1958 OK 87, 325 P.2d 735.

Covenant Not to Sue. Although technically there is a difference between "covenant not to sue" and "general release," where insured enters into "covenant not to sue" which releases insured's tortfeasor from liability, reserving no rights as to insurer, insurer's right to be subrogated is destroyed, even though insurer did not participate in settlement or covenant not to sue. Thus, insured can no longer recover against insurer under uninsured motorist coverage. *Frey v. Independence Fire & Cas. Co.*, 1985 OK 25, 698 P.2d 17.

Even if loan receipt agreement was not a release or a covenant not to sue, it was at least a "similar agreement" for purposes of this section of the Oklahoma statute governing set-off, and amounts received under the purported loan receipt agreement were to be set-off against jury verdict. *Moore v. Subaru*, 891 F.2d 1445 (10th Cir. 1989). OKLA. STAT. tit. 12, § 832 does not apply to alter rule that satisfaction of judgment by one concurrent tortfeasor bars suits against other concurrent tortfeasors. *Brigance v. Velvet Dove Rest.*, 1988 OK 68, 756 P.2d 1232.

Fraud and Misrepresentation. Avoidance of release may be set aside on showing of fraud. Not necessary to tender consideration paid but credit may be made. *Great Am. v. Love*, 1934 OK 413, 35 P.2d 948. Burden of proof is on party claiming fraud in settlement. *Williams v. New Brunswick*, 1935 OK 520, 45 P.2d 127.

When misrepresentation by insurer is one of law, it is not sufficient basis to predicate fraud in compromise of insurer's liability. *Nat'l Aid Life Ass'n v. Krow*, 1940 OK 427, 107 P.2d 177. Settlement can be avoided where Insurance Company did not raise dispute in good faith. *Guar. Life Ins. Co. v. Nelson*, 1940 OK 168, 101 P.2d 627.

An action to invalidate release on ground of fraud and misrepresentation is governed by the same legal rules governing actions to invalidate other written contracts on such grounds. *Darby Petroleum v. Bowers*, 1937 OK 352, 91 P.2d 663.

Infants/Capacity.



Joint Tortfeasors. See OKLA. STAT. tit. 12, § 832(B), (D) and (H) (1995).

Under this section, settlement agreements not releasing liability of other tortfeasors bar settler from obtaining any contribution from unreleased tortfeasors in contribution action. *Nat'l Union Fire Ins. v. A.A.R. W. Skyways, Inc.*, 1989 OK 157, 784 P.2d 52.

General release of one among several joint tortfeasors operates to release all of them from liability. In contract, covenant not to sue will only release the one to whom it is given. *Frey v. Indep. Fire & Cas. Co.*, 1985 OK 25, 698 P.2d 17.

Mistake. As a general rule, releases may be set aside for mutual mistake of material fact; but mutual mistake must be as to a past or present fact, material to the agreement, and must not be a mistake in prophecy, opinion, or in belief relative to an uncertain event such as probable developments from and permanency of a known injury. *Holmes v. Mo.-Kan.-Tex. R.R. Co.*, 1978 OK 6, 574 P.2d 297.

## REPRESENTATIONS AND WARRANTIES

Statutory Provisions. OKLA. STAT. tit. 36, § 3609 provides that misrepresentation or omission precludes recovery under a policy only if the misrepresentation is 1) fraudulent, or 2) material to the acceptance of the risk, or 3) if the insurer in good faith would not have issued the policy had the true facts been known as required by the application. However, some cases suggest all three of § 3609's requirements must be present to establish misrepresentation defense to coverage.

Misrepresentations. It is well-settled that an insured's material misrepresentation about his health history is ground for rescission of the policy. *Vaughn v. Am. Nat'l Ins.*, 1975 OK 169, 543 P.2d 1404.

Materiality. "A misrepresentation will be considered material if a reasonable insurance company, in determining its course of action, would attach importance to the fact misrepresented." *Long v. Ins. Co. of N. Am.*, 670 F.2d 930 (10th Cir. 1982). "Most courts have construed materiality broadly, emphasizing that the subject of the misrepresentation need not ultimately prove to be significant to the disposition of the claim, so long as it was reasonably relevant to the insurer's investigation at the time." *Powell v. Farmers Ins. Co.*, 2008 WL 3387077 (N.D. Okla. 2008).

Rescission. Under life policy providing that insured's statements in application therefore are representations and not warranties, to cancel such policy for fraudulent misrepresentation made in application, proof must establish that such misrepresentation was material,

false, made willfully, and that policy was issued in reliance thereon. *N.Y. Life Ins. v. Kaplan*, 1945 OK 221, 163 P.2d 1009.

Reformation. To justify reformation of insurance contract, there must have been antecedent agreement which contract through mutual mistake, or mistake and fraud, failed to express; and proof of mistake must be very clear and satisfactory. *Kelly-Dempsey & Co. v. Century Indem. Co.*, 77 F.2d 85 (10th Cir. 1935). Insurance policy may be reformed to carry out intentions of parties after loss, when evidence of mutual mistake is clear and convincing. *Davis v. Universal Ins.*, 1934 OK 696, 38 P.2d 932.

## SERVICE OF PROCESS

See Law Digest Tables.

Upon Corporations. Personal service on domestic or foreign corporation or partnership or other unincorporated association is made by delivery of summons and petition to officer, managing or general agent, or any other agent authorized by appointment or by law to receive service. OKLA. STAT. tit. 12, § 2004 (2009).

In any action against foreign corporation where service on Secretary of State is authorized, two copies of summons and petition shall be filed with Secretary of State with prescribed fee. Within three working days after receipt of summons, Secretary of State must send copies of summons and petition return receipt requested. Answer date is 40 days after service on Secretary of State. OKLA. STAT. tit. 12, § 2004 (2009).

Personal service on unincorporated association or trust may be had by service upon any one of individuals composing same, except that in case of common law trust, process must be served upon one of individuals who are designated as trustees. OKLA. STAT. tit. 12, § 182 (1976).

Upon Insurance Commissioner. Foreign or alien insurer must appoint the Insurance Commissioner as agent to receive service of legal process. OKLA. STAT. tit. 36, § 621 (1997).

Personal Service. Personal Service on Individual. Summons is issued by court clerk and served by plaintiff or plaintiff's attorney by mail, or by County Sheriff, licensed private process server, or person specially appointed by court. Summons may be served by certified mail, return receipt requested from addressee only, or by officer to whom it is directed. Person making service must file proof of service with court. Service may be made by delivery of copy to defendant personally, or by leaving one at his usual place of residence with member of his family who is 15 years old or older, or served



upon agent authorized by appointment or by law to receive service. OKLA. STAT. tit. 12, § 2004 (2009).

### SUBROGATION

In General. Insurer was entitled to credit against contractual damages award for amounts paid to insured's mortgagee. *McCoy v. Okla. Farm Bureau Mut. Ins.*, 1992 OK 43, 841 P.2d 568.

Subrogation action not maintainable where insured's right of action for other damages would be destroyed. *Lowder v. Okla. Farm Bureau Mut. Ins.*, 1967 OK 245, 436 P.2d 654.

Insurer, who has reimbursed insured for insured's expenses as result of tortfeasor's negligence, and has become subrogated to insured's rights to collect those expenses pursuant to insurance policy, may bring action in its own name to collect those expenses from tortfeasor; and OKLA. STAT. tit. 12, § 2017(1984), does not prohibit transfer of cause of action by subrogation. *Aetna Cas. & Sur. Co. v. Assocs. Trans., Inc.*, 1973 OK 62, 512 P.2d 137. Automobile liability insurance policy provision providing trust agreement on settlement, for benefit of insurer, is void as to medical payment coverage. *Lusk v. State Farm Mut. Auto Ins.*, 1977 OK 169, 569 P.2d 985.

After receiving notice of insurance company's claimed subrogation rights, party may not defeat them by settling with insured alone. *Aetna Cas. & Sur. Co. v. Assocs. Trans., Inc.*, 1973 OK 62, 512 P.2d 137.

Parties to Action. Statute requiring every action to be prosecuted in name of the real party in interest does not prohibit the transfer of the cause of action by subrogation. OKLA. STAT. tit. 12, § 2017 (1984); *Aetna Cas. & Sur. Co. v. Assocs. Trans., Inc.*, 1973 OK 62, 512 P.2d 137.

Inasmuch as insured had been fully compensated for her loss by tortfeasor, only the insurer was entitled to any proceeds recovered and therefore insurer was the "real party in interest and entitled to prosecute action against tortfeasor." *Aetna Cas. & Sur. Co. v. Assocs. Trans., Inc.*, 1973 OK 62, 512 P.2d 137.

Where insurer has paid damage incurred by plaintiff from acts of third party, it is proper to substitute insurer as party plaintiff since it is real party in interest. *Great W. Motor Lines, Inc. v. Cozard*, 1966 OK 134, 417 P.2d 575.

Liability Insurance. Attorney's malpractice insurance carrier allowed equitable subrogation to buyer's cause of action against real property seller for breach of warranty in real estate conveyance. *Lawyers Title Guar. Fund v. Sanders*, 1977 OK 210, 571 P.2d 454.

Insurer which paid one-half of negligence judgment against owner of equipment was subrogated to rights of owner against the company and hence could recover the amount paid by insurer. Where joint adventurer was, under Oklahoma law, entitled to indemnity from co-adventurer for amount of judgment against joint adventurers, joint adventurer's insurer succeeded to joint adventurer's rights of indemnity by subrogation and could recover attorney fees and other litigation expenses in such amounts as were found reasonable by trial court and upon a proper showing that such amounts had been paid. OKLA. STAT. tit. 15, § 427(2) (1910); *Safeway Rental & Sales Co. v. Albina Engine & Mach. Works, Inc.*, 343 F.2d 129 (10th Cir. 1965).

Where warehouseman was neither the insured nor coinsured under policy insuring Commodity Credit Corporation against warehouseman's default, and warehouseman agreed in amendment to uniform grain storage agreement that policy would not insure to warehouseman's benefit and that insurer would be subrogated to insured's right of recovery, insurer was subrogated to insured's right against warehouseman to recover for grain shortage. *Jorski Mill & Elevator Co. v. Farmers Elevator Mut. Ins.*, 404 F.2d 143 (10th Cir. 1968).

A roofing contractor, hired by the insured and alleged to have negligently caused damage to the insured's property, for which the insurer paid, cannot be considered a co-insured for the purpose of making him immune from liability to the insurer on its subrogation claim. Further, a pre-loss mutual "waiver" of liability agreement between the roofer-contractor and the insured owner does not bar the insurer's subrogation claim against the contractor. *Travelers Ins. v. Dickey*, 1990 OK 109, 799 P.2d 625.

Collision Insurance. Insurer, upon paying insured's loss for damage to insured's automobile in collision, became subrogated, to the extent of the amount paid, to the insured's right of action against the tortfeasor. *Aetna Cas. & Sur. Co. v. Assocs. Trans., Inc.*, 1973 OK 62, 512 P.2d 137.

Fire Insurance. Provision in standard policy. OKLA. STAT. tit. 36, § 4803 (2003). Company entitled to subrogation after payment. *Schaff v. Coyle*, 121 Okla. 228, 249 P. 947 (1925).

Surety. A surety includes a guarantor so that a guarantor acquires rights just as surety acquires rights against principal upon payment of debt through equitable doctrine of subrogation and is limited in those rights just as surety is limited when, upon payment of principal's debt, surety becomes subrogated to rights of creditor, but cannot claim greater rights than were possessed

by creditor. OKLA. STAT. tit. 12A, § 3-402 (1992); *Moore v. White*, 1979 OK 159, 603 P.2d 1119.

Doctrine of subrogation by which performing sureties may claim subrogation to creditor's rights rests on premise that although owner is debtor as to promised payments to contractor, he is also creditor as to full performance by contractor and thus contract payments still in hands of owner stand impressed by operation of subrogation doctrine with superior equity in favor of surety's discharging contractor's duty of performance under compulsion. OKLA. STAT. tit. 15, §§ 378, 382 (1910). *Mid-Continent Cas. Co. v. First Nat'l Bank & Trust Co. of Chickasha*, 1975 OK 18, 531 P.2d 1370.

Workers' Compensation. Insurance carrier's subrogation rights could not be reduced to one-third of total recovery merely because injured employee settled his case by reducing his claim to one-third of amount originally claimed. *Pretymen v. Halliburton Co.*, 1992 OK 63, 841 P.2d 573.

### SUICIDE

Not presumed. *Frankel v. New York*, 51 F.2d 933 (10th Cir. 1931). Held question for jury. *N.Y. Life v. Gibbs*, 176 Okla. 535, 56 P.2d 1179.

### THEFT

No recovery allowed under automobile theft policy where person taking it intended to return it. *Hanover v. W. Bank & Off. Supply*, 1947 OK 95, 178 P.2d 883.

Insurance companies do not avoid responsibility under policy by offering to replace stolen items on airplane which was so far damaged as to be incapable of repair. *Nat'l Fire Ins. v. McCoy*, 1951 OK 379, 239 P.2d 428.

Where automobile is taken by person asserting title under bona fide claim, loss of possession of such vehicle is not "theft" under automobile theft policy. *Reece v. Motors*, 116 F. Supp. 394 (W.D. Okla. 1953).

Where terms "theft" or "larceny" are used in grant of coverage in automobile insurance policy, but are not clearly defined or limited, they are ambiguous and should be interpreted broadly to include loss caused by any unlawful or wrongful taking of insured vehicle with criminal intent, whether or not such taking technically qualifies as embezzlement, theft or larceny. *Mann v. State Farm Mut. Auto Ins.*, 1985 OK 27, 698 P.2d 925.

### WAIVER AND ESTOPPEL

In General. Tender after suit filed sufficient to prevent waiver of forfeiture where material facts not ascertained until that time. *U.S. Cas. v. Jackson*, 1935 OK

721, 46 P.2d 939. To constitute waiver of forfeiture because of non-payment of premiums plaintiff must show course of conduct affording insured ground to infer forfeiture would not be exacted. *Exch. v. Capitol*, 49 F.2d 133 (10th Cir. 1931). Acceptance of premiums with knowledge of facts constituting forfeiture constitutes waiver thereof. Agreement to settle claim, with knowledge of breach of condition, constitutes waiver. *Gordon v. Cont'l*, 1938 OK 53, 76 P.2d 1055. Mere act of investigation does not constitute waiver. *Cont'l v. Portwood*, 1938 OK 567, 84 P.2d 435. Insurer barred by both waiver and estoppel if it fails to tender refund of premiums promptly upon discovery of ground for rescission. *Great Am. Reserve Ins. v. Strain*, 1962 OK 241, 377 P.2d 583. Conduct on part of insurance company which leads insured to believe that by conforming thereto, forfeiture of policy will not be incurred, will estop company from claiming forfeiture, although such should be claimed under express letter of insurance contract. *Sec. Ins. v. Greer*, 1968 OK 3, 437 P.2d 243.

Waiver by Agent. Soliciting agent may estop insurer from denying liability on policy issued upon his solicitation by his veto and representation. *Equitable Life Assur. Soc'y v. Case*, 1933 OK 656, 28 P.2d 571. Agent authorized to solicit insurance, prepare applications, deliver policies, and collect premiums, may estop insurer from denying liability on policies procured by such solicitation. *Id.* Fire Company's local agent may waive certain policy provisions. *N. Assur. Co. of London v. Payne*, 1935 OK 766, 52 P.2d 70.

### Non-waiver Agreements.

Premiums. Forfeiture of life policy may be waived by acceptance of premium. *Improved Indus. Order of Wisemen v. Mims*, 1934 OK 264, 32 P.2d 885. Retaining premiums is waiver of forfeiture rights. *Sovereign Camp v. Pettigrew*, 1924 OK 346, 224 P. 545.

Proof of Loss. Prompt objection must be made to proofs, or requirement for further proof waived. *Queen v. Baker*, 1935 OK 1024, 50 P.2d 371. Company must have had actual notice of facts to establish waiver. *N. British & Mercantile Ins. Co. v. Wright*, 1916 OK 85, 154 P. 654. Under non-waiver agreement, insurer requiring proof of loss and certificate of authority from county clerk held not to waive rights under policy. *Gordon v. Cont'l Ins. Co.*, 1938 OK 53, 76 P.2d 1055. Denial of liability after proof of loss is furnished constitutes waiver of further proof. *Atlas v. Fairchild*, 1935 OK 190, 43 P.2d 482. Substantial compliance with proof of loss requirement where proof accepted and retained by insurer without objection or request for detailed information. *Cent. Fire Ins. Co. v. Smith*, 1940 OK 398, 107 P.2d 361. Insured must plead and prove notice of disability and proof of claim within terms of policy or



waiver of such notice and proof. *Metro v. Smith*, 1945 OK 137, 158 P.2d 335.

### WORKERS' COMPENSATION

Statutory reference. Original jurisdiction. Workers' Compensation Court has exclusive jurisdiction to determine liability of employers and insurance carriers under Workers' Compensation Act, but cannot resolve all coverage questions. *State Ins. Fund v. Asarco*, 1989 OK 135, 782 P.2d 113.

Appellate Jurisdiction. The court held that the decision of three-judge panel of Workers' Compensation Court vacating trial judges award and directing trial court to rehear case is a non-reviewable interlocutory order. *Hermetics Switch, Inc. v. Sales*, 1982 OK 12, 640 P.2d 963.

Wages. The three statutory methods for determining the average annual earnings for benefit calculations provide the exclusive methods for determining such earnings. *Jones v. Shattuck Convalescence/Amity Care Co.*, 1990 OK CIV APP 32, 792 P.2d 96; see also *Norman Regional v. Hearold*, 2008 OK CIV APP 47, 184 P.3d 1105. A workers' compensation award is marital property only to the extent to which it reimburses a couple for loss of income during their marriage. *Crocker v. Crocker*, 1991 OK 130, 824 P.2d 1117; see *Hayes v. Hayes*, 2007 OK CIV APP 58, 164 P.3d 1128.

Disability. An injured worker's potential for rehabilitation should not be considered in determining his eligibility for permanent total disability benefits. *TWA v. McKinley*, 1988 OK 5, 749 P.2d 108.

Disfigurement may be awarded over and above award of 100% permanent total disability in Workers' Compensation case. *G & G Steel Erectors, Inc. v. Gutierrez*, 1984 OK CIV APP 26, 683 P.2d 543.

Workers' compensation carrier is not entitled to set-off against disability award amount recovered by worker through his uninsured motorist coverage. *Bill Hodges Truck Co. v. Humphrey*, 1984 OK CIV APP 55, 704 P.2d 94.

Employment Defined. OKLA. STAT. tit. 85, § 3(11) (2005). Employer/Employee relationship is a jurisdictional issue. Reviewing court will not consider findings of workers compensation court conclusive. *Murray State Coll. v. Akins*, 1990 OK CIV APP 63, 794 P.2d 1218.

Independent contractors not covered under workers compensation act. Distinction between employee and independent contractor depends on who controls details of work. *Sport O'Kings Farms v. Thomas*, 1990 OK CIV APP 75, 797 P.2d 1016.

Hirer of independent contractor may be "principle employer" if duties of independent contractor are a "necessary and integral" part of hirers operation. *Murphy v. Chickasha Mobile Homes, Inc.*, 1980 OK 75, 611 P.2d 243. For further analysis and explanation of three part test, see *Bradley v. Clark*, 1990 OK 73, 804 P.2d 425; see also *Carlson v. U.S. Postal Service*, 248 F. Supp. 2d 1040, (N.D. Okla. 2003) (application of the *Bradley* test).

Causal. To establish injury as arising out of employment, a causal connection must be shown between the employment requirements and the injury. The act leading to the injury must be a part of the duty the employee was hired to perform, or reasonably incident thereto. *Loggins v. Wetumka Gen. Hosp.*, 1978 OK 150, 587 P.2d 455.

Dual Capacity. Where employer is also manufacturer of defective product, plaintiff's wife may not sue under doctrine of dual capacity. Employer's duties as manufacturer and as employer are too interrelated; wife's exclusive remedy is provided by Workers' Compensation Act. *Rios v. Nicor Drilling Co.*, 1983 OK 74, 665 P.2d 1183.

Pursuant to the dual-capacity doctrine, an employer who is generally immune from tort liability may become liable to his employee as a third-party tortfeasor, if he occupies, in addition to his role as employer, a second capacity that confers on him obligations independent of those imposed on him as an employer. Dual capacity doctrine does not apply in employer/manufacturer situation. *Weber v. Armco, Inc.*, 1983 OK 53, 663 P.2d 1221.

Exclusive Remedy. The Workers' Compensation Statutes were designed to provide the exclusive remedy for accidental injuries sustained during the course and scope of a worker's employment. *Thompson v. Madison Mach. Co.*, 1984 OK CIV APP 24, 684 P.2d 565.

Express contract of indemnification between employer and third party is enforceable notwithstanding Workers' Compensation statute. *Rucker Co. v. M & P Drilling Co.*, 1982 OK 131, 653 P.2d 1239.

Employees injured while fighting or by willful act of employer. Workers' Compensation exclusive remedy only for accidental injuries. Workers Compensation statutes not designed to shield employers or co-employers for willful, intentional or violent conduct. *Thompson v. Madison Mach. Co.*, 1984 OK CIV APP 24, 684 P.2d 565. Willful or intentional injury involves knowing and purposeful conduct of employer to injure employee. *Harrington v. Certified Systems, Inc.*, 2001 OK CIV APP 53, 45 P.3d 430.

The purchase of individual insurance was not sufficient to waive such immunity under Workers' Compensation Act. Automobile liability insurers not obligated to protect insured against responsibility falling within Compensation Act. *Deffenbaugh v. Hudson*, 1990 OK 37, 791 P.2d 84.

Where an employee sustains injury while engaged in fights, horseplay or similar non-employment-related activities, that injury does not arise out of employment. Yet, where an employee is the victim of an assault of horseplay in which the employee does not participate, and the employee is thereby injured, that injury is one that arises out of employment and is compensable. *Weyerhaeuser Co. v. Virgin*, 1990 OK CIV APP 53, 798 P.2d 1097.

Occupational Disease. Compensable injury may result from disease whether considered accident or occupational development. *Alimenta, U.S.A. v. Sawyers*, 1982 OK CIV APP 41, 654 P.2d 660.

Mental Injury. Mental stress, like physical symptoms, such as pain, tingling of limbs, and nausea, is not a "accidental injury," that will be compensable under the Workers' Compensation Act, in absence of any accompanying physical injury. *Fenwick v. Okla. State Penitentiary*, 1990 OK 47, 792 P.2d 60, 62, holding limited by *Griffin v. State*, 1993 OK CIV APP 48, 852 P.2d 800.

Suicide does not automatically preclude compensation under Workers' Compensation Act if mental prob-

lems resulted from work related injuries. *Matter of Death of Stroer*, 1983 OK 94, 672 P.2d 1158. To be compensable, psychological injury must result from or arise out of physical employment-related injury. *Teel v. Tulsa Mun. Employees*, 1993 OK 74, 859 P.2d 1079.

Fellow Employee Rule. The loaned servant doctrine has been abrogated by, in factual situations where an employee of a subcontractor sues another subcontractor for that subcontractor's negligence. *Noyce v. Ratliff Drilling Co.*, 1989 OK CIV APP 99, 790 P.2d 1129. Employers who are neither immediate employer of injured worker, nor intermediate or principle employer of injured workers employer are not secondarily liable for Workers' Compensation and are not immune from common law liability. *Stacy v. Bill Hodges Truck Co.*, 1991 OK 40, 809 P.2d 1313.

Attorneys' Fees. Health care providers were not entitled to attorneys' fees incurred in seeking payment in the Workers' Compensation Court. *PepsiCo, Inc. v. Pierce*, 1990 OK 126, 802 P.2d 1291.

Legislature, by requiring State and its various agencies to provide workers' compensation insurance coverage, did not waive sovereign immunity for claims alleging retaliatory discharge for the claimant's attempt to obtain Workers' Compensation benefits. *Gingles v. State*, 1988 OK 3, 749 P.2d 105; called into doubt by statute as stated in *Gunn v. Consol. Rural Water & Sewer Dist. No. 1*, 1992 OK 131, 839 P.2d 1345.