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Supreme Court strikes down 2009 tort reform measure

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(eCap) The Oklahoma Supreme Court struck down a 2009 tort reform measure Tuesday,

In a 7-2 ruling, the majority said the Comprehensive Lawsuit Reform Act of 2009 was unconstitutional because it violated the Oklahoma Constitution's single-subject rule by logrolling a numerous subjects into a single piece of legislation.

Writing for the majority, Justice Noma Gurich noted, "The court has long rejected a broad, expansive approach to the single-subject rule."

The issue, wrote Gurich, "...is whether a voter, or a legislator, is able to make a choice without being misled and is not forced to choose between two unrelated provisions contained in one measure. The question is not how similar two provisions in a proposed law are, but whether it appears that the proposal is misleading or that the provisions in the proposal are so unrelated that those voting on the law would be faced with an all-or-thing choice...If a bill contains multiple provisions, they provisions must reflect a common closely akin theme or purpose."

The Comprehensive Lawsuit Reform Act of 2009 (House Bill 1603, 2009) did not, Gurich indicated. The measure "... contains 90 sections, encompassing a variety of subjects that do not reflect a common, closely akin theme or purpose." Twenty-four sections, she wrote, "...amend and create new laws within our civil procedure code found in Title 12. Many of these provisions have nothing in common...45 sections create entirely new acts, which have nothing in common with each other, including The Uniform Emergency Volunteer Health Practitioners Act, the Common Sense Consumption Act, The Asbestos and Silica Claims Priorities Act, The Innocent Successor Asbestos-Related Liability Fairness Act and The School Protection Act....Other dissimilar sections of HB 1603 amend the Mandatory Seat Belt Use Act and the Oklahoma Livestock Activities Liability Limitation Act, limit the liability of firearms manufacturers and amend existing laws regarding school discipline"

The bill encompassed so many different subjects "...that severance is not an option," wrote Gurich. "It would be both dangerous and difficult for this Court to engage in the exercise of severance in this case. By picking and choosing which provisions relate to lawsuit reform and which do not, this Court would essentially become the policymaker. Policymaking is the job of the Legislature."

Gurich concluded by writing, "The Legislature should be well aware of the single-subject requirements of the Oklahoma Constitution. We do not doubt that tort reform is an important issue for the Legislature. But the constitutional infirmity of logrolling, which is the basis of this opinion, can only be corrected by the Legislature considering the acts within the (Comprehensive Lawsuit Reform Act of 2009) separately."

Joining Gurich in the majority were Chief Justice Tom Colbert, Vice Chief Justice John Reif, Justice Joseph Watt,

Justice James Edmondson, and Justice Douglas Combs.

Justice Yvonne Kauger also concurred but wrote a separate opinion in which she compared the legislation to a peanut butter cookie. "When you add chocolate chips, pecans, coconut, M&M's, raisins and dried cranberries, the additional ingredients changes the homogenous nature of a peanut butter cookie into a jumble of different tastes and textures. It is still a cookie; it is just not a peanut butter cookie. Likewise, the (Comprehensive Lawsuit Reform Act of 2009) is still a statute, but it ceased to be a statute for the reform of civil procedure when sections having nothing to do with civil procedure were included."

Justices James Winchester and Steven Taylor dissented. In their dissent, written by Winchester, the two justices suggested "...that this Court should adopt a more deferential approach toward the (single-subject) rule. Based on the majority's present opinion, statutes that were enacted in a comprehensive bill, and that have remained aw law for years could be found unconstitutional.

State Chamber President and Chief Executive Officer Fred Morgan said in a press release, "We are extremely disappointed in today's ruling, as the court has chosen to legislate from the bench instead of exercising judicial restraint. The dissent rightly points out, "The Legislature and the public understood the common themes and purposes embodied in the legislation; it was tort reform. Too often the activist arm of this court misuses constitutional terms like 'special law' and 'single subject' to strike down any law they do not like, subverting the will of the duly-elected representatives of the people.

"Regrettably, the activist judges on this court have shown they will continue to anoint themselves the ultimate arbiter of the state's social, moral and legal values. It is clear Oklahomans need to take a serious look at revising our state Constitution to protect the people from an activist judiciary."

The decision arose from a wrongful death case in Tulsa County in which the defendant sought to dismiss the case citing the plaintiff's failure to comply with certain provisions of the new law. The plaintiff responded with a motion to dismiss, arguing that the law was unconstitutional logrolling in violation of the single-subject rule.

House Bill 1603, by former Rep. Daniel Sullivan, R-Tulsa and former Sen. Glenn Coffee, R-Oklahoma City, creates the Comprehensive Lawsuit Reform Act of 2009. It states that in any civil action for professional negligence, the plaintiff must attach to the petition an affidavit that includes a written opinion from a qualified expert that the claim has merit. If such an affidavit is not filed, a court may dismiss the petition without prejudice. It sets forth procedures for a plaintiff to request an indigency exemption from providing an affidavit of merit. It requires such person to submit an appropriate application and a nonrefundable application fee of \$40. It allows a court to defer all or part of the fee. It directs the Supreme Court to promulgate rules governing determination of indigency by Dec. 1, 2009. The measure also states that a court may decline to exercise jurisdiction and stay, transfer or dismiss the action if it is in the best interest of justice and the convenience of the parties. It allows actions to be dismissed by the plaintiff without court order by filing a notice of dismissal at any time before service by the adverse party of an answer or motion for summary judgment, whichever is first, or filing a stipulation for dismissal signed by all parties appearing in the action. It states that if a plaintiff files a notice of dismissal after discovery has commenced, the action will not be dismissed without prejudice without the consent of the defendant. The bill also modifies the language related to prejudgment interest, stating that beginning Nov. 1, 2009, prejudgment interest shall begin to accrue 24 months after the suit resulting in the judgment was commenced. It directs that postjudgment and prejudgment interest be calculated using a rate equal to the average U.S. Treasury Bill rate of the preceding calendar year. It allows parties to obtain a stay of enforcement of a judgment, decree or final order during the time in which an appeal may be commenced or while an appeal is pending in any court inside or outside of the state. It also prohibits bonds filed when seeking a stay of enforcement from exceeding \$25 million. The measure exempts appeals of punitive damages from an appeal bond requirement. The measure adds language related to Medicaid reducing its recovery to take account of the cost of procuring the judgment or settlement, setting forth procedures for the Oklahoma Health Care Authority to seek recovery. The measure sets forth language related to computation of the recovery if a Medicaid payment is less than

the judgment or settlement amount and computation of the recovery if Medicaid payments equal or exceed the judgment or settlement amount. It places an additional cap of 10 percent of the net worth of the judgment debtor on bonds in any action or litigation brought involving a signatory, successor of a signatory or affiliate of a signatory of the Master Settlement Agreement or the Smokeless Tobacco Master Settlement Agreement. The bill modifies language related to claims for relief, changing reference from \$10,000 to a section of law under the U.S. Code. It prohibits damages sought in excess of \$10,000 but less than that set forth in the U.S. Code from exceeding the amount set forth in the pleadings, unless a good-faith-based change in circumstances arises. The bill modifies the definition of "frivolous" for purposes of a court's determination of whether a claim is frivolous. It modifies language related to filings of class actions. It requires a court order determining a class action entered on or after Nov. 1, 2009, to define the class and the class claims, issues or defenses and appoint class counsel. It states that such orders are subject to a de novo standard of review by an appellate court reviewing the order. For certified classes, the court may direct appropriate notice to the class. It limits class membership on actions filed after Nov. 1, 2009, to individuals or entities who are residents of the state or non residents who own an interest in property in the state that is relevant to the action or who have a significant portion of the nonresident's cause of action arising from conduct within the state. The measure also modifies language related to dismissal or compromise in class actions, stating that claims, issues or defenses of a certified class may be settled, dismissed or compromised only with the court's approval. It sets forth procedures for such motions filed after Nov. 1, 2009. It also sets forth new language regarding class counsel, stating that a court-certified class must appoint counsel. It allows a court to award reasonable attorney fees and nontaxable costs in a certified class action. The bill also modifies language related to opinion testimony, allowing a qualified expert to testify in the form of an opinion if the testimony is based on sufficient facts or data, is the product of reliable principles and methods and if the witness has applied the principles and methods reliably to the facts of the case. The measure modifies language related to joint and several liability. It makes inapplicable a requirement that a defendant be joint and severally liable for damages if the percentage of responsibility attributed to the defendant is greater than 50 percent on actions brought by or on behalf of the state. It removes language that previously exempted political subdivisions of the state and actions in which no comparative negligence was found to be attributable to the plaintiff. The bill also states that in any civil action arising from a claimed bodily injury, there is no limitation on an award for economic loss. It also modifies the cap on noneconomic damages, instituting a \$400,000 cap on noneconomic damages for civil actions arising from a claimed bodily injury, regardless of the number of parties against whom the action is brought or the number of actions brought. The measure also states that upon establishment of a Health Care Indemnity Fund, any damages awarded that exceed the \$400,000 limitation are to be paid from the fund; however, such provision does not apply to any action that accrues before the date of enactment of the fund, which is to be established pursuant to the recommendations of a task force. The fund is to include professional liability insurance coverage requirements in an amount no less than \$1 million for physicians and maintain availability of \$20 million annually. The measure states legislative intent to purchase reinsurance of up to \$20 million to cover judgments through the fund. It states that there is no limit on noneconomic damages that may be awarded in civil actions arising from a claimed bodily injury resulting from professional negligence against a physician if a judge and jury finds by clear and convincing evidence that the plaintiff or injured person suffered permanent and substantial physical abnormality or disfigurement, loss of use of a limb, loss of or substantial impairment to a major body organ or system; or the plaintiff or injured person has suffered permanent and physical functional injury that prevents him/her from being able to independently care for himself/herself and perform life sustaining activities; or the defendant's acts or failures to act were in reckless disregard for the rights of others, grossly negligent, fraudulent or intentional or with malice. It places no limit on the amount of noneconomic damages that may be awarded in an action arising from claimed bodily injury not resulting from professional negligence against a physician if it is found by a preponderance of the evidence that one of the three previous scenarios existed. It also sets forth guidelines for the court to enter judgments for economic damages and noneconomic damages. In jury-tried actions, the jury is not to be instructed with regard to the limit on noneconomic damages. It states that the limits are not to apply to actions brought under the Governmental Tort Claims Act or actions for wrongful death. The measure also creates an eight-member Health Care Indemnity Fund Task Force to study a mechanism for creating a

health care indemnity fund to pay a portion of damages awarded by a court or settled and approved by a court in professional negligence cases against physicians. It requires the task force to report its findings to the Senate president pro tempore and House speaker by May 1, 2011. It removes the language related to admission of evidence of a remarriage or social situation of a surviving spouse of a decedent in actions to recover damages for injuries resulting in death. The bill modifies the language related to evidence of violations of child passenger restraint system requirements, allowing admission of such evidence in a civil action or proceeding for damages unless the plaintiff is a child under age 16. It prohibits peer review information discovered pursuant to a claim of independent negligence against a health care facility from being used as evidence unless a judge or jury first find the professional to have been negligent in providing health care to the patient in the facility. It allows credentialing and recredentialing data to be used if the civil action claims alleges the health care facility was independently negligent as a result of permitting the health care professional to provide services. The bill creates the Uniform Emergency Volunteer Health Practitioners Act, allowing the Department of Health to limit, restrict or otherwise regulate the duration of practice, geographical areas, types of practice and any other matters of volunteer health practitioners. It allows volunteer health practitioners registered with a registration system and who is licensed and good standing to practice in Oklahoma while an emergency declaration is in effect. The measure creates a Common Sense Consumption Act, the intent of which is to prevent frivolous lawsuits against manufacturers, packers, distributors, carriers, holders, sellers, marketers or advertisers of food products that comply with statutory and regulatory requirements. It states that no firearm manufacturer, distributor or seller who lawfully manufactures, distributes or sells firearms is liable to a person or entity, or to the estate, successors or survivors of either, for any injuries suffered, including wrongful death and property damage, because of the use of a firearm by another. It states a legislative finding that the unlawful use of firearms, rather than their lawful manufacture, distribution or sale, is the proximate cause of any injury arising from their unlawful use. It prevents an association from being liable to any person or entity for any injury suffered, including wrongful death and property damage, because of the use of a firearm sold or manufactured by any licensee who is a member of the association. The measure modifies language related to product liability, stating that a manufacturer or seller is not liable if the product is inherently unsafe and known to be unsafe by the ordinary consumer. The bill also creates the Asbestos and Silica Claims Priorities Act, establishing elements of proof for asbestos or silica claims, requiring a claimant in any civil action alleging an asbestos or silica claim to file a detailed narrative medical report and diagnosis with a claim. It requires such claimants with pending claims on Nov. 1, 2009, to file the written medical report and supporting test results within 180 days of Nov. 1, 2009, or within 60 days prior to the commencement of a trial, whichever comes first. It sets forth information that must be included in new asbestos or silica claims. It requires all asbestos and silica claims to be filed individually and prohibits claims on behalf of a group or class of persons. It sets forth other guidelines governing asbestos and silica claims. The bill also creates the Innocent Successor Asbestos-Related Liability Fairness Act, limiting the cumulative successor asbestos-related liabilities of an innocent successor corporation to the fair market value of the total gross assets of the transferor determined as of the time of the merger or consolidation. It adds language relating to the Oklahoma Livestock Activities Liability Limitation Act, adding language related to agritourism activities. The measure also repeals language related to expert affidavits in medical liability actions, prejudgment interest and emergency powers regarding licensing and appointment of health personnel. It makes provisions of the bill severable, providing that if any part or provision is held void, it does not affect or impair the remaining parts or provisions.

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