Civil Procedure: Exclusion of Injured or Disfigured Plaintiffs from Trial-- *Cary v. Oneok, Inc.* --A Solution to the Exclusion Issue or Bad Precedent?

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NOTES

Civil Procedure: Exclusion of Injured or Disfigured Plaintiffs from Trial — Cary v. Oneok, Inc. — A Solution to the Exclusion Issue or Bad Precedent?

I. Introduction

When filing a lawsuit, most people automatically assume that they have the right to be present during their trial. Few people, however, can articulate the source which grants parties the right to be present at their trial.1 The right to be present during trial cannot be traced to an express constitutional provision.2 Nonetheless, many courts base the right on the Due Process Clause of the Fifth or Fourteenth Amendment.3 In Fillippon v. Albion Vein Slate Co.,4 the United States Supreme Court suggested that the right to be present stems from the right to be heard.5 The Fillippon decision also indicates that the Court's concern was that someone be present to protect the plaintiff's interests.6 While most courts may agree that a party has the right to be present during trial, case law often varies concerning the nature and extent of this right.7 Some view the exclusion issue as a matter of fairness8 while others view the issue in constitutional terms.9 According to the former view, the exclusion issue should be determined by trial judges as a part of their supervisory authority over the proceedings.10 "The focus of this view is on the

2. See id. at 391.
3. See Helmski v. Ayerst Labs., 766 F.2d 208, 213 (6th Cir. 1985) ("The extent of a civil litigant's right to be present at trial is appropriately analyzed under the due process clause of the Fifth Amendment."); Arrington v. Robertson, 114 F.2d 821, 823 (3d Cir. 1940) ("The due process clause of the Fifth Amendment . . . requires that a defendant be [given] the right to be present in person or by counsel . . . .").
5. See id. at 81 ("We entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict.").
6. See supra note 5; see also Grunes, supra note 1, at 393 ("The use of the disjunctive word 'or' makes it clear that the Court was not concerned about the rights of a litigant to be present in the courtroom per se; rather, the concern was that there be someone present to assert and protect the litigant's interests.").
7. See Grunes, supra note 1, at 389.
8. See Dickson v. Bober, 130 N.W.2d 526 (Minn. 1964); see also Morley v. Superior Court of Ariz., 638 P.2d 1331 (Ariz. 1981); infra note 29.
10. See Grunes, supra note 1, at 389.
integrity of the proceedings from the standpoint of overall fairness."11 Under the latter view, courts find that the right to be present is protected by constitutional provisions, such as the right to due process of law.12 This view vests supervisory responsibility in the appellate court rather than the trial court.13

Courts have recently begun to consider challenges to a litigant's presence at trial.14 Exclusion of a litigant from trial most often arises in personal injury cases. The plaintiff's injuries in these cases are often disfiguring and grotesque. The defendant usually claims that the plaintiff's presence in the courtroom will unfairly prejudice the jury against the defendant. In cases discussing exclusion of injured or disfigured plaintiffs, several courts balance the right of a party to be present at trial against the prejudicial effect of the plaintiff's presence on the jury.15

This note discusses the recent Oklahoma Supreme Court decision in Cary v. Oneok, Inc.16 In a 5-4 decision the court held that in the absence of exceptional circumstances, a party may not be excluded from the courtroom solely on the basis of physical appearance.17 Part II of this note examines decisions discussing the exclusion issue from other jurisdictions as well as relevant Oklahoma law prior to the decision in Cary. Part III of this note discusses the facts of Cary and the reasoning followed in the majority opinion, while also addressing the dissenting opinion's view. Part IV of this note analyzes the Cary decision by demonstrating the inappropriateness of the court's analysis and conclusion.

II. Background Information

A. Other Jurisdictions — A Functional Approach

A uniform approach among the courts regarding the exclusion of injured or disfigured plaintiffs has recently emerged.18 These courts have held that a litigant should not be excluded from trial unless he or she is unable to comprehend trial proceedings or to assist counsel, and his or her presence would materially increase the risk of jury prejudice.19 Courts have taken a functional approach to the

11. Id.
12. See id.
13. See id.
14. See id. at 388.
17. See id. at 202.
19. See Grunes, supra note 1, at 389; see also Province v. Center for Women's Health & Family Birth, 25 Cal. Rptr. 2d 667, 675 (Cal. App. 1993) (holding that the trial court did not abuse its discretion when excluding an infant from the liability phase of the trial where the infant was unable to communicate with counsel); Caputo v. Stitson Trucking Co., 611 N.Y.S.2d 655, 656 (N.Y. App. Div. 1994) (holding that the trial court did not abuse its discretion in excluding the plaintiff from the courtroom during the liability portion of the proceedings where the plaintiff's presence would have impaired the jury's ability to perform its task objectively); Reems v. St. Joseph's Hosp. & Health Ctr., 536 N.W.2d 665, 669 (N.D.
exclusion issue, viewing it in "terms of the purposes served by the litigant's presence in the courtroom." However, courts are not in agreement as to the nature and extent of a plaintiff's right to be present at trial.

The first case to view the exclusion issue in functional terms was *Dickson v. Bober.* In *Dickson*, the defendant injured Allan Dickson, a minor, when his car collided with Dickson's motorcycle. Clarence Dickson, acting on behalf of Allan, sued the defendant for negligence. The trial judge excluded Allan from the courtroom during the trial, and Clarence Dickson appealed the ruling. The Minnesota Supreme Court upheld the minor's exclusion by first determining that the decision to exclude a plaintiff is within the trial court's discretion. The court reasoned that Allan's exclusion was "probably necessary to preserve an atmosphere of fairness while the evidence with respect to liability was being presented and assessed." The court determined that Allan's rights were protected by his guardian, who brought the action for him, and by his attorney. The Minnesota Supreme Court also stated that a plaintiff's presence is irrelevant to the determination of liability.

The *Dickson* court balanced the plaintiff's right to be present at trial against the probable prejudice to the defendant resulting from the plaintiff's presence. The court also drew a distinction between litigants who could meaningfully participate at trial and those who could not.

1995) (holding that a plaintiff who is unable to understand the proceedings or assist counsel may be excluded from the liability portion of a bifurcated trial if the trial court determines that the party's presence would be unfairly prejudicial).

20. Grunes, supra note 1, at 389.
21. 130 N.W.2d 526 (Minn. 1964).
22. See id. at 529.
23. See id.
24. See id.
25. See id. at 530.
26. Id. Allan was unable to comprehend or contribute to the trial proceedings. The Supreme Court stated: "The accident changed Allan Dickson from a vital, intelligent, healthy youth to one unable to express or sustain himself, helpless and entirely dependent on others, and wholly unable to comprehend trial proceedings." Id. at 529.
27. See id. at 530.
28. See id. at 530 n.3 ("Separation of issues for purposes of trial would be an effective way of permitting a plaintiff whose appearance is relevant to the issue of damages to be present when and if that question is decided and to be absent when evidence relevant to legal responsibility is being presented to the jury.").
29. See Grunes, supra note 1, at 398; see also Morley v. Superior Court of Ariz., 638 P.2d 1331, 1334 (Ariz. 1981) ("[A] plaintiff unable by reason of his injuries to contribute to or understand the proceedings may be excluded, in the court's discretion, from the trial of the liability issue if the plaintiff will be fully and adequately represented by counsel."). In *Morley*, the trial court excluded the comatose plaintiff from the liability and damages portions of the bifurcated proceedings. Id. at 1332-33. The court stated further that "where the plaintiff's mere presence would prejudice the jury, then failure to exclude the plaintiff during the liability phase would deny the defendant's right to an unbiased jury when the source of the bias is totally irrelevant to the liability issue." Id. at 1334.
The United States Court of Appeals for the Sixth Circuit dealt with the exclusion issue in *Helminski v. Ayerst Laboratories*. In *Helminski*, the plaintiffs, as next friends of their minor son, sued the defendant alleging that the minor's developmental disabilities were the result of his mother's exposure to the defendant's product during her pregnancy. Prior to trial, the plaintiffs' attorney agreed to present the minor to the jury by videotape. Plaintiffs' counsel later announced his intention to call the minor as a witness during trial, despite the previous agreement. The defendant objected to the minor's presence and as a result, the district court bifurcated the proceedings, excluding the minor from the liability phase. The plaintiffs alleged that the minor's exclusion deprived him of due process of law.

The Sixth Circuit established a two part test to determine whether the exclusion of a litigant violates due process. First, a court must determine if a party's mere presence will be prejudicial. Second, if a court determines that a party's presence would be prejudicial to his opponent, it must consider whether the party can understand the proceedings and assist counsel in any meaningful way. "If the trial court concludes that a party can comprehend the proceedings and assist counsel in any meaningful way, the party cannot be involuntarily excluded regardless of prejudicial impact." The *Helminski* court stated that in such a case, cautionary instructions will protect the interests of a defendant.

The court concluded, however, that the exclusion of the minor did not constitute reversible error. "Under the facts of this case . . . [w]here the [plaintiffs] acted as [the minor's] next friends and legal representatives . . . and where [the minor] was unable to assist his attorney in any meaningful way," it was not a violation of his due process rights to exclude him.

The *Helminski* court treated the exclusion issue as a matter of the plaintiff's due process rights while *Dickson* and *Morley* focused on the risk of jury prejudice. The *Helminski* court applied the due process rationale to the trial court's determination of likely jury prejudice. The Sixth Circuit defined prejudice strictly as "whether the party's presence would prevent or substantially impair the jury from performing its duties in accordance with its instructions and its oath."

30. 766 F.2d 208 (6th Cir. 1985).
31. See id. at 210.
32. See id. at 211.
33. See id.
34. See id. at 212.
35. See id.
36. See id. at 217.
37. See id. at 218.
38. Id.
39. See id.
40. See id.
41. Id.
42. See Grunes, supra note 1, at 404.
43. See *Helminski*, 766 F.2d at 217.
44. Id.
Shortly after the Sixth Circuit's decision in *Helminski*, the United States District Court for the Southern District of Ohio examined the exclusion issue in *In re Richardson-Merrell, Inc. "Benedictin" Products Liability Litigation.* In *Richardson*, the plaintiffs sued the manufacturer of Benedictin on behalf of their minor crippled children. The trial court bifurcated the proceedings and excluded the children from the liability portion. The *Richardson* court began its analysis by discussing Rule 403 of the Federal Rules of Evidence. The court stated that the rationale behind this rule was important to determining whether a plaintiff should be excluded from trial.

According to Rule 403, relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. "While the presence of birth defect plaintiffs should not be evidence . . . [i]t is beyond argument that . . . the appearance of children with birth defects might confuse the issues or mislead the jury."

The *Richardson* court then discussed and applied the *Helminski* test. The court stated that the children's testimony was not pertinent nor could the children meaningfully assist counsel at trial. While it may appear that the *Richardson* court actually followed *Helminski*, a closer look at the reasoning in the opinion reveals that the court really followed the *Dickson* and *Morley* approach. For example, the court stated "[t]he mere presence of severely handicapped young children could render the jury unable to arrive at an unbiased judgment concerning liability." The court stated further, "A fair trial contemplates fairness to both sides . . . [t]he probative value of a deformed child or children in the courtroom on an issue of liability alone is nonexistent. The unfair prejudicial effect of the presence of that child is beyond calculation." However, the court concluded that once liability is established, the deformed child would be a critical witness to help determine damages.

**B. Oklahoma Law**

Prior to the decision in *Cary*, Oklahoma case law did not address the exclusion of disfigured or injured plaintiffs from trial. Oklahoma law did discuss a party's general right to attend trial. In *Waddle v. Waddle*, the Oklahoma Court of Civil Appeals stated, "[a]s a general rule, a party is not required to attend court during

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46. See id. at 1216.
47. See id. at 1222.
48. See id.
49. See id.
50. See id.
51. Id.
52. See id. at 1224.
53. Id.
54. Id.
55. See id.
Further, the Oklahoma Supreme Court stated in Jones v. Nicoma Park Radio & Television Service, that a party should have a reasonable opportunity to attend his trial. According to article 2, section 6 of the Oklahoma Constitution, a party should have "access to a court if he has suffered a wrong which is recognized in the law." Article 2, section 6 has never been interpreted to require a party's presence at his or her trial.

Besides addressing a party's general right to attend trial, Oklahoma case law also discusses due process requirements concerning a party's presence at trial. In In re Rich, the Oklahoma Supreme Court stated that "courtroom confrontation with one's civil adversary is not required by due process or other constitutional strictures." In Rich, the defendant's parents-in-law brought an action to terminate the defendant's parental rights. The defendant was unable to attend the proceedings because he was in prison. The district court determined that the children were deprived and terminated the defendant's parental rights. On appeal, the defendant alleged that his involuntary absence from the proceedings denied him due process of law. The Rich court stated that Oklahoma law allows testimony from an incarcerated witness to be taken by deposition. The court went on to say that the defendant was entitled to a "meaningful and fair opportunity to defend in a family-status suit...[and his] opportunity to meet the issues raised via deposition testimony was nowhere impaired." The Rich court concluded that the defendant's absence did not deny him the opportunity for a fair and just hearing.

In a similar case, Bell v. Great Lakes Container Corp., the Oklahoma Court of Appeals examined due process requirements concerning the absence of a witness. The Bell court noted that no authority supports the "contention that the credibility of a witness can only be determined by a court which hears and sees a witness. Of course, [this] is an advantage but it is not absolutely essential." It is not a denial of due process for a judge to decide a matter without observing a witness.

57. Id. at 753.
58. 408 P.2d 770 (Okla. 1965).
59. See id. at 774.
60. OKLA. CONST. art. II, § 6 ("The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay or prejudice.").
63. 604 P.2d 1248 (Okla. 1979).
64. Id. at 1253.
65. See id. at 1250.
66. See id.
67. See id.
68. See id.
69. See id. at 1253.
70. Id.
71. See id.
73. Id. at 391.
74. See id.
process requires an "orderly proceeding . . . [where] the parties have an opportunity to be heard, and to defend, enforce and protect their rights." Fairness requires an absence of bias in the trial of cases.

III. Cary v. Oneok, Inc.

A. Facts

Oneok, Inc. inspected and ignited a water heater in the Cary household. Shortly thereafter, the water heater exploded and severely burned Eric Cary, who was not quite three years old. As a result of the explosion, Eric is permanently disfigured. Eric's mother, on Eric's behalf, sued Oneok for negligence. Prior to trial, Oneok moved to bifurcate the trial into liability and damages portions. Oneok also requested that Eric be excluded from the liability portion of the trial. The trial court granted the motion for bifurcation and then excluded Eric from the liability portion of the trial. The trial court reasoned that Eric's presence would be unfairly prejudicial. Cary's counsel objected to Eric's exclusion.

The jury returned a verdict for Oneok on the issue of liability and the Oklahoma Court of Civil Appeals affirmed. Cary's counsel then petitioned the Oklahoma Supreme Court for certiorari. On appeal, Cary's attorney argued that article 2, section 6 of the Oklahoma Constitution guarantees that a party be permitted to attend his own civil trial. Cary's counsel further asserted that Eric's presence would aid him because it would demonstrate to the jury the "actual person" whose life had been affected. Oneok's attorney argued that Eric's presence would serve no legitimate purpose and would "inflame the passions of the jury." Further, counsel for Oneok argued that the Oklahoma Constitution does not guarantee an individual the right to be present during his or her trial.

75. Malone v. Malone, 591 P.2d 296, 298 (Okla. 1979); see also McMinn v. State Indus. Court, 366 P.2d 954, 957 (Okla. 1961) (stating that due process requires "due notice to the adversary parties, with an opportunity to be fully heard").
78. See id.
79. See id.
80. See id.
81. See id.
82. See id.
83. See id.
84. See id.
85. See id.
86. See id.
87. See id.
88. See id.
89. See id. at 203.
90. See id.
91. Id.
92. See id.
A closely divided court held that it was error to exclude Eric from the liability portion of the trial. Consequently, the Court of Civil Appeals' decision was reversed and the judgment for Oneok was vacated. The court stated that in the absence of exceptional circumstances, a party may not be excluded from the courtroom based on physical appearance alone.

B. Majority Opinion

Vice Chief Justice Summers began the majority opinion by stating that the issue presented in Cary was one of first impression in Oklahoma. The opinion discussed various cases from other jurisdictions, concluding that these courts agree on two points: "(1) The ideals behind due process and a fair trial permit a party to be present in the courtroom absent extreme conditions and (2) the possibility of juror sympathy alone is not juror prejudice, and is insufficient to exclude a party from the courtroom." The majority reasoned that "we find no authority for the proposition that a party may be excluded solely by reason of his disfigurement." The court stated that a party's physical appearance does not amount to an "extreme circumstance" warranting exclusion. The court further reasoned that the party seeking exclusion bears the burden of showing that he cannot obtain a fair trial unless the plaintiff is excluded.

The majority pointed out that if Eric was simply an observer, he would have been permitted in the courtroom. "It is impermissible that he is kept from observing and participating in the proceedings solely because of his status as a party who was burned and is thus physically scarred." The court went on to say that the likelihood of jury sympathy is not the equivalent of prejudice. "A jury will generally follow the court's instructions and decide a case based on the law presented."

The majority discussed the two part test set forth in Helminski. "[O]nly if the court has found that in addition to the physical condition the party's mental state is such that he or she can neither comprehend the proceedings nor aid counsel in

93. See id. at 206.
94. See id.
95. See id. at 202.
96. See id. at 203.
98. Cary, 940 P.2d at 204.
99. Id.
100. See id.
101. See id.
102. See id.
103. Id. at 204-05.
104. See id. at 205.
105. Id.
presenting the case, does the court have discretion to exclude him or her from the liability phase of the trial.\footnote{107} Applying the Helmsinski test to Cary, the majority concluded that the test was not satisfied.\footnote{108} The majority stated that there was no evidence to support the conclusion that Eric could not meaningfully comprehend the proceedings.\footnote{109} The court stated that Oneok failed to show that Eric would have been of no assistance to his attorney.\footnote{110} "Oftentimes, it is essential for the proper presentation of the case to have the client at hand ready to prompt the cross-examiner and respond to his inquires."\footnote{111} Unlike the Sixth Circuit in Helmsinski, which held that the exclusion of the minor was harmless, the majority stated that extending the harmless error doctrine to the case at bar would "trivialize [Eric's] right to observe and be part of the proceedings which likely will profoundly influence much of the rest of his life."\footnote{112}

C. Dissenting Opinion

Unlike the majority opinion, which primarily followed the Helmsinski approach, Justice Opala's dissenting opinion listed several reasons that Eric's exclusion during the liability portion of the proceedings was proper. First, the dissent pointed out that Eric's status was that of a non-party whose action was brought in his name.\footnote{113} According to title 12, section 2017 of the Oklahoma Statutes,\footnote{114} a minor cannot sue or defend except by guardian. The minor's legal representative "conducts, manages and controls the litigation."\footnote{115} The dissent concluded that the legal representative is the dominus litis,\footnote{116} or master of the litigation. Further, the right to remain in the courtroom is vested in the legal representative, who was Eric's mother.\footnote{117} The dissent went on to say "[a]lthough the minor is the sole real party in interest (in whose name litigation must be brought and who would have the requisite stake in the outcome to meet standing requirements), as a person non sui juris he is not a party to the suit but a beneficiary of its proceeds."\footnote{118} Consequently, the right to courtroom presence cannot attach to a child who is represented by a legal representative.\footnote{119}
Second, the dissent observed that "national jurisprudence" holds that no claim to one's courtroom presence is absolute.\textsuperscript{120} "It should be weighed against the opposite party's right to a fair trial — one that is free of prejudice likely to be engendered in the triers of fact."\textsuperscript{121} The dissent reasoned that, according to the majority of case law dealing with the exclusion issue, exclusion of a litigant is free from error if "1) the litigant's appearance or conduct is likely to prejudice the defendant; 2) the litigant's testimonial participation is neither necessary nor expected; and, 3) the litigant cannot assist counsel in any meaningful way."\textsuperscript{122} The dissenting opinion stated further that if an excluded litigant's presence is not critical to his effective representation at trial, it is not unfair to exclude him.\textsuperscript{123}

Third, the dissent argued that a ruling within the trial court's discretion should not be disturbed absent an abuse of discretion.\textsuperscript{124} "To reverse a trial court order on [an] abuse-of-discretion standard, it must appear that the decisionmaker reached a clearly erroneous conclusion that is contrary to sound principles of reason and evidence."\textsuperscript{125} The dissent stated that a trial court must withhold prejudicial information from the jury.\textsuperscript{126} Further, the dissent pointed out that the district court record would not lead one to conclude that the decision was contrary to reason.\textsuperscript{127} Testimony indicated that Eric remembered little about the accident, and he was not expected to be called as a witness.\textsuperscript{128} Therefore, the dissent concluded that the trial court's ruling was not abusive.\textsuperscript{129}

Fourth, the dissenting opinion stated that the rule crafted by the majority violated Oneok's right to an impartial jury as guaranteed by article 2, section 7\textsuperscript{130} of the Oklahoma Constitution and the Fourteenth Amendment\textsuperscript{131} to the United States Constitution.\textsuperscript{132} The dissenters in Cary concluded that when a defendant satisfies the three part test under the majority view,\textsuperscript{133} protections embodied in the federal and respective state constitutions are invoked.\textsuperscript{134} Once a defendant has satisfied this burden, the trial court may, exercising its discretion over the proceedings, exclude a litigant whose presence will unfairly prejudice a defendant.\textsuperscript{135}

\begin{thebibliography}{99}
\bibitem{120} \textit{Id.} at 212.
\bibitem{121} \textit{Id.}
\bibitem{122} \textit{Id.}
\bibitem{123} \textit{See id.}
\bibitem{124} \textit{See id.} at 214.
\bibitem{125} \textit{Id.}
\bibitem{126} \textit{See id.}
\bibitem{127} \textit{See id.}
\bibitem{128} \textit{See id.}
\bibitem{129} \textit{See id.}
\bibitem{130} \textit{OKLA. CONST.} art. II, § 7 ("No person shall be deprived of life, liberty, or property without due process of law.").
\bibitem{131} \textit{U.S. CONST.} amend. XIV ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . ").
\bibitem{132} \textit{See Cary}, 540 P.2d at 206.
\bibitem{133} \textit{See id.} at 212.
\bibitem{134} \textit{See id.} at 214.
\bibitem{135} \textit{See id.} at 212.
\end{thebibliography}
Finally, the dissenting opinion stated that the majority's reversal of the exclusion order violated two statutory provisions that make reversal of a judgment impermissible. First, according to title 12, section 78 of the Oklahoma Statutes, an appellate court may not reverse a judgment unless an error affects the substantial rights of the parties. Second, title 20, section 3001.1 forbids reversal where the error complained of does not involve a miscarriage of justice. The dissent concluded that Eric's exclusion neither affected his substantial rights nor resulted in a miscarriage of justice.

IV. Analysis of Cary v. Oneok, Inc.

The majority opinion disregarded current Oklahoma law by creating a new doctrine which precludes a litigant's exclusion from the courtroom in the absence of exceptional circumstances. Additionally, the majority disregarded years of prior case law from other jurisdictions holding that a person's right to be present in court is not absolute. The majority's conclusion violated Oneok's right to a fair trial. Finally, the majority's decision was inappropriate because the court overlooked several applicable evidentiary provisions.

A. Oklahoma Law

The majority disregarded the applicable standard for reviewing a trial court's decision. The Supreme Court must affirm the trial court's decision unless the court finds an abuse of discretion. To reverse on the grounds of abuse of discretion, the trial judge must make a clearly erroneous conclusion against reason and evidence. The trial court's decision to exclude Eric was not against reason and evidence, and thus should have been upheld. Neither Eric's mother nor Oneok disputed Eric's extensive disfigurement nor the fact that his presence might have prejudiced the jury. Further, the record supported the conclusion that Eric could not assist counsel at trial in a meaningful way. Consequently, the majority

136. See id. at 216.
137. 12 OKLA. STAT. § 78 (1991) ("The court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.").
139. 20 OKLA. STAT. § 3001.1 (1991) ("No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, . . . for error in any matter of pleading or procedure, unless . . . the error complained of has probably resulted in a miscarriage of justice or constitutes a substantial violation of a constitutional or statutory right.").
140. See Cary, 940 P.2d at 216.
141. See id.
142. See supra notes 58-74 and accompanying text.
146. See id. ("There was testimony that Cary — six years old at the time of trial — remembered
improperly overruled the trial court's exclusion order. A "trial judge is in the best position to make a determination on matters which may affect the jury's performance of its duties." 147

Additionally, the majority overlooked two Oklahoma statutory provisions prohibiting reversal of a trial court's judgment. Title 12, section 78 of the Oklahoma Statutes provides that a court must disregard an error or defect in the proceedings which doesn't affect the substantial rights of a party. Further, section 78 states that no judgment shall be reversed for such an error. The Oklahoma Supreme Court stated in *Parris v. McCallay* 148 that if a judgment is in accord with a verdict of a properly instructed jury and supported by the evidence, it will not be reversed because of procedural errors unless there is a substantial violation of a party's constitutional rights. 149 Eric's constitutional right to be heard was not substantially violated because his legal representative protected this right by appearing in court on his behalf. 150 In *Cary*, where the verdict was supported by the evidence and Eric's constitutional right to be heard was not substantially violated, the trial court's judgment should have been upheld.

The majority also ignored title 20, section 3001.1 of the Oklahoma Statutes, which provides that an appellate court may not reverse a judgment unless the error results in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right. 151 The majority disregarded these statutory provisions by reversing the trial court's judgment, and this reversal extends beyond the proper role of an appellate court.

In creating a new doctrine, the majority opinion also failed to adhere to relevant Oklahoma precedent. The Oklahoma Supreme Court determined in *In re Rich* 152 that due process does not require courtroom confrontation with one's civil adversary. 153 In *Rich*, the court concluded that the defendant's absence from trial did not deny him the opportunity for a fair and just hearing 154 because he could address the issues raised via deposition testimony. 155 Similarly, Eric's presence was not critical to addressing the issues raised in the liability portion of the proceedings. Eric was not scheduled to be a witness 156 and it is difficult to see how, under the circumstances, Eric's presence would have made any difference. Moreover, the majority's statement that "[o]ftentimes it is essential for the proper presentation of the case to have the client at hand ready to prompt the cross-examiner and respond

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little about the circumstances surrounding the harm dealing occasion and, at different times, reported widely varying accounts of the event. He was neither necessary nor expected to be called as a witness.

147. Grunes, *supra* note 1, at 396.
149. *See id.* at 68.
151. *See supra* note 139.
152. 604 P.2d 1248 (Okla. 1979).
153. *See id.* at 1253.
154. *See id.*
155. *See id.*
to his inquiries"\textsuperscript{157} is misplaced. First, Eric could not recall the accident. If a client cannot remember what happened, it is doubtful that he can respond to inquiries. Further, Eric was six years old at the time of the proceedings. A child of that age will in all likelihood not be able to "prompt the cross-examiner." Consequently, the majority's rationale for concluding that Eric's presence at trial was warranted is incorrect. Eric's mother adequately protected his interests in trial, satisfying Rich. Counsel felt this way all along, as demonstrated by the fact that he did not schedule Eric as a witness at trial.

Another relevant case that the majority chose to ignore is \textit{Bell v. Great Lakes Container Corp.}\textsuperscript{158} In \textit{Bell}, the Oklahoma Court of Civil Appeals determined that it was not a denial of due process for a judge to decide a matter without observing a witness.\textsuperscript{159} While it is preferable for a court to hear and see a witness, it is not absolutely essential.\textsuperscript{160} Eric's presence is much like the testimony of a witness; his appearance is testimony of his injuries. Under the reasoning in \textit{Bell}, the jury may have determined Oneok's liability without observing Eric.

Moreover, the majority's holding in \textit{Cary} makes title 12, section 2018(D) of the Oklahoma Statutes of little consequence in personal injury actions where the plaintiff is disfigured. Section 2018(D) states that the court may order a separate trial of any claim to avoid prejudice. "[B]ifurcation of trial of the liability and damages issues . . . avoid[s] completely the possibility of prejudice."\textsuperscript{161} According to the majority, a party may not be excluded on the basis of physical appearance alone.\textsuperscript{162} Thus, the majority creates a hard and fast rule that even where the proceedings are bifurcated, a disfigured plaintiff cannot be excluded from the liability portion of the trial regardless of the resulting prejudice to the defendant. The holding in \textit{Cary} will in all likelihood discourage future defendants from utilizing 2018(D). "There would be here no basis for a litigant's exclusion if there were no bifurcation order in the case."\textsuperscript{163}

\textbf{B. Other Jurisdictions}

By holding that Eric's exclusion was reversible error, the majority disregarded the view articulated by a large number of courts examining the exclusion issue. According to these courts,\textsuperscript{164} a litigant may be excluded if (1) his presence prejudices the defendant, and (2) he cannot assist counsel in any meaningful way or comprehend the proceedings. If both parts of this test are met, the trial court's exclusion of a litigant is appropriate:

\begin{flushleft}
\textsuperscript{157} \textit{Id.} at 206. \\
\textsuperscript{158} 702 P.2d 387 (Okla. Ct. App. 1985). \\
\textsuperscript{159} \textit{See id.} at 391. \\
\textsuperscript{160} \textit{See id.} \\
\textsuperscript{162} \textit{See Cary}, 940 P.2d at 204. \\
\textsuperscript{163} \textit{Id.} at 212-13. \\
\end{flushleft}
Although the physical condition of a plaintiff, in and of itself, is not enough to justify his involuntary exclusion from any phase of the trial, when a plaintiff is both physically and mentally incapable and his mental incapacity prevents him from assisting counsel in any meaningful way, then the decision to exclude the plaintiff from the liability phase of a trial lies within the sound discretion of the trial court.\( ^{165} \)

According to the standards followed by most courts, Eric's exclusion was appropriate.

C. Due Process

The majority's decision denied Oneok the right to a fair trial. Article 2, section 7 of the Oklahoma Constitution guarantees that no person shall be deprived of life, liberty, or property without due process of law. A basic requirement of due process is a "fair trial in a fair tribunal."\( ^{166} \) By creating a rule that a plaintiff may not be excluded from trial on the basis of physical appearance in the absence of exceptional circumstances, the majority created a situation fostering bias. When a "trial court determines [that] the plaintiff's mere presence would prejudice the jury, then failure to exclude the plaintiff during the liability phase would deny the defendant's right to an unbiased jury."\( ^{167} \) If a plaintiff may not be excluded, regardless of the prejudicial impact, the defendant is denied due process because his trial will not be free of bias.\( ^{168} \) The holding in Cary makes it quite difficult for a defendant in a personal injury case to receive a fair trial. "The right to be heard should not include the right to prejudice the jury. Indeed, unnecessary jury prejudice may itself violate due process if it infringes upon the right to a fair trial."\( ^{169} \)

D. Evidentiary Provisions

The majority opinion ignored the standard of relevancy set out in title 12, section 2401 of the Oklahoma Statutes. Section 2401 states, "[r]elevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."\( ^{170} \) In Cary, the fact of consequence in the liability portion of the proceedings was whether Oneok was negligent. Eric's injuries are not relevant to this determination. Eric's injuries do not tend to make the

\( ^{165} \) Caputo, 611 N.Y.S.2d at 656.


\( ^{168} \) See 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND Procedure § 2390 (1971) ("[A]lthough defendants win in 42% of the cases tried routinely, they win in 79% of the cases in which the liability issue is submitted alone. These figures suggest that juries are moved by sympathy when they have heard evidence of the extent of the plaintiff's injuries and that this influences their decision on the liability issue."); see also Zofcin v. Dean, 144 F.R.D. 203, 205 (S.D.N.Y. 1992) ("This Court finds that introduction of evidence offered only to prove damages poses a substantial risk of impairing the jury's objectivity on the liability issue in this case.").

\( ^{169} \) Grunes, supra note 1, at 395.

defendant's negligence more or less probable. By ruling that Eric's exclusion was reversible error, the majority disregarded the fact that even if he were permitted to be present at trial, his injuries are not relevant to the liability issue.\textsuperscript{171}

In addition, section 2403 of the Oklahoma Evidence Code states that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. In \textit{Strubhart v. Perry Memorial Hospital Trust Authority}, \textsuperscript{172} the Oklahoma Supreme Court stated that balancing relevancy against prejudice is within the trial court's discretion and its ruling will not be disturbed in the absence of an abuse of discretion.\textsuperscript{173} Even assuming that Eric's presence is relevant to Oneok's liability, the trial court may still exclude him if his presence would be substantially outweighed by the danger of unfair prejudice. \textit{Cary} is similar to the \textit{Richardson} case.\textsuperscript{174} In \textit{Richardson}, the court concluded that the balancing process under Rule 403 of the Federal Rules of Evidence was relevant in determining whether to exclude crippled minors from trial.\textsuperscript{175} The \textit{Richardson} court concluded that while the presence of the minors was not evidence, their presence would confuse the issues or mislead the jury.\textsuperscript{176} The court stated further:

> It is clear that the presence at trial during the liability phase of children suffering from severe visible birth defects is inherently prejudicial . . . . If the battle is emotional alone between newborn infants and big business, there can be but one winner. Emotional battles, however, should not be staged in a federal courtroom. We deal in liability imposed not by emotion but by law. It is customary, in fact, to instruct juries that "all persons including corporations are entitled to a fair trial."\textsuperscript{177}

The reasoning followed by the court in \textit{Richardson} is applicable to \textit{Cary}. Eric's presence would be inherently prejudicial to Oneok.

Similarly, Eric's presence could also be considered impermissible extrinsic evidence. In \textit{Watson v. State},\textsuperscript{178} the Indiana Supreme Court stated:

> A jury looking about the courtroom, seeing objects brought into the courtroom, has no right to consider such extrinsic material, and base

\textsuperscript{171} Further, the trial court's exclusion order was not reversible error according to the reasoning of \textit{Patrick v. Oklahoma City}, 41 P.2d 103 (Okla. 1935) ("Where a plaintiff suing for personal injuries fails to show negligence of the defendant . . . exclusion of evidence regarding extent and probable duration of injuries was not reversible error.").

\textsuperscript{172} 903 P.2d 263 (Okla. 1995).

\textsuperscript{173} See id. at 269-70.

\textsuperscript{174} See supra notes 45-57 and accompanying text.


\textsuperscript{176} See id.

\textsuperscript{177} Id. at 1224.

\textsuperscript{178} 140 N.E.2d 109, 110 (Ind. 1957). In \textit{Watson}, the State failed to introduce any evidence of the defendant's age, which was an element of the charged crime. There was no direct testimony given at trial concerning the defendant's age, nor did the defendant take the witness stand.
their verdict thereon, or draw inferences therefrom, without such exhibits being properly referred to for their observation as evidence in the trial. The same rule holds true as to persons within the view of the jury during trial.179

Under the reasoning in Watson, when Eric's condition had not been admitted into evidence during the liability phase of the trial,180 his presence in the courtroom might cause the jurors to consider impermissible extrinsic material in reaching a verdict.

Finally, the majority's opinion violated the principle underlying section 2102 of the Oklahoma Evidence Code. This section states: "[t]his code shall be construed to secure fairness in administration . . . to the end that the truth may be ascertained and proceedings justly determined."181 In Three "M" Investments, Inc. v. Ahrend Co.,182 the Oklahoma Supreme Court stated, "Section 2102 brings flexibility as the underlying principle for the code's application and interpretation . . . [T]he evidentiary rules intend to invest the trial court with broad latitude."183 Further, in Callison v. Callison,184 the Oklahoma Supreme Court observed that the purpose of the Oklahoma Evidence Code is to ascertain the truth and justly determine the proceedings.185

The assessment of jury prejudice calls for an evidentiary determination. It is therefore a matter which properly lies within the discretion of the trial court. While the power to supervise trial proceedings is not unlimited; it is vested in the trial court, and reasonably should extend to the decision to exclude a party to a civil action.186

If the majority would have adhered to the principle underlying section 2102, Eric's exclusion would have been upheld. The trial court may exclude a person from the courtroom if exclusion will further a just outcome. Eric's exclusion is harmonious with the underlying principle of section 2102.

E. "Day in the Life" Films

The treatment of "day in the life" films is relevant to the exclusion issue. "Day in the life" films show the details of a plaintiff's daily life so that the jury may assess the plaintiff's injuries.187 These films have become quite common in

179. Id. at 112.
180. See supra notes 172-73 and accompanying text (discussing relevant evidence).
183. Id. at 1332.
185. See id. at 110.
186. Grunes, supra n.1, at 396.
personal injury cases.\textsuperscript{188} The dangers of these films are that they elicit jury sympathy and are resistant to effective cross examination.\textsuperscript{189} The Supreme Court of Missouri excluded such films in \textit{Haley v. Byers Transportation Co.}.\textsuperscript{190} The \textit{Haley} court concluded that the films "constituted . . . testimony from [the] plaintiff which was not subject to cross examination."\textsuperscript{191} The court stated further that the impact of the films would have been to create sympathy for the plaintiff out of proportion to the relevancy of the evidence.\textsuperscript{192} The United States District Court for the District of Maine followed the \textit{Haley} approach in \textit{Bolstridge v. Central Maine Power Co.}.\textsuperscript{193} The court excluded a "day in the life" film because "admission of the tape [would] . . . create the risk of distracting the jury and unfairly prejudicing the Defendant, principally though not exclusively, because the benefit of effective cross-examination is lost."\textsuperscript{194} The same type of analysis is appropriate for determining whether a plaintiff's presence in the courtroom during the liability phase would unduly prejudice the defendant.\textsuperscript{195} Eric's presence is testimony of his injuries which is not subject to cross examination. His presence, like a "day in the life" film, creates the risk of distracting the jury and unfairly prejudicing Oneok.

\textbf{V. Conclusion}

There is no express constitutional right to be present at a civil trial.\textsuperscript{196} However, due process does require that a party have the opportunity to be heard.\textsuperscript{197} The majority of jurisdictions treat the determination to exclude a litigant from trial as a responsibility within the trial court's discretion. These courts allow the trial judge to balance the prejudicial effect of the plaintiff's presence with the defendant's right to a fair trial. A large number of cases from other states hold that if a plaintiff's presence will be prejudicial to the defendant and the plaintiff cannot meaningfully assist counsel or comprehend the proceedings, the plaintiff may be excluded from the liability phase of the proceedings.

In \textit{Cary}, the Oklahoma Supreme Court declined to follow the approach adopted by a majority of courts, holding instead that a plaintiff may not be excluded from trial on the basis of physical appearance in the absence of exceptional circumstances. This new doctrine intrudes upon the discretion of trial courts and makes it

\textsuperscript{188} See Grunes, \textit{supra} note 1, at 406.
\textsuperscript{189} See id.
\textsuperscript{190} 414 S.W.2d 777 (Mo. 1967). The films showed the plaintiff engaging in the following activities: (1) getting in and out of a wheelchair, (2) getting into an appliance which permitted him to move in an upright position, (3) moving his legs manually to accomplish bodily movements, and (4) raising himself from certain places and positions by means of an overhead bar. See id. at 780.
\textsuperscript{191} Id. at 780.
\textsuperscript{192} See id.
\textsuperscript{194} Id. at 1204.
\textsuperscript{195} See Grunes, \textit{supra} note 1, at 406.
\textsuperscript{196} See id. at 1223.
\textsuperscript{197} See \textit{supra} note 6.
difficult for a defendant in a personal injury case to receive a fair trial. Additionally, the majority failed to reconcile its holding with applicable Oklahoma law that conflicts with its position. The rationale underlying the majority's opinion is incorrect. Instead of solving the exclusion issue in Oklahoma, the majority created bad precedent.

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