Statutory Interpretation: Should Oklahoma's New Limits on Punitive Damages Operate Retrospectively?

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those situations, a creditor, by simply remaining silent, may arguably "require" the spouse's signature, thereby violating Regulation B, section 202.7(d).

Moreover, the amendment creates a potential for multiple damage recoveries arising from a single violation of Regulation B. Because compensatory damages under the ECOA are often personal in nature, this is not a problem. If both applicants suffered actual damages, arguably both should be allowed to recover, even though only one violation occurred. On the other hand, multiple recovery of punitive damages is a problem. Punitive damages are not personal in nature and Congress intended to limit them to a particular amount. Therefore, the intent of Congress and the Federal Reserve Board would be best served if courts will adopt a hybrid approach to damage awards.

Finally, for thirteen years Oklahoma consumers have ignored a potential additional source of relief from discrimination within the state's Consumer Credit Code. Section 1-109 prohibits limitations or refusals of credit on the basis of sex or marital status. There appear to be a variety of potential avenues through the Administrator of Consumer Affairs to enforce section 1-109, including recovery of improperly collected funds and equitable relief. In addition, an applicant may combine the benefits of the ECOA and Oklahoma law. Also, vesting enforcement powers in the Administrator does not appear to preclude raising the creditor's violation of section 1-109 as a defense to liability on the obligation. However, until these issues are raised it will not be certain whether the statute was intended to provide such relief or simply to acknowledge the existence of the federal law.

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In 1983 the Oklahoma Supreme Court decided to allow punitive damage awards in manufacturer's product liability cases. At the same time, the court expressed concern about excessive product liability awards in other jurisdictions. While discussing the role of punitive damages as a "sword" that would protect consumers from blameworthy manufacturers, the court cautioned that "since the primary purpose of punitive damages is to punish the defendant and deter similar wrongdoing in the future, the 'sword' must be used to deter the wrongdoer, not kill him."

2. Id. at 518.
3. Id. at 517.
Despite this precaution, and others like it, Oklahoma has been affected by
the nationwide trend of increasing punitive damage awards.4 In June 1986,
the Oklahoma legislature responded by enacting statutory limits on punitive
damage awards. The limits are provided in the 1986 Oklahoma Session Laws,
chapter 315, section 1.5 This amends the Oklahoma statute that allows
punitive damage awards in certain causes of action.6

At first glance, the Tort Reform Amendment may appear to operate pro-
spectively only, so that the new limits on punitive damages would not apply
to actions that accrued or were filed prior to the effective date of the amend-
ment. A retrospective interpretation of the amendment, however, would
significantly alter the procedure by which punitive damages are awarded in
cases that accrued or were filed before the effective date. The alternative in-
terpretations of the amendment—prospective or retrospective—may repre-
sent large differences in potential punitive damages awards in those cases.

This note will examine the issue of whether the Tort Reform Amendment
should operate retrospectively. First, the terms of the amendment will be ex-
amined for language indicating a legislative intent for prospective or
retrospective effect. Second, Oklahoma common law rules of statutory inter-
pretation will be applied to the amendment to determine whether prospective
or retrospective effect is suggested. Finally, provisions of the Oklahoma con-
stitution will be studied to determine if retrospective interpretation of the
amendment will be constitutional.

Terms of the Tort Reform Amendment

Prior to enactment of the Tort Reform Amendment, section 9 of title 23 of
the Oklahoma Statutes provided the authority for punitive damage awards.7
The Tort Reform Amendment added provisions limiting the award of
punitive damages and creating a procedure by which a plaintiff can escape
the new limits in an appropriate case. The text of the Tort Reform Amend-
ment reads:

4. The Oklahoma legislature recognized the trend of increasing damage awards, creating a
16. Subsection F(1) directed the Committee to “[m]ake a study of existing state statutes, court
   and industry procedures and other sources having to do with torts, insurance, damages and other
   liability issues with the objective of developing a comprehensive and equitable solution to the
   problem of increasing liability insurance premiums and court awards.”

5. Professors and attorneys have referred to 1986 Okla. Sess. Laws ch. 315, § 1 as the
   “Tort Reform Bill” or the “Tort Reform Act.” The Act is actually a compilation of enactments
   that addresses various subjects; only section 1 deals with punitive damages. The actual title is
   long and cumbersome. For convenience, section 1 will be referred to as the “Tort Reform
   Amendment” in order to emphasize its amendatory nature.

6. 1986 Okla. Sess. Laws ch. 315, § 1 provides that “23 O.S. 1981, Section 9, is amended to
read as follows.” For text of the amendment, see infra note 8 and accompanying text.

7. 23 Okla. STAT. § 9 (1951), prior to this amendment, provided that: “In any action for
the breach of an obligation not arising from contract, where the defendant has been guilty of op-
pression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may
give damages for the sake of example, and by way of punishing the defendant.”
A. In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant, in an amount not exceeding the amount of actual damages awarded. Provided, however, if at the conclusion of the evidence and prior to the submission of the case to the jury, the court shall find, on the record and out of the presence of the jury, that there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, then the jury may give damages for the sake of example, and by the way of punishing the defendant, and the percentage limitation on such damages set forth in this section shall not apply.

B. The provisions of this section shall be strictly construed. 8

By its terms, the Tort Reform Amendment operates in two stages. Initially, a jury has the capacity to award punitive damages if it finds the defendant guilty of fraud, oppression, actual or presumed malice, or conduct evincing a wanton disregard for the rights of another. The amount of punitive damages the jury can award is limited to the amount of actual damages it awards. 9

However, the judge may be asked to review the evidence on the record and out of the presence of the jury before the case is given to the jury for decision. If the judge finds clear and convincing evidence that the defendant is guilty of fraud, oppression, actual or presumed malice, or conduct evincing a wanton disregard for the rights of another, then punitive damages are no longer limited to the amount of actual damages. 10 The jury may award punitive damages in any amount it deems appropriate, and the Tort Reform Amendment consequently has no effect other than to vary the procedure by which punitive damages are awarded.

9. The first sentence of the Tort Reform Amendment provides in part: “In any action for the breach of an obligation not arising from contract. . . . the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant, in an amount not exceeding the amount of actual damages awarded.” 1986 Okla. Sess. Laws ch. 315, § 1. See supra note 8 and accompanying text.
10. The second sentence of the amendment allows a plaintiff to escape the limit on punitive damages in an appropriate case:

[I]f . . . the court shall find . . . that there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, then . . . the percentage limitation on such damages set forth in this section shall not apply.

1986 Okla. Sess. Laws ch. 315, § 1. See supra note 8 and accompanying text. Note that the elements the judge must find are supported by clear and convincing evidence are the same elements the jury must find to award punitive damages in the first place.
If the judge does not find clear and convincing evidence of the defendant's fraud, oppression, malice, or conduct evincing a reckless disregard for another's rights, then punitive damages remain limited to the amount of actual damages awarded. In this situation, the amendment again affects procedure by providing an upper limit on the amount of punitive damages the jury may award. Thus, the Tort Reform Amendment is procedural in effect.

The terms of the amendment do not include any language that indicates a legislative intent for prospective or retrospective interpretation. An effective date for the amendment was provided by a statement that it "shall become effective November 1, 1986." This statement does not indicate a prospective or retrospective intent on the part of the legislature.12

Because the terms of the Tort Reform Amendment cannot serve as a guide for determining the issue, the issue must be resolved by Oklahoma law. The analysis should begin with Oklahoma common law principles of statutory interpretation.

Common Law Principles

General Rule: Statutes Have Prospective Effect

In 1911 the Supreme Court of Oklahoma, in Good v. Keel, recognized that a statute is construed as prospective in effect unless the language of the statute clearly expresses or implies a legislative intent for retrospective effect.13 The plaintiffs, an Indian couple, farmed and lived on a parcel of land for thirty years. They received title to the land by allotment from the Choctaw Indian Nation in 1904. In 1906 Congress enacted a law providing that public roads and highways could be established along all section lines in the Indian nations and that all allottees of land would take title subject to these rights.14

Although the law contained no express language indicating a retrospective effect, state highway officers contended that it divested title to land along section lines from Indian allottees who, like the plaintiffs, had previously received title. The state officers wished to condemn the portions of plaintiffs' land that bordered section lines to construct public roads without compensating the plaintiffs for the value of the land.

The issue facing the court was whether the statute had the retrospective effect of divesting title from persons who received title to the land prior to

12. An investigation of similar legislation enacted in other states to limit punitive damage awards reveals that the problem of prospective versus retrospective interpretation is easily solved by legislatures that think ahead. COLO. REV. STAT. § 13-21-102 (West Supp. 1986) provides that it is effective July 1, 1986, and "applies to civil actions accruing on or after said date." MINN. STAT. ANN. § 549.191 (West Supp. 1987) provides that it "applies to all actions commenced on or after its effective date." MINN. STAT. ANN. § 549.20 (West Supp. 1987) provides that it is effective April 15, 1978, and will "apply to all causes of action arising on or after that date."
13. 29 Okla. 325, 116 P. 777 (1911).
enactment of the statute. Basing its decision on common law rules of statutory interpretation, the court found the statute operated prospectively and did not divest title from persons who had previously received title.15

Since 1911 the court has consistently affirmed the principle that a statute must be interpreted as prospective in effect unless the language of the statute clearly expresses, or necessarily implies, a legislative intent of retrospective effect; all doubts are resolved in favor of prospective effect.16 The language of the Oklahoma Tort Reform Amendment does not express a legislative intent for retrospective effect or necessarily imply such an intent.17 The amend-

15. Good, 29 Okla. 325, 116 P. at 778.
16. Casey v. Bingham, 37 Okla. 484, 132 P. 663 (1913) (1906 Act of Congress invalidating certain deeds and contracts to sell land made by Indians held prospective in effect; plaintiff's contract to sell land and subsequent deed were valid where both were performed prior to enactment); Franklin v. Sovereign Camp, 145 Okla. 159, 291 P. 513 (1930) (1923 statute authorizing Oklahoma Insurance Commissioner to hear complaints against fraternal associations held prospective in effect; plaintiff stated no cause of action where abuses by defendant association occurred prior to enactment of statute); Stagg v. Board of Trustees, 147 Okla. 172, 296 P. 417 (1930) (1921 amendment creating pension rights for widows of firemen held prospective in effect; plaintiff widow not entitled to pension where her husband died prior to enactment of amendment); Swatek Constr. Co. v. Williams, 177 Okla. 305, 58 P.2d 585 (1935) (1933 survival statute held prospective in effect; husband's right to future installments of workmen's compensation award did not survive his death where husband's injury and award occurred before the survival statute was enacted, despite the fact that husband died after enactment of the statute); Washabaugh v. Bartlett Collins Glass Co., 177 Okla. 159, 57 P.2d 1162 (1936) (same); Lincoln Nat'l Life Ins. Co. v. Read, 194 Okla. 542, 156 P.2d 368 (1944) (1941 amendment raising tax rate on premiums collected by foreign insurance companies held prospective in effect; plaintiff insurance company not liable for state tax at higher rate on premiums collected in 1941 prior to April 25, the effective date of amendment), aff'd, 325 U.S. 673; Board of Trustees v. Naughton, 197 Okla. 592, 173 P.2d 425 (1946) (1945 amendment reducing pension rights of widows of firemen held prospective in effect; plaintiff widow entitled to draw her pension at previous higher rate where husband died prior to amendment); Ross v. Board of Trustees, 201 Okla. 476, 207 P.2d 254 (1949) (same 1945 amendment reducing pension rights of widows of firemen affirmed prospective in effect; but plaintiff widow not entitled to draw her pension at previous higher rate where husband died after amendment); State v. Board of Educ., 206 Okla. 699, 246 P.2d 368 (1952) (1949 amendment allowing qualified school board electors to bring suit against school board held prospective in effect; plaintiff, a qualified elector, had no standing to sue defendant school board where alleged violations occurred prior to amendment); In re Layman's Estate, 208 Okla. 174, 254 P.2d 784 (1953) (1951 amendment reducing time allowed to file petition to contest will after probate held prospective in effect; plaintiff entitled to longer filing period under statute in effect when will was admitted to probate, despite the fact that plaintiff filed petition after amendment); Board of Trustees v. Kern, 366 P.2d 415 (Okla. 1961) (1957 amendment requiring five years of marriage for widow of policeman to receive husband's pension held prospective in effect; plaintiff widow entitled to pension under previous statute that had no time of marriage requirement where pension was awarded to husband prior to amendment); Wilbanks v. Wilbanks, 441 P.2d 967 (Okla. 1968) (1965 statute allowing courts to stop alimony payments upon remarriage of person receiving alimony held prospective in effect; plaintiff husband required to continue alimony payments despite wife's remarriage, where divorce decree occurred prior to enactment of statute); Wickham v. Gulf Oil Corp., 623 P.2d 613 (Okla. 1981) (1977 amendment limiting production rights of holders of oil and gas leases held prospective in effect; defendant oil company retained production rights under statute in effect when lease was formed).
17. See supra note 8 and accompanying text.
ment is silent with respect to either prospective or retrospective effect. Therefore, if the general common law principle favoring prospective interpretation controls the interpretation of the Tort Reform Amendment, the amendment should operate prospectively.

Exception: Statutes Affecting Remedies or Modes of Procedure Have Retrospective Effect

The Oklahoma Supreme Court recognized an exception to the general rule of prospective statutory interpretation as early as statehood. In Independent Cotton Oil Co. v. Beacham, the court faced changes in law that accompanied statehood in 1907. Plaintiff, a twenty-year-old, sought damages in negligence from his employer for personal injuries suffered at work. The injuries occurred before statehood; however, the plaintiff brought suit after statehood. The defendant raised the defenses of contributory negligence and assumption of the risk.

At close of trial, the defendant requested the twelve-member jury be instructed that it must return a unanimous verdict to find for the plaintiff, an instruction consistent with the law before statehood. The trial court, however, instructed the jury that nine or more of the twelve jurors could render a plaintiff’s verdict under the current law of the state.

The trial court then submitted the defenses of contributory negligence and assumption of the risk to the jury, pursuant to a constitutional provision that stated: “The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times be left to the jury.” The jury found for the plaintiff.

On appeal, the defendant contended the action should be governed by the law in effect when the injuries occurred, the law in effect before statehood. Accordingly, the defendant argued the trial court should have required a unanimous verdict and should not have submitted the defenses of contributory negligence and assumption of the risk to the jury.

The court found current law governed both issues alleged as error because the suit was filed after statehood.

The rule is that no person has a vested right in any particular mode of procedure, and if, before the trial of the cause, a new law of procedure goes into effect, it governs, unless the statute itself provides otherwise.

There is no property in a naked cause of action for tort, but simply a cause of action, based upon a personal injury. [Citation

18. 31 Okla. 384, 120 P. 969 (1911).
19. Id., 120 P. at 971.
20. Id., 120 P. at 971-72.
omitted.] It is too nebulous a right, if a right at all, to hold inviolate against the right of a sovereign state to remedy its mode of procedure, as the exigencies of the administration of justice may require.23

The court clarified this principle in *Shelby-Downard Asphalt Co. v. Enyart*,24 where it examined the amendment of a venue statute. The plaintiff was injured at work in 1912. During 1912, he twice brought suit for negligence against his employer, a domestic corporation with its domicile and principal office in Carter County, Oklahoma.

The plaintiff filed both actions in Osage County, Oklahoma, where the injuries occurred. Both actions were dismissed without prejudice for improper venue. The venue statute in effect in 1912 provided that a suit against a domestic corporation could only be filed in the county where its principal officer resided or in the county of its domicile, where its principal office was located.25

In 1913 the venue statute was amended to allow suit to be brought against a domestic corporation in the county where the cause of action arose.26 Accordingly, plaintiff filed suit a third time in Osage County in 1914. Because of the new amendment, the trial court overruled the defendant’s objections to jurisdiction and the case was tried, resulting in a jury verdict for the plaintiff. On appeal, the defendant corporation argued the 1913 amendment could only operate prospectively and, therefore, would not control causes of action that arose prior to the amendment.

The supreme court found the amendment related only to procedure and affirmed the principle that a person cannot have a vested right in a mode of procedure.27 The general rule that favors prospective interpretation of statutes does not apply to statutes affecting only legal procedure or remedy. Amendments or new statutes that affect only procedure or remedy operate retrospectively to control all actions, whether future, pending, or previously accrued.28

"In this country, the general rule seems to be, in accordance with the English, that statutes pertaining to the remedy, i.e., such as relate to the course and form of proceedings for the enforcement of a right, but do not affect the substance of the judgment pronounced, nor either directly nor indirectly destroy all remedy whatever for the enforcement of the right, are retrospective, so as to apply to causes of action subsisting at the date of their

23. *Id.*, 120 P. at 971-72.
24. 67 Okla. 237, 170 P. 708 (1918).
25. *Id.*, 170 P. at 709.
26. *Id.*
27. *Id.* See also *Independent Cotton Oil Co.*, 31 Okla. 384, 120 P. 969 (1911); *supra* notes 18-23 and accompanying text.
passage." . . . It is said that an act dealing with procedure only applies, unless the contrary intention is expressed, to all actions falling within its terms whether commenced before or after the enactment. The doctrine thus announced seems well imbedded in principle.29

Examining the language of the statute, the court found nothing that indicated a legislative intent for prospective effect.30 Therefore, the court held the statute operated retrospectively.31 The Oklahoma Supreme Court has continued to affirm this exception to the general rule of prospective statutory interpretation.32

To determine whether a statute should have a prospective or a retrospective effect, therefore, Oklahoma courts apply one of two opposing rules of statutory interpretation, depending on the nature of the statute at issue.

29. Id., 170 P. at 710 (quoting Clark v. Kansas City, St. L. & C.R.R., 219 Mo. 524, 118 S.W. 41 (1909)) (emphasis added).
30. Id.
31. Id.
32. American Nat'l Ins. Co. v. Donahue, 54 Okla. 294, 153 P. 819, 822 (1915) ("[N]o person has a vested right in any particular mode of procedure or remedy, and if, before the trial of a cause, the Legislature provides a new procedure relative thereto, or gives another and different remedy, it governs, unless the statute provides otherwise."); Fry v. Wolfe, 106 Okla. 289, 234 P. 191, 195 (1924) ("[W]e think the 1919 statute which was in force at the time of the trial controlled the procedure. . . . This part of the 1919 act related entirely to a matter of procedure as distinguished from a substantive right of contract, and would control in spite of the fact that under the law as it existed at the time the contract was made such procedure was unauthorized."). Phillips v. H.A. Marr Grocery Co., 295 P.2d 765, 768 (Okla. 1956) ("[T]he general rule that statutes will be construed to be prospective only does not apply to statutes affecting procedure; but such statutes, unless the contrary intention is clearly expressed or implied, apply to all actions falling within their terms, whether the right of action existed before or accrued after the enactment.") (quoting Shelby-Downard Asphalt Co., 67 Okla. 237, 170 P. 708 (1918)); State v. Bailey, 305 P.2d 548 (Okla. 1956) (recognized that remedial statutes represent an exception to the general rule of prospective interpretation, but found the statute at issue affected substantive rights); Benson v. Blair, 515 P.2d 1363, 1365 (Okla. 1973) (held amendment providing for recovery of prejudgment interest only affected procedure and thus operated retrospectively); Trinity Broadcasting Corp. v. Leeco Oil Co., 692 P.2d 1364, 1366 (Okla. 1984) ("Statutes affecting procedure only, as distinguished from those that affect substantive rights, may be applied retroactively."); Jeffcoat v. Highway Contrs., Inc., 508 P.2d 1083, 1086 (Okla. Ct. App. 1972) ("[S]tatutes which relate only to remedies or to modes of procedure are held to operate retroactively unless the contrary intention is clearly expressed or implied from the language used."); Cox v. American Fid. Assur. Co., 581 P.2d 1325, 1327 (Okla. Ct. App. 1977) ("The general rule that statutes will be given progressive operation only does not apply to statutes affecting procedure."); Magers v. Magers, 645 P.2d 1039, 1041 (Okla. Ct. App. 1982) ("[T]he general rule that statutes will be construed to be prospective only does not apply to statutes affecting procedure; but such statutes, unless the contrary intention is clearly expressed or implied, apply to all actions falling within their terms, whether the right of action existed before or accrued after the enactment.") (quoting Shelby-Downard Asphalt Co., 67 Okla. 237, 170 P. 708 (1918)). Contra Adair v. McFarlin, 28 Okla. 633, 115 P. 787, 788 (1911) ("Even remedial statutes, such as is the one under construction, are to be deemed prospective in their operation, and are not to be applied to proceedings pending at the time they are enacted, unless a contrary intent appears.").
Generally, courts will interpret a statute as prospective in effect unless the language of the statute clearly expresses, or necessarily implies, a legislative intent of retrospect effect.\(^{33}\) If the statute at issue affects only legal procedure or remedy, however, courts will give it retrospect effect unless the language of the statute clearly expresses, or necessarily implies, a legislative intent of prospective effect.\(^{34}\)

The language of the Tort Reform Amendment does not indicate a legislative intent for prospective or retrospective effect.\(^{35}\) Under the general rule, therefore, it would be interpreted as prospective. However, if the Tort Reform Amendment affects only legal procedure or remedy, it will fall under the exception and be interpreted as retrospective.

The Tort Reform Amendment affects the procedures by which punitive damages are awarded. It limits the amount of punitive damages a plaintiff can recover and creates a procedure by which the plaintiff may escape the limit in an appropriate case.\(^{36}\) Therefore, the amendment will fall under the retrospective exception unless a plaintiff has a substantive right to an unrestricted award of punitive damages.

**Do Plaintiffs Have a Substantive Right to Punitive Damages?**

To approach the issue of whether a plaintiff has a substantive right to an unrestricted award of punitive damages, the purposes for awarding punitive damages must first be examined. In Oklahoma punitive damages are awarded "for the sake of example, and by way of punishing the defendant."\(^{37}\) Oklahoma courts have often held these two purposes to be the only justification for punitive damages in Oklahoma.\(^{38}\)

The purposes of punitive damages support the conclusion that a plaintiff lacks a substantive right to recover punitive damages. Punitive damages do

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33. See *supra* notes 13-17 and accompanying text.
34. See *supra* notes 18-32 and accompanying text.
36. *Id.*
38. Main v. Levine, 189 Okla. 564, 118 P.2d 252, 255 (1941) ("Exemplary damages are in the nature of punishment imposed for the benefit of society, as a restraint upon the transgressor, and as a warning and example to deter him and others from committing like offenses in the future."); Moyer v. Cordell, 204 Okla. 255, 228 P.2d 645, 650 (1951) ("The frequency of reported cases wherein the amount of punitive damages greatly exceeds the amount of actual damages serves to illustrate the purpose of punitive damages, that purpose being to punish defendant and to deter others from commission of the same wrong, rather than as compensation to the plaintiff.") (quoting Halliburton-Abbott Co. v. Hodge, 172 Okla. 175, 44 P.2d 122, 127 (1935); Nixon v. Oklahoma City, 555 P.2d 1283, 1285 (Okla. 1976) ("The law allows the recovery of money over and above the actual loss of the offended party because as a matter of policy the punishment of the transgressor may serve as an example to the rest of society that conduct of a similar kind will not be allowed. The complaining party is allowed to recover exemplary damages not because his position is meritorious, but because society is benefited by deterring similar conduct. [Citation omitted.] If no social benefit is to be derived from the imposition of exemplary damages, all legal justification for the award collapses.").
not compensate a plaintiff for any actual harm suffered; compensatory damages fulfill that function. The focus of punitive damages is not on the plaintiff but on the defendant and on society; punitive damages punish the defendant and serve as an example to society. Because punitive damages are not intended to benefit the plaintiff or compensate him for harm he has suffered, the plaintiff should have no substantive right to punitive damages.

Consistent with the purposes of punitive damages, Oklahoma requires plaintiffs to recover nominal or compensatory damages in order to justify a punitive damage award; plaintiffs may not bring an action for punitive damages alone. This requirement also supports the view that a plaintiff has no substantive right to recover punitive damages. The plaintiff’s right is only in the cause of action for nominal or compensatory damages, not in the prayer for punitive damages.

The Supreme Court of Oklahoma has used these arguments to find that a plaintiff has no substantive right to recover punitive damages. In *Cox v. Theus,* the court considered a plaintiff’s discovery request in an action for slander. The plaintiff wished to discover defendant’s financial worth before trial to bolster his argument for punitive damages.

The court first examined the language of section 9 of title 23 setting forth the purposes for punitive damages; the court affirmed that exemplary damages are awarded for the punishment of the offender and for the benefit of society. It then considered the nature of the plaintiff’s interest in the recovery of punitive damages.

A party asking for exemplary damages has only an incidental personal interest. His recovery is whole and complete with actual damages. Exemplary damages, as a tool to deter the wrongdoer, is [sic] for society’s benefit and not the litigating party’s. Exemplary damages are not a basis and a means for awarding expenses of litigation.

The allowance, including the amount, of exemplary damages is not an issue for, or a real concern of, the party claimed to have

39. Lilly v. St. L. & S.F. Ry., 31 Okla. 521, 122 P. 502, 504 (1912) ("It is well settled that, in the absence of actual damages, there can be no recovery of exemplary damages."); Brown v. Higby, 191 Okla. 173, 127 P.2d 195, 196 (1942) ("It is the rule in this jurisdiction that in the absence of actual damages there can be no recovery of exemplary damages."); Mathies v. Kittrell, 354 P.2d 413, 415 (Okla. 1960) ("Since plaintiff has not stated a cause of action entitled him to any actual damages, the question of punitive damages becomes immaterial."); Moore v. Metropolitan Util. Co., 477 P.2d 692, 694 (Okla. 1970) ("In the absence of actual damages, there can be no recovery of exemplary damages."); Davidson v. First Bank & Trust Co., 559 P.2d 1228, 1233 (Okla. 1976) ("It is settled in Oklahoma that for a jury to award punitive damage, actual damages must first be shown."); Armbruster v. Thetis Energy Corp., 675 P.2d 476, 478 (Okla. Ct. App. 1983) ("Punitive damages may not be the subject of a separate cause of action. If they are to be recovered at all it must be in connection with a cause for compensatory damages. If, as here, no compensatory damages are sought, or, if sought, none are awarded, then no punitive or exemplary damages can be recovered.").


41. Id. at 449-50.
be wronged. Exemplary damages go neither to merits of the
issues being litigated nor to the actual recovery sought by the
litigation.42

The defendant’s financial worth was therefore not an issue prior to trial, and
the plaintiff’s discovery request was denied.43

The United States District Court for the Western District of Oklahoma
used the same argument to find that punitive damages are not recoverable as
a matter of right in Amoco Pipeline Co. v. Montgomery.44 The plaintiff
argued that the trial court should have reduced defendant’s punitive damage
award by defendant’s percentage of comparative negligence. Again, the court
turned to the purposes of punitive damages as expressed in section 9.45 The
court found that punitive damages are not recoverable as a matter of right
and that the award of punitive damages is discretionary with the trier of
fact.46

The comparative negligence statute was intended to equitably apportion
losses among parties according to fault. Because punitive damages are in-
tended to punish the offender and bear no relationship to the plaintiff’s in-
jury, the court found the statute was not intended to reduce punitive damage
awards.47

It appears settled, therefore, that a plaintiff cannot claim any substantive
right to a punitive damage award. Even if a plaintiff can claim an interest in
punitive damages, however, the present issue is whether a plaintiff has a
substantive right to an unrestricted amount of punitive damages. The Tort
Reform Amendment does not eliminate a plaintiff’s opportunity to recover
punitive damages, nor does it reduce the plaintiff’s chances of recovering
punitive damages. The amendment only limits the amount of punitive
damages the plaintiff may receive in certain circumstances.48 Once again,
because the amount of punitive damages is always discretionary with the trier
of fact, a plaintiff cannot claim a substantive right to a certain amount of
punitive damages. Therefore, the amendment affects no substantive right.49

42. Id. at 450 (emphasis added).
43. Id. at 459-51.
44. 487 F. Supp. 1268 (W.D. Okla. 1980).
45. Id. at 1272.
46. Id.
47. Id. at 1273.
48. See supra text accompanying note 8.
49. A plaintiff may claim that placing a limit on his punitive damage award limits his remedy
and therefore affects his right to a recovery. However, the Oklahoma Supreme Court has held
that a remedial statute or amendment affects the right underlying the remedy only if the amend-
ment eliminates plaintiff’s remedy completely. See Shelby-Downard Asphalt co. v. Enyart, 67
Okla. 237, 170 P. 708, 710 (1918) (“[S]tatutes pertaining to the remedy, i.e., such as relate to the
course and form of proceedings for the enforcement of a right, but do not . . . either directly
nor indirectly destroy all remedy whatever for the enforcement of the right, are retrospective.”)
Hurst, 174 Okla. 685, 49 P.2d 546, 548 (1935) (“[A] taxpayer has a right, as distinguished from
a statutory privilege, to expect and demand that his property be listed for taxation at no greater
Because the Tort Reform Amendment affects only legal procedure, it falls within the exception to the general rule of prospective statutory interpretation. The exception provides that a statute affecting only legal procedure or remedy is to be interpreted as retrospective in effect, unless the statute clearly expresses, or necessarily implies, a legislative intent of prospective effect.

The amendment contains no express language indicating a legislative intent for prospective effect. Accordingly, the common law rules of statutory interpretation mandate that the Tort Reform Amendment be interpreted as retrospective in effect.

**Oklahoma Constitutional Provisions**

Once it has been determined that the Tort Reform Amendment should be applied retrospectively under common law rules of statutory interpretation, the analysis must shift to the Oklahoma constitution to determine if retrospective effect will be constitutional. Article V, section 54 of the Oklahoma constitution provides that: "The repeal of a statute shall not revive a statute previously repealed by such statute, nor shall such repeal affect any accrued right, or penalty incurred, or proceeding begun by virtue of such repealed statute.

The terms "repeal of a statute" in this article include the amendment of a statute; retrospective effects of an amendment may not violate the terms of this constitutional provision. A retrospective interpretation of the Tort Reform Amendment will violate article V, section 54 only if it affects an accrued right or a proceeding begun by virtue of the amended statute. Each of these issues will be addressed in turn.

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50. See supra notes 18-36 and accompanying text.
51. Id.
52. See supra notes 18-36 and accompanying text.
54. One Chicago Coin v. Play Boy Marble Bd. v. State, 202 Okla. 346, 212 P.2d 129, 133 (1949) ("While true that the constitutional provision deals with repealed statutes; we see no material difference merely because the statute in question was amended, rather than repealed in entirety and replaced by a new enactment containing the substance of the amended section. Although an amendment is not the same as repeal, to a certain degree it operates as a repeal.").
55. The constitutional requirement that the repeal of a statute may not affect any penalty incurred applies only to criminal actions. See Alberty v. State, 10 Okla. Crim. 616, 140 P. 1025, 1031 (1914) ("The repeal or amendment of a statute prescribing the punishment for an offense after final judgment has been pronounced, and, while an appeal therefrom is pending, will neither vacate or modify such judgment, nor arrest the execution of the sentence when there is an affirmance of the judgment and sentence."); Penn. v. State, 13 Okla. Crim. 367, 164 P. 992,
Does the Amendment Affect an Accrued Right?

To determine whether retrospective application of the Tort Reform Amendment will affect an accrued right, the definition of "accrued right" as used by the Oklahoma Supreme Court must first be discovered. In *Hammons v. Muskogee Medical Center Authority*, the supreme court defined "accrued right" when it faced the issue of whether a 1979 amendment of the Political Subdivision Tort Claims Act (PSTCA) operated retrospectively to bar plaintiff's claim for wrongful death. The plaintiff's husband died while a patient of the defendant hospital. At the time of the patient's death, a hospital that operated under authority of a public trust, like the defendant, was not entitled to sovereign immunity as a political subdivision.57

In 1979 the PSTCA was amended to extend sovereign immunity to public trusts and their institutions, instrumentalities, and agencies.58 The plaintiff filed suit in 1980 and contended the action was allowed under the statute in effect when her husband died. The defendant claimed sovereign immunity under the 1979 amendment, arguing that it operated retrospectively. The trial court agreed with defendant and sustained defendant's motion for summary judgment.

On appeal, the Oklahoma Supreme Court disagreed.59 The court first relied on the general common law rule of prospective statutory interpretation; it noted that the amendment was not procedural in nature, but affected the plaintiff's substantive right to bring an action against the hospital.60

The court then moved to constitutional grounds, citing article V, section 54.61 At issue was whether the amendment affected an accrued right. The court found that the accrual of a cause of action means "the right to institute and maintain a suit."62 This constitutional provision prevents the legislature from affecting the existence of a cause of action after it has accrued.63 If the amendment were applied retrospectively, it would abrogate the plaintiff's cause of action against the hospital; therefore, it was given prospective effect.64

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993 (1917) ("We hold, therefore, that this defendant was subject to any penalty imposed by law for this crime on the date of its commission, and any subsequent statute repealing such penalty can only operate prospectively, and is applicable only to offenses committed after the statute took effect."); Bilbrey v. State, 76 Okla. Crim. 249, 135 P.2d 999, 1000 (1943) ("[T]he constitutional provision aforesaid prevents the Legislature of this state from wiping out penalties for crimes committed prior to the taking effect of a repealing statute."). Because the Tort Reform Amendment does not affect a criminal statute, retrospective interpretation of the amendment will not violate this requirement.

56. 697 P.2d 539 (Okla. 1985).
60. Id.
61. Id.
62. Id.
63. Id.
64. Id.
According to the Oklahoma Supreme Court, therefore, the term "accrued right," as used in the article, means an accrued cause of action.\(^6\) As discussed previously, a plaintiff has no right to punitive damages\(^6\) and cannot maintain a cause of action for punitive damages.\(^7\) Therefore, a right to punitive damages or a cause of action for punitive damages cannot accrue.

The Tort Reform Amendment merely limits the amount of punitive damages recoverable in some instances and affects the procedures by which they are awarded. Thus, retrospective interpretation of the Tort Reform Amendment will not violate article V, section 54 by affecting an accrued right.

**Does the Amendment Affect a Proceeding Begun by Virtue of the Amended Statute?**

In *State v. McCaffrey*,\(^6\) the Oklahoma Supreme Court interpreted the requirement of article V, section 54 of the Oklahoma constitution, which provides that the repeal of a statute may not affect "a proceeding begun by virtue of such repealed statute." A state statute authorized boards of county commissioners to hire persons to help discover property not listed with the county for taxation.\(^9\) In 1908 the plaintiff entered into an agency contract with a board of county commissioners consistent with the statute.

In 1909 the statute was amended; the effect of the amendment was to revoke plaintiff's agency and reduce his compensation.\(^7\) The plaintiff brought an action for a writ of mandamus to compel the County Treasurer to pay the compensation called for in the contract. The plaintiff filed suit prior to the effective date of the amendment and alleged that the amendment could not control the suit because it would affect a "proceeding begun." Thus, he claimed retrospective application of the amendment would violate article V, section 54.

The court disagreed, directing its attention to the entire phrase "proceeding begun by virtue of the repealed statute."

The phrase "by virtue of" is defined by the Century Dictionary to mean "by or through the authority of. . . ." And so we say that the phrase "proceedings begun by virtue of such repealed statute" means by or through the authority of, and in full compliance with, that statute. How can such be said with reference to

\(^6\) See also Oklahoma Water Resources Bd. v. Central Okla. Master Conserv. Dist., 464 P.2d 748, 755 (Okla. 1968) ("A 'vested right' is the power to do certain actions or possess certain things lawfully, and is substantially a property right. It may be created either by common law, by statute or by contract. Once created, it becomes absolute, and is protected from legislative invasion."); Blacketer v. State, 485 P.2d 1069, 1070 (Okla. Crim. App. 1971) ("An 'Accrued Right' is defined as a matured cause of action or legal authority to demand redress.").

\(^6\) See *supra* notes 37-49 and accompanying text.

\(^7\) See *supra* note 39 and accompanying text.


\(^9\) *Id.*, 105 P. at 993.

\(^70\) *Id.*, 105 P. at 993-94.
the proceedings at bar, when the repealed statute did not undertake to give a right of action to anybody?\textsuperscript{71}

The court then discussed the policy supporting this section. At common law a court lost jurisdiction of a case begun under a statute when that statute was repealed.\textsuperscript{72} Apparently this rule developed from an English theory that because the law did not survive the king, all suits abated on the death of the king.\textsuperscript{73} Article V, section 54 was written as a general saving clause. It provides that proceedings begun by virtue of a particular statute, instead of being dismissed when that statute is repealed, are to be retained by the court for decision.\textsuperscript{74}

The statute repealed by the amendment did not create a right of action but simply authorized the board of county commissioners to hire help.\textsuperscript{75} The plaintiff's action was for a writ of mandamus, which was not provided for by the repealed statute.\textsuperscript{76}

The court used similar reasoning in Ensley v. State.\textsuperscript{77} The defendant was convicted of selling intoxicating liquor in violation of the state prohibition law. When the offense occurred, a defendant had one year in which to appeal a misdemeanor conviction.\textsuperscript{78} Before trial, however, a statutory amendment reduced the time allowed for filing a misdemeanor appeal to sixty days.\textsuperscript{79}

The defendant contended he had a year in which to file an appeal under the statute in effect when the offense was committed. He argued that retrospective operation of the amendment would affect a "proceeding begun by virtue of the repealed statute."\textsuperscript{80} The court disagreed.\textsuperscript{81}

It would seem to require neither argument nor citation of authorities to show that this prosecution was not a proceeding begun by virtue of the statute, now repealed, granting to a defendant convicted of a misdemeanor a year in which to appeal. What that statute had to do with making criminal the act complained of we are unable to perceive. This prosecution was begun by virtue of the statute making it an offense to sell intoxicating liquor. . . . That was the basis of the action, the statute creating and defining the crime, and that was the statute under and by virtue of which the proceeding was begun and carried on. If, after the prosecution had been instituted, the prohibition law had been repealed, under

\textsuperscript{71} Id., 105 P. at 996.
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id., 105 P. at 997.
\textsuperscript{77} 4 Okla. Crim. 49, 109 P. 250 (1910).
\textsuperscript{78} Id., 109 P. at 254.
\textsuperscript{79} Id.
\textsuperscript{80} See Okla. Const. art. V, § 54. See supra note 53 and accompanying text.
\textsuperscript{81} Ensley, 4 Okla. Crim. 49, 109 P. at 254.
the constitutional provision quoted the state's right to proceed with the prosecution would not have been affected.\textsuperscript{82}

The present issue is whether a retrospective interpretation of the amendment of section 9 of title 23 would affect a proceeding begun by virtue of the amended statute. Using the court's reasoning, the answer is clearly no.

Section 9 of title 23, the "amended statute," provided that a jury may award punitive damages in certain actions.\textsuperscript{83} However, when a plaintiff files an action and prays for punitive damages, he does not bring the action by virtue of, or under the authority of, section 9. In Oklahoma, a plaintiff may not bring an action for punitive damages.\textsuperscript{84} Instead, the action is brought by virtue of, or under the authority of, the statute or common law rule that creates the substantive cause of action.

Accordingly, a retrospective interpretation of the Tort Reform Amendment would not affect a "proceeding begun by virtue of such repealed statute." As discussed previously, a retrospective interpretation of the amendment would not affect an accrued right.\textsuperscript{85} Therefore, a retrospective interpretation of the Tort Reform Amendment would not violate article V, section 54 of the Oklahoma constitution.

\textit{Conclusion}

The Oklahoma legislature recently enacted chapter 315, section 1 of the 1986 Oklahoma Session Laws, which limits punitive damage awards to the amount of actual damages awarded and provides a procedure by which plaintiffs may escape this limit in appropriate cases. If the amendment is applied retrospectively to cases that accrued or were filed prior to its effective date of November 1, 1986, it could have a significant impact on the amounts of punitive damages awarded in those cases. It is submitted that the amendment should operate retrospectively.

Because the amendment merely limits the amount of punitive damages recoverable in some instances and affects the procedure by which they are awarded, it falls within an exception to the general common law rule of prospective statutory interpretation. The exception provides that statutes affecting only legal procedure or remedy are interpreted as retrospective in effect, unless the language of the statute clearly expresses, or necessarily implies, a legislative intent of prospective effect. The Tort Reform Amendment contains no language indicating a legislative intent of prospective effect.

A retrospective interpretation should not violate Oklahoma constitutional provisions because it would not affect any accrued right or proceeding begun by virtue of the amended statute. A plaintiff has no right to punitive damages and, more particularly, no right to an unrestricted award of

\textsuperscript{82} Id.

\textsuperscript{83} See 23 OKLA. STAT. § 9 (1951). See supra note 7.

\textsuperscript{84} See supra note 39 and accompanying text.

\textsuperscript{85} See supra notes 56-67 and accompanying text.