



OADC OUTLOOK

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Deadline for submissions to the OADC Fall 2005 Newsletter is October 15th. Submissions should be sent to Cindy Sparling at:

CSparling@swmb.net or Cindy Sparling, Short, Wiggins, Margo & Butts, 210 Park Avenue, Suite 3100, Oklahoma City, OK 73102.

President's Message

by: Michael Brewer

As summer draws to a close, OADC members continue to build on a successful year with several scheduled fall events. Highlighted in The Outlook, is our summer meeting in Napa Valley. This was an awesome trip for everyone. If you could not attend, I hope you don't miss out on the next big OADC meeting and CLE trip. Additionally, this



issue of OADC Outlook highlights the Amicus Committee, Young Lawyers' Civic Project, the Insurance Law Seminar scheduled for December 1, 2005 and a Trial Tactics Seminar scheduled for 2006. In this edition of the Outlook and those for the remainder of 2005, we will also add substantive law articles from OADC substantive committees.

These events present great opportunities for you to become more involved in the growth of the Association. As of this publishing date, we have completed our third successful DPAC fund raising effort which culminated in a grand prize drawing at the end of the Trucking Litigation Seminar in Oklahoma City on August 19, 2005. Several prize packages were available for some lucky donors and, best of all, we raised more DPAC funds so that OADC can join in the coming battle over civil lawsuit reform during the fall legislative session.

The Trucking Litigation Seminar held in Tulsa and Oklahoma City, was OADC's first broad based effort at seminar programming for the entire State Bar. This presented a great opportunity for OADC members to learn and also to educate. The Association continues to improve the quality of seminar programming. Quality legal education is an important aspect of OADC membership.

The continued success of OADC rests on your willingness to get involved and stay involved. If you need more information or have a specific project you want to get involved in, let me, President-Elect Brad Jackson, or OADC Executive Director Skoshi Heron know. In the meantime, my final thought as fall approaches is, GO SOONERS!

Fifty-Five Members Travel to Napa Valley

The 2005 Summer Meeting at the Napa Valley Marriott Hotel and Spa, June 9-11, was a smashing success. Napa Valley did not disappoint with its fabulous restaurants and wineries. The weather was great for everyone except the Sharpe's hot air balloon operator. Maybe that was just an excuse, as the



weather didn't seem to bother the hot air balloon company that took the Hendrickson family for a ride above the valley at the crack of dawn.

Fifty-five OADC

members came to Napa for the fun, fellowship and six hours of CLE. On behalf of OADC I would like to thank our speakers for volunteering their time. The CLE program included presentations from Eugene Robinson, Chris Condren, Jake Jones, Kyle Sweet and Malinda Matlock. Kevin Driskill and Shane Curtin, both very involved with the recent legislative session, provided an update to the membership on the civil and worker's compensation reform efforts. There is now confirmation that I am computer challenged as I did my best to sabotage Chris' slide show. Sorry Chris!

On Friday afternoon a number of members and their guests enjoyed private wine tasting at Mumm Cuvée Napa and Honig. What a treat for those who attended the wine tasting at Honig. Elaine Honig, Oklahoma City native and owner of the fabulous Honig winery, invited everyone into her private residence to taste and learn about her wines.

Friday night ninety-five members and guests attended Dinner at Rutherford Hills Winery. Our evening began with wine tasting and hors d'oeuvre in a beautiful courtyard.



Then we were escorted through the winery to an elegant candlelit meal in the mile-long caves where Rutherford Hills

Winery maintains over 8,000 French and American oak barrels in which all of the winery's harvests are matured. Following dinner we returned to the courtyard for desert wine with chocolate covered blueberries and cigars. Fortunately for Peter Wheeler, our tour guide was distracted when he went for his own refill.

We also want to thank our 2005 Sponsors:

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Their support helped ensure another outstanding summer meeting. A very special thanks to Jake Underwood and Tracy Kykendall from Professional Reporters who

made the trip to Napa with lots of gifts for the members in attendance. Lucky for them that we scheduled the summer meeting the same weekend as Kat's wedding.

This is your early invitation to the 2006 Summer Meeting at the Four Seasons at Las Colinas, June 23 - 25. For those of you that aren't aware, 2006 marks the 40th anniversary of OADC. We are already hard at work to make the entire 40th Anniversary year one to remember. To the members that have been to a summer meeting at the Four Seasons at Las Colinas, I

know I will see you next year. To those members who have not experienced a summer meeting at the Four Seasons, come see what you have been missing!



DRI Southwest Regional Meeting

by: Kevin Driskill

On July 30, 2005, I attended the Southwest Regional Meeting of DRI. Our region consists of the states of Arkansas, Louisiana, Texas, New Mexico, and Oklahoma. Representatives from each of these states were present. Among the attendees were four DRI directors, Cary Hiltgen from Oklahoma, Drake Lee and Paul Lavelle from Louisiana, and Patricia Alvarez from Texas. Also in attendance was the DRI Second Vice President, John Martin. Mr. Martin will be the DRI President in three years and is from Texas. Each of the states gave reports regarding the state organizations and legislative issues within their states. All of the state organizations reported increases in memberships. Of note, the Texas Association of Defense Counsel reported that the Texas Legislature was currently debating taxing legal services. TADC was, of course, opposed to such a tax. Since our state tends to follow Texas trends, this is an issue we should monitor. We also received reports regarding the status of DRI and the upcoming annual meeting.

The annual meeting is scheduled in Chicago for October 19 through October 22, 2005. Two of the featured speakers at the annual meeting are Senator Fred Thompson and James McElhaney. It should be of interest to hear Senator Thompson's discussion of his involvement in the selection of the next United States Supreme Court Justice. As many of you know, Mr. McElhaney's presentations on evidence are always entertaining and educational. I would encourage each of you to visit the DRI website, which is new and improved, to obtain more information on the annual meeting. I would also encourage each of you to attend the annual meeting. For those of you who are not members of DRI, I would encourage each of you to join DRI. DRI provides a number of benefits which cannot be found in any other organization. If you have an interest in joining DRI, please contact me for more information and an application form.

Young Lawyers' Committee Reaches Out to Community

by: Jennifer Jackson

The members of the Young Lawyers' committee of the Oklahoma Association of Defense Counsel sought opportunities to reach the community on behalf of OADC and our profession. Two organizations were selected: John 3:16 Mission in Tulsa and Infant Crisis Services Inc. in Oklahoma City.

The John 3:16 Mission first opened its doors to Tulsa's homeless population in October of 1952. The mission, a converted fish market, housed a small chapel, a few beds and a crowded eating area. Today, the John 3:16 Mission continues to evolve and grow to meet the ever-changing needs of the homeless and at-risk members of the Tulsa community. Initially started as a men's ministry, the mission now includes family and youth services. Our goal was to assist the mission in providing new and gently used clothes and new school supplies for less fortunate school age children.

Infant Crisis Services' mission states that in the richest nation of the world no baby should go hungry. Infant Crisis Services believes that every baby and toddler deserves life's basic necessities. ICS provides life sustaining formula and food as well as diapers and clothing for babies and toddlers in time of crisis. ICS employees and volunteers provide education, emotional support, and guidance to the families. Each individual is treated with compassion, respect and without judgment. ICS serves as a link to connect families with other helping agencies in addition to programs leading to self-sufficiency. We collected new and used clothing, formula and toys. We also collected monetary donations in that ICS can make a dollar go a long way in meeting the needs of the littlest members of Oklahoma City's community.

We would like to thank you for your donations and contributions. Without your help, our gifts to these wonderful causes would not have been possible. We were privileged to provide tangible gifts to our community on behalf of our profession as a whole and OADC. We look forward to our next opportunity to provide to those who are less fortunate.

Announcement

The Trial Practice Section of the OADC, chaired by Thomas Wolfe of Phillips McFall McCaffrey McVay & Murrah, P.C., and Paul Middleton, Vice Chair, of Dobbs and Middleton, has been asked by the OADC Leadership to put on a Trial Tactics Seminar. The time and place for the seminar will be announced. We plan for the seminar to be informative and enjoyable. The Trial Practice Section will need volunteers to participate. If you would like to volunteer or have questions, please call Thomas Wolfe at (405) 235-4100 or Paul Middleton at (405) 235-7600.

Badillo v. Mid Century Insurance Co. - A Blurring of the Duty of Good Faith and Fair Dealing

The Oklahoma Supreme Court recently issued an extraordinary ruling that an insurer was liable for bad faith even though the insurer did not withhold payment of benefits and paid such benefits to the third party plaintiff.¹ In *Badillo v. Mid Century Insurance Co.*, 2005 OK 48, ___ P.3d ___, the insured driver, Mario Badillo's ("Badillo") vehicle, struck pedestrian, Loretta Smith, ("Smith") in a crosswalk. Smith sustained severe injuries and incurred medical bills over \$700,000.00. Mid Century Ins. Co. ("Mid Century") and Farmers Ins.Exchange ("Farmers"), were Badillo's liability insurers. The policy limits were \$10,000.00.

At Smith's attorneys' request, the Mid Century adjuster sent a policy limits check. However, the attorneys decided not to sign the release until they received a statement from Badillo that there were no other entities liable. The adjuster refused to produce Badillo to protect him from criminal liability.

Smith's attorneys then hired a litigation attorney who telephoned the adjuster and demanded the insurers produce Badillo for a statement. While the adjuster said he would explore the possibility, he never had the chance to do so because the attorney filed the Smith lawsuit within four hours of their conversation. The jury awarded damages for \$1,000,000.00, finding Badillo 60% negligent. The judgment, including interest, was \$633,202.63. Mid Century tendered the policy limits to Smith, which she accepted. When Smith's attorney tried to collect the judgment, he quickly learned Badillo was judgment proof. The attorney suggested Badillo sue his insurers for bad faith and use that judgment to satisfy the debt to Smith.

Badillo filed a bad faith suit against Mid Century and Farmers. The court denied the directed verdict motion as to the bad faith, granted it as to the punitive damages, and found no evidence of reckless disregard or malice by the insurers. The jury returned a verdict against the insurers for \$2,200,000.00. The trial court entered judgment but denied attorney fees and prejudgment interest. In *Badillo I*, the Oklahoma Supreme Court reversed the trial court's ruling and remanded the case.² However, the petition for rehearing was granted and *Badillo II*, 2005 OK 48, ___ P.3rd ___, was decided on June 21, 2005. In *Badillo II*, the Oklahoma Supreme Court reversed itself and affirmed the trial court's rulings.

In *Badillo II*, the Court first held the essence of a bad faith tort is the insurer's unreasonable, bad faith conduct and if there is conflicting evidence as to the reasonableness of the insurer's actions, it is for the jury to decide. The Court found that the duty of good faith and fair dealing required the insurers to reasonably respond to reasonable requests from Smith's attorneys to obtain a statement from Badillo in an effort to settle the case for the protection of their insured whose financial life was hanging in the balance. The majority also found that the insurers failed in their communicative/consultative duty by not informing Badillo of the request for his statement and including him in the decision of whether to give it since his financial future was on the line.

The Court also affirmed the trial court's denial of Farmers' motion for a directed verdict on the bad faith claim. Farmers argued because it was not the named insurer on the policy it was not subject to liability or suit for breach of the duty of good faith and fair dealing towards Badillo. The Court found that there was sufficient evidence that Farmers' employees handled and adjusted the claim, that Farmers and Mid-Century were affiliated companies under the umbrella of the Farmers Insurance Group of Companies, and that Farmers and Mid-Century acted as one entity in regard to Badillo's policy relating to Smith's claim. The Court further held there was sufficient evidence that Farmers acted like an insurer so that a special relationship could be said to exist between it and the insured in relation to the Smith claim. Therefore, the trial court did not err in denying Farmers' motion for a directed verdict and treating Farmers and Mid-Century as one.

Finally, the Court held that the jury could have determined the insurers had an affirmative duty to seize a reasonable opportunity to protect the insured from the potential for excess liability and that consisted of more than just a passive role in the settlement process. The Court also ruled that the standard for an insurer's culpability for bad faith "is more than simple negligence but less than the reckless conduct necessary to sanction a punitive damage award against an insurer."

In his dissent, Justice Winchester wrote that the majority handed down a landmark decision which is the first to hold that an insurance company violated its duty of good faith and fair dealing to the insured despite its timely settlement offer of the insured's policy limit and the third-party victim's subsequent acceptance. He wrote the majority's ruling blurred the insurer's duty and "fosters confusion among attorneys for insurance carriers and for insured parties, alike, in their attempts to decipher exactly what is required of them, now, to settle a claim." Justice Winchester also stated the majority's standard for bad faith is now "a subjective standard that is open to a different interpretation by every person who examines it." Justice Opala also dissented writing that "Today's message stands the bad-faith tort on its head and leaves the insurance business in a quandary."

In the blink of an eye, *Badillo II* changed the rules of the game for the insurance industry. No longer can insurance companies rely on established precedent in defending against bad faith claims. Significantly, you can expect plaintiff's attorneys to argue that every bad faith case must be submitted to a jury. Finally, it also means attorneys representing insurers and adjusters working for insurers must consider new and creative ways to protect their clients from potential liability

by: Lynne F. Saunders, Hiltgen & Brewer, P.C.

¹ This case has not been released for publication. It is still subject to modification, revision or withdrawal. There is still hope that this ruling will not stand.

² 2004 OK 42, _P.3rd (withdrawn from publication 6/21/05).

Amicus Report

by: Thomas Hird

As stated in Article II of its Bylaws, the OADC is dedicated to working for the improvement of our adversary system of jurisprudence and the overall administration of justice. One of the ways the OADC fulfills its mission statement is through participation in appellate litigation as amicus curiae.

The OADC has been involved as amicus curiae in numerous important cases over the years, often advocating successful positions (see, e.g., *Sisk v. J.B. Hunt Transport Inc*, 2003 OK 69, 76 P.3d 61 and *Christian v. Gray*, 2003 OK 10, 65 P.3d 591), while also occasionally coming up on the short end of the stick (see, e.g., *Badillo v. Mid Century Insurance Co.*, 2005 OK 48, ___ P.3d ___). *Badillo* is a recently-released insurance bad faith case that, according to Justice Opala, “stands the bad-faith tort upon its head and leaves the insurance business in a quandary.” While the pain of *Badillo* is still fresh, I should note that, as of this writing, it has not been released for publication in the permanent law reports. As such, it is subject to revision or withdrawal (there is theoretically still hope!).

The OADC participated in the *Badillo* case in 2004. Thus far in 2005 the OADC has evaluated five different requests for amicus participation, and applied for leave to file an amicus curiae brief in four of the five cases. A brief outline of those cases follows:

Sholer v. Gurich, PR-102068. This original jurisdiction action sought to have the new provision of 12 O.S. § 3226(B)(1) requiring the production of insurance agreements declared unconstitutional. Alison Cave and Kevin Driskill provided the substantial assistance in preparing the amicus brief for the OADC, but the writ of prohibition was ultimately denied by the Oklahoma Supreme Court.

Scottsdale Insurance Co. v. Tolliver, CQ-102080. This is a certified question from the United States District Court for the Northern District of Oklahoma regarding whether 36 O.S. § 3609 requires that misrepresentations be made with fraudulent intent in order for an insurer to rescind an insurance contract. The OADC applied for leave to participate as amicus, but due to the lateness of its involvement in the case was unable to file an amicus brief within the briefing cycle. The case is still pending.

Hopkins v. Byrd, DF-101887. This is an appeal of a district court’s ruling that a defendant prevailing on a 12 O.S. § 1101.1 offer to confess was not entitled to attorney’s fees. Under the district court’s reasoning, the defendant did not “incur” legal fees pursuant to 1101.1 because the defendant had insurance that provided the defendant with legal representation. The OADC has filed its application for leave to file amicus brief, but the briefing cycle has not yet started.

Parret v. UNICCO Services Co., CQ-99883. In this case that is currently on rehearing, the Oklahoma Supreme Court chose the “substantial certainty” test for the exception to workers’ compensation exclusivity over a stricter specific-intent type of standard of intent. The OADC has only recently entered into this case and filed its application for leave to file amicus brief. Karen Grundy is providing the briefing on this amicus matter.

As chair of the Amicus Committee, I help the OADC Board of Directors analyze incoming requests for amicus involvement. Requests for OADC amicus participation are determined by the executive committee of the OADC Board of Directors. The Board has no official guidelines for the kind of cases that merit OADC involvement, but amicus cases should generally concern issues of substantial interest to the defense bar. Amicus procedure can be found at Okla.Sup.Ct.R. 1.12. If you are interested in OADC amicus involvement in a case, it is vital that you contact the OADC early, as leave of court may be required, and extraordinary cause must be shown before an amicus curiae brief will be permitted outside the normal briefing cycle of an appeal.

I would like to thank Alison Cave, Kevin Driskill, Karen Grundy, and any others who are providing or have provided assistance on these cases. If you would like to volunteer to assist with amicus-related activities, or have any questions about amicus curiae matters, I can be reached at (918) 585-2394, or third@richardsconnor.com. In addition, the OADC welcomes the opportunity to help fulfill its mission statement through requests for amicus involvement. If you have a case you think is appropriate for OADC amicus involvement, please do not hesitate to contact me or an OADC officer or board member.

Could Your Client's Dress Code Leave Them Stripped?

by: Byrona J. Maule, Phillips McFall McCaffrey McVay & Murrah, P.C.

How many of your clients have a dress code in their employee handbook? Maybe your firm has a dress code – most if not all courts have a dress code. It does seem reasonable that an employer can require that its employees present a certain image. Banks want their employees to project a conservative, trustworthy, financially responsible look. Retail sales stores want their employees to ‘model’ their apparel. We’ve all been to those stores in the mall where the sales clerks are wearing apparel from their store, whether they are dressed as if they just returned from a safari, or looking as if they are over grown children in their pull over shirt with a cartoon character embossed on the shoulder. However, after the recent case of *Gonzalez, et al. v. Abercrombie & Fitch, Co.*, Case Nos. 03-28127 SI, 04-4730 and 04-4731 (N. Dis. Cal., June 16, 2003) you may want to rethink your strategy before you tell a client that having a dress code is acceptable.

Late last year, the Equal Employment Opportunity Commission (EEOC) declared victory over clothier Abercrombie & Fitch (A & F) in a groundbreaking case about a kind of discrimination you may never have considered: *Image Discrimination*. The basis of the lawsuit was that A & F’s marketing image and other policies limited opportunities for female and minority employees. In the EEOC’s press release (located at www.eeoc.gov), Eric Dreiband, General Counsel for the EEOC, proclaims, “The retail industry and other industries need to know that businesses cannot discriminate against individuals under the auspice of a marketing strategy or a particular ‘look.’ Race and sex discrimination in employment are unlawful, and the EEOC will continue to aggressively pursue employers who choose to engage in such practices.”

You may be asking yourself, *How does a marketing strategy or a particular ‘look’ result in race and/or sex discrimination?* Or even, *When did the EEOC become the fashion police?* If you think that the EEOC’s authority is limited to the prevention of discrimination or harassment in employment based on age, race, sex, pregnancy, disability, national origin, religion, and equal pay between the sexes, you are still correct. However, what A & F discovered is that sometimes a marketing strategy, or requiring that your work force

have a particular ‘look’, can have a negative impact on minorities and women (which is illegal under the Civil Rights Act of 1964). In a groundbreaking petition, the EEOC alleged three counts of discrimination in the class action. The first two are typical, intentional discrimination actions under *42 U.S.C. § 1981* and the California Fair Employment and Housing Act, *Government Code § 12940, et seq.* Count three, however, should have the full attention of all employment law attorneys. In count three the EEOC alleged A & F’s Appearance Policy and marketing strategy violated Title VII, *42 USC § 2000e et seq.*, in that it had an adverse disparate impact on minority applicants and employees – and that there was no justified business necessity for A & F’s actions. At the end of the day, A & F’s Appearance Policy (its ‘look’) and marketing strategy resulted in a predominantly white, male, workforce - and *that* is the type of discrimination the EEOC is designed to handle.

So what, exactly, did this ‘look’ cost A & F? \$40 million in settlement fees and \$7.25 million in attorneys’ fees and related expenses, including the cost of monitoring, administering and implementing a historically restrictive Consent Decree (which can be viewed in its entirety at www.abercrombieclaims.com). The Consent Decree, which is 60 pages of substantive material, is in place for six years and requires aggressive changes in A & F’s recruitment, hiring, and marketing processes.

Back to your client’s dress code – when you review a dress code, ask your client the following questions: *Is its workforce diverse?* Does it employ men and women, young and old? Does it employ people of different races, different religions, and of diverse national origin? If not, could this be a result of the company’s official, or perhaps unofficial, “image?” *What about the company’s marketing?* Do its advertisements use models that are diverse in sex, race and national origin? Does the client recruit its applicants for employment from diverse sources, such as job fairs for minorities? If the client cannot give an unequivocal “yes” to each of these questions, I can think of 40 million reasons why you might want to give some serious consideration to your client’s dress code.

