

STATE OF OKLAHOMA

1st Session of the 46th Legislature (1997)

HOUSE BILL NO. 1037

By: Pettigrew

AS INTRODUCED

An Act relating to tort reform; amending 5 O.S. 1991, Section 7, which relates to contingent fees for attorneys; modifying limitation on contingent fees in tort actions; providing schedule for contingent fees in tort actions; providing for determination of contingent fee if plaintiff is paid future damages in periodic installments; requiring filing of contingent fee agreement and service on all parties; authorizing the court to review contingent fee agreements; providing for additional compensation for extraordinary services; defining term; amending 12 O.S. 1991, Section 100, which relates to commencement of new action after reversal or failure otherwise than on the merits; limiting commencement of new action if original action is voluntarily dismissed; providing a statute of repose for product liability actions; defining terms; amending 12 O.S. 1991, Section 178, which relates to joint and several liability; providing for actions against two or more defendants; modifying recovery in tort actions; providing for several liability in tort actions; providing for joint and several liability for certain medical malpractice actions if limitations

on noneconomic damages are deemed invalid;  
requiring itemized verdicts for certain causes of  
action; amending 12 O.S. 1991, Section 2702, which  
relates to expert witnesses; providing standards  
for qualification of expert witnesses for certain  
issues; providing the standards apply to causes of  
action filed on or after a certain date; declaring  
public policy; providing immunity from civil  
liability for certain nonprofit corporations;  
providing exceptions; providing for availability of  
certain defenses; disallowing damages incurred  
through criminal conduct of plaintiff in certain  
circumstances; disallowing damages incurred through  
work release program if plaintiff was trespassing;  
creating the Premises Liability Act; providing  
short title; providing that Premises Liability Act  
applies to causes of action filed on or after a  
certain date; abolishing common law distinction  
between invitees and licensees for certain purpose;  
providing that duty owed to entrants on to property  
is duty of reasonable care under the circumstances;  
excluding certain duties from scope of duty of  
reasonable care under the circumstances; providing  
that Premises Liability Act does not affect law  
regarding trespassing child; providing  
circumstances in which an owner or occupier of land  
has duty to warn of dangerous condition; providing  
that duty to warn does not include duty to protect  
from danger; creating the Products Liability Act;  
providing short title; defining terms; providing  
scope of actions to be governed by Products  
Liability Act; providing for determination of

reasonable safety of product or product component; providing for determination or reasonable safety of design; excluding certain evidence, with exception; providing for adequacy of warning, instructions or labeling of product; excluding liability for inherent characteristic of product; limiting noneconomic and punitive damages; providing that the Products Liability Act does not create a cause of action; providing that the Products Liability Act shall apply to actions accruing on and after a certain date; requiring certain procedures in cases in which the plaintiff seeks damages for bodily injuries or death by reason of medical, hospital, or other healing art malpractice; requiring filing of affidavit in products liability cases in which the plaintiff seeks damages for bodily injuries or death; providing for admissibility of evidence of payments or services from collateral sources; providing for deductions from judgment; providing for increase in award for certain costs paid by plaintiff; providing for codification; repealing 12 O.S. 1991, Section 2411, which relates to admissibility of evidence of existence of liability insurance; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 5 O.S. 1991, Section 7, is amended to read as follows:

Section 7. A. It shall be lawful for an attorney to contract for a percentage or portion of the proceeds of a client's cause of action or claim not to exceed fifty percent (50%) of the net amount of such judgment as may be recovered, or such compromise as may be made, ~~whether~~ if the same arises ex contractu ~~or ex delicto~~, and no compromise or settlement entered into by a client without such attorney's consent shall affect or abrogate the lien provided for in Section 6 of this chapter title. ~~Provided that all such~~

B. In all actions on account of bodily injury, death, economic loss or physical damage to property:

1. The total contingent fee for plaintiff's attorney or attorneys shall not exceed the following amounts:

a. thirty percent (30%) of the first One Hundred Fifty Thousand Dollars (\$150,000.00) of the sum recovered,

b. twenty-five percent (25%) of the next Eight Hundred Fifty Thousand Dollars (\$850,000.00) of the sum recovered, and

c. twenty percent (20%) of any amount recovered over One Million Dollars (\$1,000,000.00) of the sum recovered;

2. Any future damages recoverable by the plaintiff in periodic installments shall be reduced to a lump-sum value for purposes of determining any lump-sum contingent fee; and

3. Any contingent fee agreement must be filed with the complaint and properly served on all parties. The court may review contingent fee agreements for fairness. In special circumstances, where an attorney performs extraordinary services involving more than usual participation in time and effort, the attorney may apply to the court for approval of additional compensation.

C. All contingent fee contracts in personal injury or wrongful death cases including, but not restricted to, cases in which jurisdiction is in the ~~Industrial Commission~~ Workers' Compensation Court, shall be void and unenforceable ~~(1) if:~~

1. If secured as a result of the intervention of any laymen, association, or corporation for compensation, or promise of compensation, or anticipation of gift, compensation or hope of reward,; or ~~(2) where~~

2. Where any laymen, association or corporation has a direct or indirect interest in, or growing out of, any judgment arising out of such claim recovery or compensation from, or settlement of any such claim.

D. As used in this section, "contingent fee" includes any fee arrangement under which the compensation is to be determined in whole or in part on the result obtained.

E. This section shall apply to causes of action filed on or after November 1, 1997.

SECTION 2. AMENDATORY 12 O.S. 1991, Section 100, is amended to read as follows:

Section 100. If any action is commenced within due time, and a judgment thereon for the plaintiff is reversed, or if the plaintiff fail in such action otherwise than upon the merits, the plaintiff, or, if he should die, and the cause of action survive, his representatives may commence a new action within one (1) year after the reversal or failure although the time limit for commencing the action shall have expired before the new action is filed. For any cause of action accruing on or after November 1, 1997, no new action may be commenced if the original action is voluntarily dismissed by the plaintiff and if the time for commencing the action has expired.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 95.1 of Title 12, unless there is created a duplication in numbering, reads as follows:

A. Subject to the provisions of subsections B and C of this section, no product liability action based on any theory or doctrine shall be commenced except within the applicable limitations period provided in Section 95 of Title 12 of the Oklahoma Statutes and, in

any event, within twelve (12) years from the date of first sale, lease or delivery of possession by a seller or ten (10) years from the date of first sale, lease or delivery of possession to its initial user, consumer or other nonseller, whichever period expires earlier, of any product unit that is claimed to have injured or damaged the plaintiff, unless the defendant expressly has warranted the product for a longer period and the action is brought within that period.

B. No product liability action based on any theory or doctrine to recover for injury or damage claimed to have resulted from an alteration, modification or change of the product unit subsequent to the date of first sale, lease or delivery of possession of the product unit to its initial user, consumer or other nonseller shall be limited or barred by subsection A of this section if:

1. The action is brought against a seller making, authorizing or furnishing materials for the accomplishment of such alteration, modification or change or against a seller furnishing specifications or instructions for the accomplishment of such alteration, modification or change when the injury is claimed to have resulted from failure to provide adequate specifications or instructions; and

2. The action is commenced within the applicable limitations period and, in any event, within ten (10) years from the date such alteration, modification or change was made, unless the defendant expressly has warranted the product for a longer period and the action is brought within that period; and

3. The injury or damage is claimed to have resulted from an alteration, modification or change of a product unit and there is proof that such alteration, modification or change had the effect of introducing into the use of the product unit, by reason of defective materials or workmanship, a hazard not existing prior to such alteration, modification or change.

C. If the injury complained of occurs within any of the periods provided by subsection A of this section and paragraph 2 of subsection B of this section, the plaintiff may bring an action within two (2) years after the date on which the claimant knew, or through the use of reasonable diligence should have known, of the existence of the personal injury, death or property damage, but in no event shall such action be brought more than eight (8) years after the date on which such personal injury, death or property damage occurred. In any such case, if the person entitled to bring the action was, at the time the personal injury, death or property damage occurred, under eighteen (18) years of age, or under a legal disability, then the period of limitations does not begin to run until the person attains eighteen (18) years of age, or the disability is removed.

D. Replacement of a component part of a product unit with a substitute part having the same formula or design as the original part shall not be deemed a sale, lease or delivery of possession or an alteration, modification or change for the purpose of permitting commencement of a product liability action based on any theory or doctrine to recover for injury or damage claimed to have resulted from the formula or design of such product unit or of the substitute part if such action would otherwise be barred according to the provisions of subsection A of this section.

E. Nothing in this section shall be construed to create a cause of action or to affect the right of any person to seek and obtain indemnity or contribution.

F. As used in this section:

1. "Alteration, modification or change" or "altered, modified or changed" means an alteration, modification or change that was made in the original makeup characteristics, function or design of a product or in the original recommendations, instructions and

warnings given with respect to a product, including the failure properly to maintain and care for a product;

2. "Product" means any tangible object or goods distributed in commerce, including any service provided in connection with the product. Where the term "product unit" is used, it refers to a single item or unit of a product;

3. "Product liability action" means any action based on any theory or doctrine brought against the seller of a product on account of personal injury, death, or property, economic or other damage allegedly caused by or resulting from the manufacture, construction, preparation, assembly, installation, testing, makeup, characteristics, functions, design, formula, plan, recommendation, specification, prescription, advertising, sale, marketing, packaging, labeling, repair, maintenance or disposal of, or warning or instruction regarding any product. This definition excludes actions brought by state or federal regulatory agencies pursuant to statute; and

4. "Seller" means one who, in the course of a business conducted for the purpose, sells, distributes, leases, assembles, installs, produces, manufactures, fabricates, prepares, constructs, packages, labels, markets, repairs, maintains, or otherwise is involved in placing a product in the stream of commerce.

G. The provisions of this section shall apply to any cause of action accruing on or after November 1, 1997, involving any product which was in or entered the stream of commerce prior to, on, or after November 1, 1997.

SECTION 4. AMENDATORY 12 O.S. 1991, Section 178, is amended to read as follows:

Section 178. Where the action is against two or more defendants, and one or more shall have been served, but not all of them, the plaintiff may proceed as follows:



First. If the action be against defendants jointly indebted upon contract,~~tort,~~ or any other cause of action, ~~he~~ except a tort action, the plaintiff may proceed against the defendants served, unless the court otherwise direct; and if ~~he~~ the plaintiff recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendants served; and if they are subject to arrest, against the persons of the defendants served.

Second. If the action be against defendants severally liable, ~~he~~ the plaintiff may, without prejudice to ~~his~~ the rights of the plaintiff against those not served, proceed against the defendants served in the same manner as if they were the only defendants.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 178.1 of Title 12, unless there is created a duplication in numbering, reads as follows:

A. In any action brought on account of death, bodily injury to a person, economic loss, or physical damage to property in which recovery is predicated upon fault, a defendant is severally liable only and is liable only for that proportion of recoverable economic and noneconomic damages, if any, that the amount of that defendant's fault, if any, bears to the aggregate amount of fault of all other tortfeasors whose fault was a proximate cause of the death, bodily injury, economic loss, or physical damage to property for which recovery is sought.

B. In any medical malpractice action based on negligence or wrongful death, any defendants found liable shall be jointly and severally liable if the limitations on noneconomic damages provided for in Section 6 of this act are for any reason deemed or found to be invalid.

This section applies to causes of action filed on or after November 1, 1997.

C. As used in this section:

1. "Fault" means any act or omission that is a proximate cause of death, bodily injury to a person, economic loss, or physical damage to property for which recovery is sought, and:

- a. is negligent, willful, wanton, or reckless,
- b. is a breach of an express or implied warranty,
- c. gives rise to strict liability in tort, or
- d. gives rise to liability under the provisions of a state statute or municipal ordinance; and

2. "Tortfeasor" means any person, excluding the injured person, whose fault is a proximate cause of death, bodily personal injury, economic loss, or physical damage to property for which recovery is sought, regardless of whether that person is joined as a party to the action, and regardless of whether that person may have settled with the plaintiff.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 590.1 of Title 12, unless there is created a duplication in numbering, reads as follows:

In every case in which damages for bodily injury or death are assessed by the jury, the verdict shall be itemized so as to reflect the monetary distribution, if any, among economic loss and noneconomic loss as defined in Section 5 of this act, and, in medical malpractice cases, further itemized so as to reflect the distribution of economic loss by category, such itemization of economic loss by category to include:

1. Amounts intended to compensate for reasonable expenses which have been incurred, or which will be incurred, for necessary medical, surgical, x-ray, dental, or other health or rehabilitative services, drugs, and therapy;

2. Amounts intended to compensate for lost wages or loss of earning capacity; and

3. All other economic losses claimed by the plaintiff or granted by the jury.

Each category of economic loss shall be further itemized into amounts intended to compensate for losses which have been incurred prior to the verdict and amounts intended to compensate for future losses.

The provisions of this section shall apply to causes of action filed on or after November 1, 1997.

SECTION 7. AMENDATORY 12 O.S. 1991, Section 2702, is amended to read as follows:

Section 2702. A. If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise.

B. In any case in which the standard of care applicable to a medical professional is at issue, the court shall apply the following standards to determine if a witness qualifies as an expert witness and can testify on the issue of the appropriate standard of care:

1. Whether the witness is board-certified or board-eligible in the same medical specialties as the defendant, the medical problem or problems and the type of treatment administered in the case;

2. Whether the witness has devoted seventy-five percent (75%) or more of his or her time to the practice of medicine, teaching or university-based research in relation to the medical care and type of treatment at issue which gave rise to the medical problem of which the plaintiff complains;

3. Whether the witness is licensed by a state having licensure requirements comparable to this state in the same profession as the defendant; and

4. Whether, in the case against a nonspecialist, the witness can demonstrate a sufficient familiarity with the standard of care practiced in this state.

The provisions of this subsection shall apply to causes of action filed on or after November 1, 1997.

SECTION 8. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 868 of Title 18, unless there is created a duplication in numbering, reads as follows:

A. It is declared to be the public policy of this state to encourage the operation of nonprofit service corporations that are tax exempt organizations operating pursuant to Section 501(c)(3) of the Internal Revenue Code and that provide services for agencies of the local, state or federal government.

B. Any nonprofit corporation qualified as a religious, charitable, or educational organization under Section 501(c)(3) of the Internal Revenue Code that provides services to individuals and that is funded in whole or in part by any agency of the state or any political subdivision thereof, or by any agency of the federal government shall not be liable for civil damages, including personal injuries allegedly caused by the acts or omissions of the corporation unless the alleged misconduct was willful or wanton.

C. Any insurance company or religious, charitable, and educational risk pooling trust that provides coverage to a nonprofit Section 501(c)(3) corporation may utilize any immunities or may assert any defenses to which the insured nonprofit corporation is entitled.

D. As used in this section:

1. "Agency" means any board, commission, committee, department or other instrumentality or entity designated to act on behalf of the state, a political subdivision of the state, or the federal government; and

2. "Political subdivision" means:

- a. a municipality,
- b. a school district,
- c. a county, or
- d. a public trust if the sole beneficiary or beneficiaries are a city, town, school district or county.

SECTION 9. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 15 of Title 23, unless there is created a duplication in numbering, reads as follows:

No person shall be liable to a plaintiff in any civil action for damages if, by a preponderance of the evidence, the damages were incurred as a consequence of the commission, attempted commission or flight subsequent to the commission or attempted commission of a crime by the plaintiff if:

1. The amount of any force used by the defendant was not more than the amount necessary to prevent the commission, attempted commission or flight subsequent to the commission of that crime; or
2. The damages were incurred while the plaintiff was trespassing on property owned, leased or occupied by the defendant.

SECTION 10. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 16 of Title 23, unless there is created a duplication in numbering, reads as follows:

No person shall be liable to a plaintiff in any civil action for damages if, by a preponderance of the evidence, the damages were incurred while the plaintiff was trespassing on property owned, leased or occupied by the defendant and while the plaintiff was working on a court-ordered or Department of Corrections approved work release program.

SECTION 11. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 9.2 of Title 23, unless there is created a duplication in numbering, reads as follows:

A. In all common law, statutory or other actions that seek damages on account of death, bodily injury, economic loss, or physical damage to property based on negligence, or product liability based on strict tort liability, recovery of noneconomic damages shall be limited to Five Hundred Thousand Dollars (\$500,000.00) per plaintiff. There shall be no recovery for hedonic damages.

B. Beginning January 1, 1998, the liability limit established in subsection A of this section shall automatically be increased or decreased, as applicable, by a sum equal to the amount of the limit multiplied by the percentage increase or decrease in the consumer price index-u from January 1 through December 31 of the previous year. "Consumer price index-u" means the index published by the Bureau of Labor Statistics of the United States Department of Labor that measures the average change in prices of goods and services purchased by all urban consumers, United States city average, all items, 1982-84=100. The liability limits at the time at which damages subject to such limits are awarded by final judgment or settlement shall be utilized by the courts.

C. Nothing in this section shall be construed to create a right to recover noneconomic damages.

D. The provisions of this section shall apply to causes of action accruing on or after November 1, 1997.

SECTION 12. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 9.3 of Title 23, unless there is created a duplication in numbering, reads as follows:

In all actions on account of bodily injury, death, economic loss, or physical damage to property based on negligence, or product liability actions covered by the Products Liability Act:

1. "Economic loss" or "economic damages" means all damages which are tangible, such as damages for past and future medical expenses, loss of income or earnings and other property loss;

2. "Noneconomic loss" or "noneconomic damages" means damages which are intangible and not subject to monetary calculation, including, but not limited to, damages for pain and suffering, disability, disfigurement, loss of consortium, and loss of society; and

3. "Compensatory damages" or "actual damages" are the sum of economic and noneconomic damages.

This section shall apply to causes of action filed on or after November 1, 1997.

SECTION 13. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 16.1 of Title 76, unless there is created a duplication in numbering, reads as follows:

Sections 13 through 16 of this act shall be known and may be cited as the "Premises Liability Act". The provisions of the Premises Liability Act shall apply to causes of action filed on or after November 1, 1997.

SECTION 14. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 16.2 of Title 76, unless there is created a duplication in numbering, reads as follows:

A. For purposes of the Premises Liability Act, the distinction under the common law between invitees and licensees regarding the duty owed by an owner or occupier of any premises to such entrants is abolished.

B. The duty owed to entrants is that of reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them. The duty of reasonable care under the circumstances which an owner or occupier of land owes to entrants shall not include any of the following:

1. A duty to warn of, or otherwise take reasonable steps to protect entrants from, conditions on the premises that are known to the entrants, are open and obvious, or can reasonably be expected to be discovered by the entrants;

2. A duty to warn of latent defects or dangers or defects or dangers unknown to the owner or occupier of the premises;

3. A duty to warn entrants of any dangers resulting from misuse by the entrants of the premises or anything affixed to or located on the premises; or

4. A duty to protect entrants from their own misuse of the premises or anything affixed to or located on the premises.

SECTION 15. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 16.3 of Title 76, unless there is created a duplication in numbering, reads as follows:

A. The Premises Liability Act shall not affect the law regarding a trespassing child entrant.

B. An owner or occupier of land has the duty of ordinary care to warn an adult entrant of a dangerous condition on the premises only if the adult entrant is physically and actually discovered in a place of danger or if the owner or occupier has affirmatively permitted actual, frequent, and habitual trespass in a place of danger. This duty of ordinary care to warn a discovered or habitual adult entrant shall not include a duty of ordinary care to protect an adult entrant from danger.

SECTION 16. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 16.4 of Title 76, unless there is created a duplication in numbering, reads as follows:

The provisions of the Premises Liability Act shall not affect the liability imposed by Section 14 of Title 76 of the Oklahoma

Statutes. SECTION 17. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 101 of Title 76, unless there is created a duplication in numbering, reads as follows:

Sections 17 through 27 of this act shall be known and may be cited as the "Products Liability Act".



SECTION 18. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 102 of Title 76, unless there is created a duplication in numbering, reads as follows:

For purposes of the Products Liability Act:

1. "Clear and convincing evidence" means that measure or degree of proof that will produce in the mind of the trier of fact a high degree of certainty as to the truth of the allegations sought to be established;

2. "Harm" means:

- a. damage to property other than the product itself,
- b. personal physical injury, illness, or death,
- c. mental anguish or emotional harm to the extent recognized by applicable law,
- d. any loss of consortium or services, or
- e. other loss deriving from any type of harm described in this paragraph;

3. "Manufacturer" means:

- a. any person who is engaged in a business to design or formulate and to produce, create, make, or construct any product or component part of a product,
- b. a product seller with respect to all component parts of a product or a component part of a product that is created or affected when, before placing the product in the stream of commerce, the product seller designs or formulates and produces, creates, makes, or constructs an aspect of a product or a component part of a product made by another, or
- c. any product seller not described in subparagraph b of this paragraph that holds itself out as a manufacturer to the user of the product;

4. "Product liability action" means a civil action brought on any theory against a manufacturer or product seller for harm caused by a product; and

5. "Product seller" means a person who, in the course of a business conducted for that purpose, sells, distributes, leases, installs, prepares, blends, packages, labels, markets, repairs, maintains, or otherwise is involved in placing a product in the stream of commerce.

SECTION 19. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 103 of Title 76, unless there is created a duplication in numbering, reads as follows:

Except as may be otherwise provided by law, any civil action that conforms to the definition of a product liability action shall be governed by the provisions of the Products Liability Act.

SECTION 20. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 104 of Title 76, unless there is created a duplication in numbering, reads as follows:

In a product liability action, a product or product component shall be presumed to be reasonably safe if the aspect of the product or product component that allegedly caused the harm was specified, authorized, or required by a federal or state statute or regulation promulgated by an agency of the federal or state government responsible for the safety or use of the product before the product was sold or delivered by the defendant to the initial purchaser or user.

SECTION 21. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 105 of Title 76, unless there is created a duplication in numbering, reads as follows:

If the design of a product or product component is in issue in a product liability action, the design shall be presumed to be reasonably safe unless, at the time the product left the control of the manufacturer, a practical and technically feasible alternative

design was available that would have prevented the harm without significantly impairing the usefulness, desirability or marketability of the product. An alternative design is practical and feasible if the technical, medical, or scientific knowledge relating to safety of the alternative design was, at the time the product left the control of the manufacturer, available and developed for commercial use and acceptable in the marketplace.

SECTION 22. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 106 of Title 76, unless there is created a duplication in numbering, reads as follows:

When measures are taken which, if taken previously, would have made an event less likely to occur, evidence of the subsequent measures is not admissible to prove a defect in a product, negligence, or culpable conduct in connection with the event. In a product liability action brought under any theory or doctrine, if the feasibility of a design or change in warnings is not controverted, then a subsequent design change or change in warnings shall not be admissible into evidence. This section shall not require the exclusion of evidence of subsequent measures when offered for another purpose such as proving ownership, control, or impeachment.

SECTION 23. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 107 of Title 76, unless there is created a duplication in numbering, reads as follows:

A. The warning, instructing, or labeling of a product or specific product component is adequate if, before the event of the death or the injury to a person or property, pamphlets, booklets, labels, or other written warnings were provided that gave notice to reasonably anticipated users or to knowledgeable intermediaries of the material risk of injury, death, or damage connected with the reasonably anticipated use of the product or instructions were provided as to the reasonably anticipated uses, applications, or

limitations of the product that the defendant anticipated or should have anticipated.

B. A defendant shall not be liable for failure to warn of material risks that were obvious to a reasonably prudent product user and material risks that were a matter of common knowledge to persons in the same position as or similar positions to that of the plaintiff in a product liability action.

C. In any product liability action brought against a manufacturer or product seller for harm allegedly caused by a failure to provide adequate warnings or instructions, a defendant manufacturer or product seller shall not be liable if, at the time the product left the control of the manufacturer, the knowledge of the danger that caused the harm was not reasonably available or obtainable in light of existing scientific, technical, or medical information.

SECTION 24. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 108 of Title 76, unless there is created a duplication in numbering, reads as follows:

In a product liability action, a manufacturer or product seller shall not be liable for harm allegedly caused by a product if the alleged harm was caused by an inherent characteristic of the product which is a generic aspect of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability and which is recognized by the ordinary person with the ordinary knowledge common to the community.

SECTION 25. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 109 of Title 76, unless there is created a duplication in numbering, reads as follows:

A. In a product liability action, noneconomic and punitive damages shall be awarded only in accordance with the provisions of this section, Section 9.1 of Title 23 of the Oklahoma Statutes and Section 11 of this act.

B. In a product liability action, punitive damages shall not be awarded against a manufacturer or product seller if the conduct of the defendant manufacturer, seller, or reseller that allegedly caused the harm was approved by or was in compliance with standards set forth in an applicable federal or state statute or in a regulation or other administrative action promulgated by an agency of the federal or state government responsible for the safety or use of the product, which statute or regulation was in effect at the time of the manufacturer's or product seller's alleged misconduct, unless the plaintiff proves by clear and convincing evidence that the manufacturer or product seller intentionally withheld from or misrepresented to Congress, the Oklahoma Legislature, or the relevant federal or state agency material information relative to the safety or use of the product that would or could have resulted in a changed decision relative to the law, standard, or other administrative action.

SECTION 26. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 110 of Title 76, unless there is created a duplication in numbering, reads as follows:

Nothing in the Products Liability Act shall be construed to create a cause of action.

SECTION 27. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 111 of Title 76, unless there is created a duplication in numbering, reads as follows:

The Products Liability Act shall apply to causes of action accruing on or after November 1, 1997.

SECTION 28. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 236b of Title 12, unless there is created a duplication in numbering, reads as follows:

A. In any action, whether in tort, contract, or otherwise, in which the plaintiff seeks damages for bodily injuries or death by reason of medical, hospital, or other healing art malpractice, to

state a claim based upon apparent or ostensible agency, a party must allege with specific facts and prove the following:

1. That the alleged principal affirmatively represented to the party that the alleged agent was the alleged principal's actual agent;

2. That the party reasonably relied upon the alleged principal's representations that the alleged agent was the alleged principal's actual agent; and

3. That a reasonable person would not have sought goods or services from the alleged principal if that person was aware that the alleged agent was not the alleged principal's actual agent.

A party basing a claim upon apparent or ostensible agency shall prove these elements by a preponderance of the evidence.

B. This section shall apply to causes of action filed on or after November 1, 1997.

SECTION 29. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 325 of Title 12, unless there is created a duplication in numbering, reads as follows:

A. In any action, whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital or other healing art malpractice, the plaintiff's attorney or the plaintiff, if the plaintiff is proceeding pro se, shall file an affidavit, attached to the original and all copies of the complaint, declaring one of the following:

1. a. that the affiant has consulted and reviewed the facts of the case with a health professional who the affiant reasonably believes:

(1) is knowledgeable in the relevant issues involved in the particular action,

(2) practices or has practiced within the last six (6) years or teaches or has taught within the last six (6) years in the same area of health

care or medicine that is at issue in the particular action, and

(3) is qualified by experience or demonstrated competence in the subject of the case,

- b. that the reviewing health professional has determined in a written report, after a review of the medical record and other relevant material involved in the particular action that there is a reasonable and meritorious cause for the filing of such action, and
- c. that the affiant has concluded on the basis of the reviewing health professional's review and consultation that there is a reasonable and meritorious cause for filing of such action.

If the affidavit is filed as to a defendant who is a physician licensed to treat human ailments without the use of drugs or medicines and without operative surgery, a dentist, a podiatrist, or a psychologist, the written report must be from a health professional licensed in the same profession, with the same class of license, as the defendant. For affidavits filed as to all other defendants, the written report must be from a physician licensed to practice medicine in all its branches. In either event, the affidavit must identify the profession of the reviewing health professional. A copy of the written report, clearly identifying the plaintiff and the reasons for the reviewing health professional's determination that a reasonable and meritorious cause for the filing of the action exists, must be attached to the affidavit;

2. That the affiant has not previously filed and voluntarily dismissed a similar action and that the affiant was unable to obtain a consultation required by paragraph 1 of this subsection because a statute of limitations would impair the action and the consultation required could not be obtained before the expiration of the statute of limitations. If an affidavit is executed pursuant to this

paragraph, the certificate and written report required by paragraph 1 of this subsection shall be filed within ninety (90) days after the filing of the complaint. The defendant shall be excused from answering or otherwise pleading until thirty (30) days after being served with a certificate required by paragraph 1 of this subsection; or

3. That a request has been made by the plaintiff or the plaintiff's attorney for examination and copying of records pursuant to Section 19 of Title 76 of the Oklahoma Statutes and the party required to comply has failed to produce such records within sixty (60) days of the receipt of the request. If an affidavit is executed pursuant to this paragraph, the certificate and written report required by paragraph 1 of this subsection shall be filed within ninety (90) days following receipt of the requested records. All defendants except those whose failure to comply is the basis for an affidavit under this paragraph shall be excused from answering or otherwise pleading until thirty (30) days after being served with the certificate required by paragraph 1 of this subsection.

B. If a certificate and written report are required pursuant to this section, a separate certificate and written report shall be filed as to each defendant who has been named in the complaint and shall be filed as to each defendant named at a later time.

C. If the plaintiff intends to rely on the doctrine of "res ipsa loquitur", the certificate and written report must state that, in the opinion of the reviewing health professional, negligence has occurred in the course of medical treatment. The affiant shall certify upon filing of the complaint that he is relying on the doctrine of "res ipsa loquitur".

D. If the attorney intends to rely on the doctrine of failure to inform of the consequences of the procedure, the attorney shall certify upon the filing of the complaint that the reviewing health professional has, after reviewing the medical record and other



relevant materials involved in the particular action, concluded that a reasonable health professional would have informed the patient of the consequences of the procedure.

E. Allegations and denials in the affidavit, made without reasonable cause and found to be untrue, shall subject the party pleading them or the party's attorney, or both, to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with reasonable attorneys' fees to be summarily taxed by the court upon motion made within thirty (30) days of the judgment or dismissal. In no event shall the award for attorneys' fees and expenses exceed those actually paid by the moving party, including the insurer, if any. In proceedings pursuant to this subsection, the moving party shall have the right to depose and examine any and all reviewing health professionals who prepared reports used in conjunction with an affidavit required by this section.

F. A reviewing health professional who in good faith prepares a report used in conjunction with an affidavit required by this section shall have civil immunity from liability which otherwise might result from the preparation of such report.

G. The failure to file a certificate required by this section shall be grounds for dismissal.

H. The provisions of this section shall apply to causes of action filed on or after November 1, 1997.

SECTION 30. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 326 of Title 12, unless there is created a duplication in numbering, reads as follows:

A. In any product liability action, as defined in the Products Liability Act, in which the plaintiff seeks damages for bodily injuries or death, the plaintiff's attorney or the plaintiff, if the plaintiff is proceeding pro se, shall file an affidavit, attached to

the original and all copies of the complaint, declaring one of the following:

1. That the affiant has consulted and reviewed the facts of the case with a qualified expert, as defined in subsection C of this section, who has determined in a written report, after examination of the product or a review of literature pertaining to the product, that:

- a. in any action based on strict tort liability, the product contained specific identifiable defects having a potential for injury beyond that which would be contemplated by the ordinary user of the product and was unreasonably dangerous and in a defective condition when it left the control of the manufacturer; or
- b. in any other action, those acts or omissions would give rise to fault, and
- c. in any action based on any theory or doctrine, the defective condition of the product or other fault was a proximate cause of the plaintiff's injury; or

2. That the affiant was unable to obtain a consultation required by paragraph 1 of this subsection because a statute of limitations would impair the action and the consultation required could not be obtained before the expiration of the statute of limitations. If an affidavit is executed pursuant to this paragraph, the affidavit required by paragraph 1 of this subsection shall be filed within ninety (90) days after the filing of the complaint. The defendant shall be excused from answering or otherwise pleading until thirty (30) days after being served with an affidavit required by paragraph 1 of this subsection. No plaintiff shall be afforded the ninety-day extension of time provided by this paragraph if the plaintiff has

voluntarily dismissed an action and has subsequently commenced a new action.

B. If the defective condition referred to in the written report required by paragraph 1 of subsection A of this section is based on a design defect, the affiant shall further state that the qualified expert has identified in the written report either:

1. A feasible alternative design that existed at the time the product left the manufacturer's control; or

2. An applicable government or industry standard to which the product did not conform.

C. A qualified expert, for the purposes of this section, is someone who possesses scientific, technical, or other specialized knowledge regarding the product at issue or similar products and who is qualified to prepare the report required by this section.

D. A copy of the written report required by this section shall be attached to the original and all copies of the complaint.

E. The failure to file an affidavit required by this section shall be grounds for dismissal.

F. This section shall apply to causes of action filed on or after November 1, 1997.

SECTION 31. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 2411.1 of Title 12, unless there is created a duplication in numbering, reads as follows:

A. In all actions brought on account of bodily injury or death, evidence of payments or services of any kind from collateral sources that have been or will be made or provided to the person on whose behalf or for whose benefit the action is brought, including payments or services for bodily injury, disability, death, loss of wages, lost profits, medical and rehabilitation expenses, or other expenses or losses, shall be admissible and may be considered by the trier of fact in determining damages. In addition, evidence of the plaintiff's direct costs for such collateral source payments and

services, and plaintiff's actual obligation to repay such collateral sources shall be admissible and may be considered in determining damages.

B. An amount equal to the sum of the benefits provided for lost wages or private or governmental disability income programs, which have been paid, or which have become payable to the injured person by any other person, corporation, insurance company or fund in relation to a particular injury, and the benefits provided for medical charges, hospital charges, or nursing or caretaking charges, which have been paid, or which have become payable to the injured person by any other person, corporation, insurance company or fund in relation to a particular injury, shall be deducted from any judgment in an action to recover for that injury based on an allegation of negligence or other wrongful act, not including intentional torts, on the part of a defendant, if application is made within thirty (30) days to reduce the judgment. Such reduction shall not apply to the extent that there is a right of recoupment through subrogation, trust agreement, lien, or otherwise. The reduction shall not reduce the judgment by more than seventy-five percent (75%) of the total amount of the judgment entered on the verdict. The reduction shall not apply to the extent of charges paid to the defendant found liable as reimbursement for the act or omission adjudged negligent. The reduction shall apply to charges paid for the subsequent care or treatment of injuries caused by the negligent act or omission.

C. The damages awarded shall be increased by the amount of any insurance premiums or the direct costs paid by the plaintiff for such benefits in the two (2) years prior to plaintiff's injury or death or to be paid by the plaintiff in the future for such benefits.

D. This section shall apply to causes of action filed on or after November 1, 1997.

SECTION 32. REPEALER 12 O.S. 1991, Section 2411, is hereby repealed.

SECTION 33. This act shall become effective November 1, 1997.

46-1-6338 SD