



OADC OUTLOOK

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September 2007

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President's Letter

by Grady Parker

We had a great turnout for the Summer meeting at Horseshoe Bay Resort on Lake Lyndon B. Johnson. We had the privilege of hearing from Jeff Lynch, Law Clerk to the Honorable Robin J. Cauthron, on how to avoid the wrath of Federal Judges and their law clerks, and from Gavin Manes, Ph.D, Oklahoma Digital Forensics Professionals, Inc., on issues involving E-discovery and digitally created evidence. In addition, we were able to enjoy the awesome lake activities and left just before the monsoon rains. If you missed the Summer meeting, make plans to attend next year, as we return to the Four Seasons at Las Colinas.

For the second time this year, OADC members volunteered their time to help Central Oklahoma Habitat for Humanity. The following is a letter Jennifer Jackson received from Steve Musch, the volunteer coordinator: Thank you, once again, to all those who gave up their Saturday. You are making a difference in your community!

Dear Jennifer,

On behalf of all of us at Central Oklahoma Habitat for Humanity, thanks to everyone from The Oklahoma Association of Defense Council who volunteered with us last Saturday. You did a great job enclosing Nakesha's house! You have all given generously of your time and talents, and a part of you is invested in a house that will become home to a deserving Central Oklahoma family. We appreciate everyone's sensitivity to the need for decent, affordable housing, and a willingness to join us in doing something about it. Imagine, a families first home that is well-built, safe, and secure.

We are so thankful for people with the desire to help others, and we are so grateful that you express this through your support of Central Oklahoma Habitat for Humanity. We look forward to working with you in the future.

Sincerely,

Steve Musch

Volunteer Coordinator

Central Oklahoma Habitat for Humanity

The 2nd Annual OADC Trial Academy is scheduled for October 11-12, 2007. It will be held at the Sheraton Midwest City Hotel in the Reed Conference Center. Under the direction of Dan Folluo, Tom Wolfe, and Phil Richards, this 2 day Trial Academy promises to provide invaluable instruction to all who attend. I would encourage all young lawyers to take advantage of this opportunity.

We are still working on our Continuing Legal Education programs for the Fall/Winter. Currently, we are developing a Workers' Compensation and Employment Law program, with the possibility of adding Oil and Gas. Details will be forthcoming.

The success of this organization depends on your willingness to get involved. If you have any suggestions or need additional information, please contact me or President-Elect Roger Butler.

Submissions should be sent to Alison Cave
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Service in Medical Liability Actions

By Edward John Main, J.D., Ph.D.

The Affordable Access to Health Care Act of 2003 included a provision requiring service in a medical liability action “within one hundred eighty (180) days of the filing of the lawsuit or the case shall be deemed dismissed without prejudice.” 12 O.S. Supp. 2006 §150. Under this statute, dismissal would be automatic, and is in contrast to the statute which governs service in most other actions, and which only grants the court discretion to dismiss an action whether it is a failure of service within that time period. 12 O.S. Supp. 2006 §2004(I). This article argues that the service requirements of §150 are constitutional and remain valid and enforceable, notwithstanding the recent opinion of the Oklahoma Supreme Court in *Zeier v. Zimmer*, 2006 OK 98, 152 P.3d 861.

The following statute was enacted in 2003, and continues in effect to this date:

In any medical liability action, a summons shall be served on the defendant, or defendants, within one hundred eighty (180) days of the filing of the lawsuit or the case shall be deemed dismissed without prejudice.

12 O.S. Supp. 2006 §150. This statute was enacted effective July 1, 2003, and applies to actions filed after that date. Okla.Sess.Laws 2003 Ch. 390, §§9, 24 & 25. It is the date the action is commenced that determines the application of this service statute. An action is commenced when the Petition is filed. 12 O.S. 2001 §2003. Section 150 would therefore apply to actions commenced after July 1, 2003, even if the underlying treatment occurred prior to that date.

Section 150 was enacted as part of the Affordable Access to Health Care Act, which sets forth the following definitions:

1. “Health care provider” means any person or other entity who is licensed pursuant to the provisions of Title 59 or Title 63 of the Oklahoma Statutes, or pursuant to the laws of another state, to render health care services in the practice of a profession or in the ordinary course of business;
2. “Health care services” means any services provided by a health care provider, or by an individual working for or under the supervision of a health care provider, that relate to the diagnosis, assessment, prevention, treatment or care of any human illness, disease, injury or condition;
3. “Medical liability action” means any civil action involving, or contingent upon, personal injury or wrongful death brought against a health care provider based on professional negligence;
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5. “Professional negligence” means a negligent act or omission to act by a health care provider in the rendering of health care services, provided that such services are within the scope of services for which the health care provider is licensed, certified, or otherwise authorized to render by the laws of this state, and which are not within any restriction imposed by a hospital or the licensing agency of the health care provider; and

Okla.Sess.Laws 2003, Ch.390, §§1, 2, 3, 5; codified as 63 O.S. Supp. 2006 §1-1708.1C(1, 2, 3, 5).

As defined, a “health care provider” includes “a person . . . licensed pursuant to the provisions of Title 59 . . . of the Oklahoma statutes, . . .” Title 59 governs Professions and Occupations. Only those individuals whose licenses allow them “to render health care services” would qualify as “health care providers.” Thus, Title 59 includes the Podiatric Medicine Practice Act (§§135.1 – 160.2); the Oklahoma Chiropractic Practice Act (§§161.1 – 161.20); the State Dental Act (§§328 – 328.51a); the Oklahoma Pharmacy Act (§§353 – 355.2); the Oklahoma Allopathic Medical and Surgical Licensure and Supervision Act (§§480 – 518); the Physician Assistant Act (§§519.1 – 524); the Oklahoma Nursing Practice Act (§§567.1 – 567.17); the Optometry Act (§§581 – 606); the Oklahoma Osteopathic Medicine Act (§§620 – 645); the Physical Therapy Practice Act (§§887.1 – 887.18); the Occupational Therapy Practice Act (§§888.1 – 888.15); the Psychologists Licensing Act (§§1351 – 1376); the Speech Pathology and Audiology Licensing Act (§§1601 – 1622); and the Respiratory Care Practice Act (§§2026 – 2045). This listing is not exhaustive, but it illustrates the kinds of professions and occupations which could involve “health care services.” Not every profession or occupation licensed under Title 59, nevertheless, would involve “health care services.” For example, architects, engineers, foresters and junk dealers, would not be engaged in rendering “health care services.” A veterinarian would not qualify as a “health care provider” because “health care services” are limited to “human illness, disease, injury or condition.”

A “health care provider” may also be an “entity” licensed under Title 63 of the Oklahoma Statutes, which governs Public Health and Safety. This Title includes licensing for Hospitals and Related Facilities (§1-701 - §1-706); Nursing Homes, Rest Homes and Specialized Homes (§1-819 - §1-842); Hospices (§1-860.1 - §1-861); and Nursing Homes (§1-1900.1 - §1943.1). Again, this is not an exhaustive list.

If a given defendant is a “health care provider”, and the claim is based upon alleged “professional negligence” in the rendition of “health care services”, then the action is a “medical liability action”, then the claim against that defendant “shall be deemed dismissed” without prejudice. 12 O.S. Supp. 2006 §150; 63 O.S. Supp. 2006 §1-1708.1C(1, 2, 3, 5). However, there are some entities which are also licensed under Title 63, but would not be involved in rendering “health care services”, e.g., shooting galleries.

The “shall be deemed dismissed” language in §150 is no stranger to Oklahoma law. At various times, and in various ways, §2004 of Title 12 has incorporated the “shall be deemed dismissed” language which now appears in §150. In fact, §2004 currently states that an action “shall be deemed to have been dismissed” where a summons is in fact served on a defendant within one hundred eighty days, but the summons or service is later quashed, and Plaintiff fails to obtain service within a time specified by the Court. 12 O.S. Supp. 2006 §2004(I). Similarly, under the Small Claims Procedure Act, “The action shall be deemed to have been dismissed” if service is not accomplished within one hundred eighty days of the filing of the affidavit. 12 O.S. 2001 §1773(B). Therefore, there is nothing unusual or contrary to Oklahoma law about a statute which stipulates that an action “shall be deemed dismissed” when service is not obtained within a specified time.

Once an action has been dismissed, no jurisdiction remains in district court to go forward with the action.

General Motors Acceptance Corp. v. Carpenter, 1978 OK 39, 576 P.2d 1166, 1168 (citation omitted). As of the date an action is “deemed dismissed,” the Court loses jurisdiction, except to embody the dismissal in an “appealable order” pursuant to 12 O.S. Supp. 2006 §696.3.

The Oklahoma Supreme Court interpreted one version of §2004 which had a provision stating an action “may” be dismissed for failure to obtain service within one hundred twenty days, but “shall be deemed dismissed” if there was no service within one hundred eighty days:

The second sentence [of the provision in that version of §2004] then states: “Service of process is not made upon a defendant within one hundred eighty (180) days after the filing of the Petition, the action shall be deemed to have been dismissed without prejudice as to that defendant.” 12 O.S. Supp. 1986, §2004(I). This statement is clear: if the plaintiff does not serve the defendant within one hundred eighty days of filing the Petition then the action is considered dismissed as to that defendant as a matter of law.

Mott v. Carlson, 1990 OK 10, ¶9, 786 P.2d 1247, 1250 (footnote omitted). In *Mott v. Carlson*, the Oklahoma Supreme Court spoke conclusively about service statutes incorporating the mandatory term “shall” as distinct from those utilizing the discretionary term “may.” The mandatory word “shall” is used in §150, and the Oklahoma Supreme Court has spoken regarding how such language is to be interpreted.

In *Moore v. Sneed*, 1992 OK CIV APP 107, 839 P.2d 682, the Court of Civil Appeals affirmed the dismissal of an earlier action for failure to obtain service within an one hundred eighty day period, and also affirmed the dismissal of the refiled action, because it had not been filed within one year of the “deemed dismissal” of the first action. The Court stated:

[W]e cannot overlook §2004(I) which provides that the “action *shall* be deemed to have been dismissed” if service is not obtained within one hundred eighty days. (Emphasis added [by Oklahoma Court of Civil Appeals]).

Moore v. Sneed, ¶12, 839 P.2d at 685. Although the language of §2004 has changed since *Mott v. Carlson* and *Moore v. Sneed*, they show the proper interpretation of statutes when the legislature has chosen to utilize the “shall be deemed dismissed” language.

Legislative familiarity with extant judicial construction of statutes is presumed.

You can find the complete article at [www. OADC.org](http://www.OADC.org)

2nd Annual Trial Academy

October 11th & 12th

Reed Conference Center at the Sheraton Midwest City

12 CLE Credits
(pending)

Guest Speaker: **Gerald E. Durbin II** has practiced law for over 30 years and is admitted in Oklahoma, the U.S. District Court, Western District of Oklahoma, the U.S. Court of Appeals, Tenth Circuit, and the U.S. Supreme Court. He handles Litigation, Personal Injury Law, Insurance Law, Nursing Home, Product Liability Law, and Medical Malpractice. He has lectured on bad faith in Oklahoma and Colorado and is a published author.

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