

STATE OF OKLAHOMA

1st Session of the 50th Legislature (2005)

COMMITTEE SUBSTITUTE
FOR
HOUSE BILL NO. 1894

By: Morgan (Fred)

COMMITTEE SUBSTITUTE

An Act relating to civil procedure; amending Section 1, Chapter 370, O.S.L. 2004 (12 O.S. Supp. 2004, Section 2011.1), which relates to frivolous claims or defenses; modifying definition; amending 12 O.S. 2001, Section 2023, which relates to class actions; requiring the court to hear and rule on certain motions before making a determination on certifying a class; providing effect of interlocutory appeal in certain circumstances; requiring potential class members to request inclusion in the class; providing procedure for summary judgment; amending 12 O.S. 2001, Section 2702, which relates to testimony by experts; providing requirements for expert testimony; providing role of the court; providing for interpretation; repealing 23 O.S. 2001, Section 103, which relates to personal injury actions asserted in bad faith; providing for codification; and providing an effective date.

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

SECTION 1. AMENDATORY Section 1, Chapter 370, O.S.L. 2004 (12 O.S. Supp. 2004, Section 2011.1), is amended to read as follows:

Section 2011.1 In any action not arising out of contract, the court shall, upon granting a motion to dismiss an action or a motion for summary judgment or subsequent to adjudication on the merits, determine whether a claim or defense asserted in the action by a nonprevailing party was frivolous. As used in this section, "frivolous" means the action ~~was knowingly asserted in bad faith,~~ was unsupported by any credible evidence, was not grounded in fact, or was unwarranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the

establishment of new law. Upon so finding, the court shall enter a judgment ordering such nonprevailing party to reimburse the prevailing party for reasonable costs, including attorney fees, incurred with respect to such claim or defense. In addition, the court may impose any sanction authorized by Section 2011 of ~~Title 12 of the Oklahoma Statutes~~ this title.

SECTION 2. AMENDATORY 12 O.S. 2001, Section 2023, is amended to read as follows:

Section 2023.

CLASS ACTIONS

A. PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if:

1. The class is so numerous that joinder of all members is impracticable;
2. There are questions of law or fact common to the class;
3. The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
4. The representative parties will fairly and adequately protect the interests of the class.

B. CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subsection A of this section are satisfied and in addition:

1. The prosecution of separate actions by or against individual members of the class would create a risk of:
 - a. inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
 - b. adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not

parties to the adjudications or substantially impair or impede their ability to protect their interests; or

2. The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

3. The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

- a. the interest of members of the class in individually controlling the prosecution or defense of separate actions,
- b. the extent and nature of any litigation concerning the controversy already commenced by or against members of the class,
- c. the desirability or undesirability of concentrating the litigation of the claims in the particular forum, and
- d. the difficulties likely to be encountered in the management of a class action.

C. CLASS ACTIONS INVOLVING JURISDICTION OF STATE AGENCY; STATE AGENCY WITH EXCLUSIVE OR PRIMARY JURISDICTION.

Before hearing or deciding a motion to certify a class action, the court shall hear and rule on all pending motions asserting lack of jurisdiction because an agency of this state has exclusive or primary jurisdiction of the action or a part of the action, or asserting that a party has failed to exhaust administrative remedies. The ruling of the court shall be reflected in a written order. If a motion provided for in this subsection is denied and a class is subsequently certified, a person may obtain appellate

review of the order denying the motion as part of an appeal of the order certifying the class action.

D. DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

1. As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subsection may be conditional, and may be altered or amended before the decision on the merits.

2. In any class action maintained under paragraph 3 of subsection B of this section, the court shall direct to the potential members of the class the best notice practicable under the circumstances, including individual notice to all potential members who can be identified through reasonable effort. The notice shall advise each potential member that:

- a. the court will ~~exclude him from~~ include the potential member in the class if he the potential member so requests by a specified date,
- b. the judgment, whether favorable or not, will include all members who ~~do not~~ request ~~exclusion~~ inclusion, and
- c. any potential member who does not request ~~exclusion~~ inclusion may, ~~if he desires,~~ enter an appearance through ~~his~~ counsel.

~~Where~~ If the class contains more than five hundred (500) potential members who can be identified through reasonable effort, it shall not be necessary to direct individual notice to more than five hundred (500) potential members, but the potential members to whom individual notice is not directed shall be given notice in such manner as the court shall direct, which may include publishing notice in newspapers, magazines, trade journals or other

publications, posting it in appropriate places, and taking other steps that are reasonably calculated to bring the notice to the attention of such members, provided that the cost of giving such notice shall be reasonable in view of the amounts that may be recovered by the class ~~members who are being notified.~~ ~~Members~~ Potential members to whom individual notice was not directed may request ~~exclusion from~~ inclusion in the class at any time before the issue of liability is determined, ~~and;~~ provided, commencing an individual action before the issue of liability is determined in the class action shall ~~be the equivalent of requesting~~ result in exclusion from the class.

3. The judgment in an action maintained as a class action under paragraphs 1 or 2 of subsection B of this section, whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under paragraph 3 of subsection B of this section, whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in paragraph 2 of this subsection ~~C of this section~~ was directed, and who have ~~not~~ requested ~~exclusion~~ inclusion, and whom the court finds to be members of the class.

4. When appropriate:

- a. an action may be brought or maintained as a class action with respect to particular issues, or
- b. a class may be divided into subclasses and each subclass treated as a class.

The provisions of this section shall then be construed and applied accordingly.

~~D.~~ E. ORDERS IN CONDUCT OF ACTIONS. In the conduct of actions to which this section applies, the court may make appropriate orders:

1. Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

2. Requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

3. Imposing conditions on the representative parties or on intervenors;

4. Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; and

5. Dealing with similar procedural matters.

The orders may be combined with an order under Section ~~16~~ 2016 of this ~~act~~ title and may be altered or amended as may be desirable from time to time.

~~E.~~ F. DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 2056 of Title 12, unless there is created a duplication in numbering, reads as follows:

A. FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may move, at any time after the expiration of twenty (20) days from the commencement of the action or after service of a motion for summary judgment by the adverse party, with or without supporting affidavits

for a summary judgment in the party's favor upon all or any part thereof.

B. FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may move, at any time, with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

C. MOTIONS AND PROCEEDINGS THEREON. The motion shall be served at least ten (10) days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

D. NOT FULLY ADJUDICATED ON MOTION. If, on motion under this section, judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall ascertain, if practicable, what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall make thereupon an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

E. FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, a party may not rest upon the mere allegations or denials of the party's pleading, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial or no genuine issue for trial, as appropriate. If the adverse party does not so respond, summary judgment, if otherwise appropriate hereunder, shall be entered against the adverse party.

F. WHEN AFFIDAVITS ARE UNAVAILABLE. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just. Upon request of a party opposing a motion for summary judgment, the court shall allow a reasonable amount of time to conclude discovery sufficient to allow the party to adequately respond to the motion for summary judgment.

G. AFFIDAVITS MADE IN BAD FAITH. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the

reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

H. STANDARD OF PROOF. Summary judgment shall be granted in favor of a party only where there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. If a standard of proof beyond a preponderance of the evidence applies at trial, the heightened standard shall not be taken into account by the court in ruling on a motion for summary judgment. In ruling on a motion for summary judgment, the court shall not weigh the evidence but shall make a determination of whether a genuine issue as to any material fact exists whether the moving party is entitled to a judgment as a matter of law because of the nonexistence of issues of material fact.

I. APPEALS. An order denying summary judgment, summary disposition of issues, or partial summary adjudication will be appealable as part of any appeal from an appealable order or judgment which is later rendered in the case.

J. SUPERSESSION. The provisions of this section supersede any court rules otherwise applicable to the subject matter of this section.

SECTION 4. AMENDATORY 12 O.S. 2001, 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, if:

1. The testimony is based upon sufficient facts or data;

2. The testimony is the product of reliable principles and methods; and

3. The witness has applied the principles and methods reliably to the facts of the case.

B. Preliminary questions concerning the admissibility of expert testimony pursuant to subsection A of this section shall be determined by the court prior to the introduction of such evidence. The court shall act as "gatekeeper" to determine the admissibility of expert testimony and shall exclude from evidence testimony that does not satisfy the requirements of subsection A of this section.

C. This section shall be interpreted in a manner consistent with Federal Rule of Evidence 702 and all the case law applicable thereto.

SECTION 5. REPEALER 23 O.S. 2001, Section 103, is hereby repealed.

SECTION 6. This act shall become effective November 1, 2005.

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