STATE CONSTITUTIONAL LAW—EQUAL PROTECTION—SPECIAL LAWS, COURT ACCESS, AND THE IMPACT OF TORT REFORM ON STATE EQUAL PROTECTION PRINCIPLES. *WALL v. MAROUK*, 302 P.3D 775 (OKLA. 2013).

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I. INTRODUCTION

In *Wall v. Marouk*,[1] the Supreme Court of Oklahoma held that a statute which required a small class of plaintiffs to produce an affidavit of merit at the time of filing violated the Oklahoma Constitution's prohibition on special laws[2] and enumerated right to access the courts.[3] First, this Comment will provide a contextual framework for scrutinizing legislative action under these specific constitutional guarantees. Then, it will outline the current positions taken by the Supreme Court of Oklahoma with regard to affidavit requirements and their practical effects on these rights. Finally, this Comment will analyze those positions

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1. 302 P.3d 775 (Okla. 2013).

2. OKLA. CONST. art. 5, § 46 provides in pertinent part:

> The [l]egislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing: . . . . Regulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts, justices of the peace, sheriffs, commissioners, arbitrators, or other tribunals, or providing or changing the methods for the collection of debts, or the enforcement of judgments or prescribing the effect of judicial sales of real estate.

3. *Id.* art. 2, § 6 provides: "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."

and discuss the threat of legislative action against fundamental equal protection principles and the policies they are employed to protect.

II. STATEMENT OF THE CASE

Title 12, section 19 of the Oklahoma Statutes required plaintiffs in civil actions for professional negligence to attach an "affidavit of merit" from an expert in the same professional field as the defendant.[4] The statute required such affidavits to include a detailed certification by the expert that a reasonable interpretation of the facts alleged by the plaintiff supported a claim for professional negligence.[5] Although the law required affidavits to be produced at the time of filing, courts were authorized to grant a ninety-day extension at their discretion.[6] Furthermore, section 19 exempted indigent litigants from the affidavit requirement.[7] Even if a plaintiff qualified as indigent, however, a non-refundable forty-dollar application fee was required.[8] This fee could be deferred at the discretion of the court, but it could not be waived.[9]

A patient—Timothy Wall—filed a petition for medical negligence against his former physician—Dr. John Marouk—on August 11, 2010.[10] In his petition, the patient alleged that his physician negligently cut the median nerve in his right arm during carpal tunnel surgery, resulting in

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4. OKLA. STAT. ANN. tit. 12, § 19 (West 2013), *repealed by* 2013 Okla. Sess. Laws ch. 12, § 2.

5. *Id.* § 19(A)(1)(b).

6. *Id.* § 19(B)(1).

7. *Id.* § 19(D).

8. The indigency exemption is not explained in section 19; rather, it is detailed in a separate provision:

> When a plaintiff requests an indigency exemption from providing an affidavit of merit in a civil action for professional negligence pursuant to [s]ection 2 of this act, such person shall submit an appropriate application to the court clerk, on a form created by the Administrative Director of the Courts, which shall state that the application is signed under oath and under the penalty of perjury and that a false statement may be prosecuted as such. A non[-]refundable application fee of Forty Dollars ($40.00) shall be paid to the court clerk at the time the application is submitted, and no application shall be accepted without payment of the fee; except that the court may, based upon the financial information submitted, defer all or part of the fee if the court determines that the person does not have the financial resources to pay the fee at time of application. Any fees collected pursuant to this subsection shall be retained by the court clerk, deposited in the Court Clerk's Revolving Fund, and reported quarterly to the Administrative Office of the Courts.

OKLA. STAT. ANN. tit. 12, § 192(A) (West 2013) (footnote omitted), *repealed by* 2013 Okla. Sess. Laws ch. 12, § 3.

9. *Id.*

10. Wall v. Marouk, 302 P.3d 775, 778 (Okla. 2013).

loss of feeling in his right fingers.[11] The patient did not produce an affidavit of merit at the time of filing.[12]

The physician filed a motion to dismiss on the grounds that the patient failed to include an affidavit of merit as required by section 19.[13] The trial court entered a certified interlocutory order[14] denying the physician's motion to dismiss and giving the patient twenty days to file the necessary affidavit of merit.[15] Rather than filing an affidavit, the patient responded by requesting the court to stay the affidavit of merit requirement, arguing that section 19 was unconstitutional as both a special law and a barrier on access to the courts.[16] The trial court rejected this argument, entering an amended certified interlocutory order confirming the requirement.[17]

The Supreme Court of Oklahoma granted certiorari to review the interlocutory order and consider the validity of section 19 under the Oklahoma Constitution.[18] Two specific issues arose from this inquiry: (1) whether the statute was a special law in violation of article 5, section 46, and (2) whether the statute created an unconstitutional economic burden on access to the courts in violation of article 2, section 6. The majority, consisting of seven justices, concluded that the affidavit requirement violated both constitutional provisions. The remaining two justices wrote separate dissents.

III. BACKGROUND

The fundamental challenge of ensuring equality among citizens is addressed by both state and federal governments alike, albeit in very different ways. In contrast to federal jurisprudence—which applies a broad interpretation of the Fourteenth Amendment to secure equal protection—many states have codified more specific equal protection

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11. *Id.*
12. *Id.*
13. *Id.*
14. A "certified interlocutory order" is a court order deciding a preliminary issue of law preceding the conclusion of a case, in which the court certifies in writing that an immediate review by the Supreme Court of Oklahoma may "materially advance the ultimate termination of the litigation." OKLA. SUP. CT. R. 1.50.
15. Wall v. Marouk, No. CJ20105063, 2010 WL 9598705, at *1 (Okla. Dist. Ct. Dec. 8, 2010) (Trial Order).
16. *Wall*, 302 P.3d at 778–79, 784.
17. *Wall*, 2010 WL 9598707, at *1. Presumably, the trial court filed certified interlocutory orders with intentions that the Supreme Court of Oklahoma accept an appeal of the Order to determine section 19's validity.
18. *Wall*, 302 P.3d at 775.

guarantees into their constitutions. These state constitutional provisions, although enacted to achieve a similar goal, have been specifically tailored to reflect their respective state's unique public policies. This Comment will focus on the Supreme Court of Oklahoma's application of two of the more prevalent state mediums of ensuring equal protection: constitutional prohibitions on special laws and guarantees of access to the court system.

A. Special Laws

One common state vehicle for achieving equality is the constitutional prohibition on special laws. A special law is one which confers a right or imposes a duty on some, but not all, of a class of similarly situated persons.[19] The natural concern with such laws is that they do not treat all members of a class in the same manner, thus promoting preferential treatment and inequality under the law. The unequal treatment which special laws can foster at the state level is theoretically—and often pragmatically—comparable to disparate treatment, which is found almost categorically unconstitutional at the federal level.[20] Thus, in that aspect, state prohibitions on special laws act as substantive microcosms of federal equal protection principles.[21]

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19. Oklahoma City v. Griffin, 403 P.2d 463, 467 (Okla. 1965) (Blackbird, J., dissenting).

20. *See* Anderson v. Bd. of Comm'rs, 95 P. 583, 587 (Kan. 1908) (noting that special laws, because they specifically target subgroups of people, are not entitled to the same presumption of constitutionality applied to most statutes); Harris v. Mo. Gaming Comm'n, 869 S.W.2d 58, 65 (Mo. 1994) (holding that classifications based upon immutable characteristics, among other things, are facially special laws; thus "[t]he party defending the . . . statute must demonstrate a 'substantial justification' for the special treatment").

21. *See* Benderson Dev. Co. v. Sciortino, 372 S.E.2d 751, 756 (Va. 1988) ("It is true that for a long period of our history, the Equal Protection clause was interpreted by both federal and state courts in language that bore marked similarities to the analysis we made of statutes under the special-laws prohibition contained in the Virginia Constitution."). This dichotomy, however, is not absolute. State prohibitions on special laws are, very clearly, limitations on legislative power. In contrast, the Federal Equal Protection Clause serves as a rights guarantee, affirmatively granting to all persons equal protection of the law. ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW CASES AND MATERIALS 772 n.1 (4th ed. 2006). There is another stark difference between special laws and equal protection principles: equal protection violations almost unanimously result in *injury* to a sub-class, while special laws can either *injure* or *benefit* a particular group of people. *See* Lerma v. Keck, 921 P.2d 28, 34 (Ariz. Ct. App. 1996) ("While the equal protection clause prohibits unreasonable discrimination *against* a particular class, the special legislation clause prohibits unreasonable discrimination in *favor* of a particular class.").

The prohibition against special laws is deeply rooted in Oklahoma's history. Even before statehood, the common law prohibited these laws in the Territory of Oklahoma:

> A statute relating to persons or things as a class is a general law; one relating to particular persons or things of a class is special. The number of persons upon whom the law shall have any direct effect may be very few, by reason of the subject to which it relates, but it must operate equally and uniformly upon all brought within the relations and circumstances for which it provides.[22]

Oklahoma's Constitution, since its inception in 1907, has continued the tradition, and specifically prohibits the legislature from enacting special laws dealing with twenty-eight subject areas.[23]

One category of special laws explicitly proscribed by the state constitution is the legislative regulation of legal proceedings.[24] Statutes promulgated by the Oklahoma legislature that create sub-classifications among litigants have been struck down according to this provision. Interestingly enough, a statute mandating the production of an affidavit of merit at the time of filing had already been struck down as a special law prior to *Wall*. In *Zeier v. Zimmer*, the Supreme Court of Oklahoma held that an affidavit of merit requirement was an unconstitutional special law when it was only imposed upon plaintiffs bringing an action for medical liability.[25] The *Zeier* court labeled the statute "underinclusive" because it impacted less than an entire class of similarly situated claimants.[26] The court deemed that the general class comprised of all tort victims, and a law exclusively affecting medical malpractice

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22. Guthrie Daily Leader v. Cameron, 41 P. 635, 639 (Okla. 1895) (citations and internal quotation marks omitted); *accord* Haman v. Marsh, 467 N.W.2d 836, 845 (Neb. 1991) ("It is because the legislative process lacks the safeguards of due process and the tradition of impartiality which restrain the courts from using their powers to dispense *special favors* that such constitutional prohibitions against special legislation were enacted." (emphasis added)).

23. The prohibited areas include, among several others: "[e]xempting property from taxation;" "refunding moneys legally paid into the treasury;" "[a]ffecting the estates of minors"; "[f]ixing the rate of interest;" "[r]egulating the management of public schools"; "limit[ing] civil or criminal actions;" "incorporating railroads or other works of internal improvements;" and "[g]ranting divorces." OKLA. CONST. art. 5, § 46; *see generally* Chickasha Cotton Oil Co. v. Lamb & Tyner, 114 P. 333, 334 (Okla. 1911) (acknowledging the constitutional prohibition on special laws for the first time).

24. OKLA. CONST. art. 5, § 46.

25. 152 P.3d 861, 868–69 (Okla. 2006).

26. *Id.* at 868.

victims essentially created a sub-class within the greater body of tort victims.[27]

B. Right to Access the Courts

Like prohibitions on special laws, intrastate rights to access the court system[28] also serve to reinforce equal protection prerogatives, although inherently defining the right more explicitly and specifically than their federal counterpart.[29] Court-access provisions prevent legislatures from barring individuals, or groups of individuals, from the courts for merely technical or semantic reasons.[30] In other words, these provisions ensure that no government entity can place conditions upon access to the courts, such as the ability to pay a fee.[31]

The Supreme Court of Oklahoma has opined on how to scrutinize a statute imposing a cost upon potential litigants, recognizing that the right of litigants to access the courts does not mean that they are entitled to do so at no cost whatsoever.[32] Despite this concession, the court has stressed that financial burdens cannot be used to deny court access

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27. *Id.*

28. The right to court access is originally derived from Chapter 29 of the Magna Carta, which reads:

> No freeman is to be taken or imprisoned or disseised of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgment of his peers or by the law of the land. To no-one will we sell or deny of delay right or justice.

MAGNA CARTA, ch. 29 (1215) (last visited Nov. 6, 2014), *available at* http://www.archives.gov/exhibits/featured_documents/magna_carta/translation.html.

29. As the Supreme Court of Oklahoma stated regarding the affidavit of merit requirement in *Zeier*, "[a] statute that so conditions one's right to litigate impermissibly denies equal protection and closes the court house doors to those financially incapable of obtaining a pre-petition medical opinion." 152 P.3d at 873.

30. Court access has been deemed fundamental by several states. *See, e.g.*, Henderson v. Crosby, 883 So. 2d 847 (Fla. Dist. Ct. App. 2004); Coleman v. State, 762 P.2d 814 (Idaho 1988); Kloss v. Edward D. Jones & Co., 54 P.3d 1 (Mont. 2002); Jensen v. Satran, 303 N.W.2d 568 (N.D. 1981); Mills v. Reynolds, 837 P.2d 48 (Wyo. 1992).

31. In fact, charging a fee in exchange for access to the court system was a common practice for the King of England at the time of the drafting of the Magna Carta. The fine/bribe imposed on the King's subjects was one of the King's primary revenue-generating devices. It was also one of the many causes of the revolt that forced King John to sign the Magna Carta in 1215. *See* Donald B. Brenner, *The Right of Access to Civil Courts Under State Constitutional Law: An Impediment to Modern Reforms, or a Receptacle of Important Substantive and Procedural Rights?*, 13 RUTGERS L.J. 384, 403 (1982).

32. Thayer v. Phillips Petrol. Co., 613 P.2d 1041, 1045 (Okla. 1980).

altogether.[33] The Supreme Court of Oklahoma has clarified the applicable rule for determining whether fees associated with bringing a lawsuit pass constitutional muster: "[S]uch fees are permissible, as long as they are reasonable."[34] Thus, the threshold inquiry for determining whether a fee associated with filing a complaint is constitutional is whether it is reasonable. Such a standard beckons the obvious question: how much is reasonable?

In *Barzellone v. Presley*, the court examined the reasonableness of a $349.00 jury fee imposed by statute.[35] Although the court ultimately found that the $349.00 fee was reasonable, it was careful to qualify its decision:

> This opinion should not be read as a rubber stamp for any decision the [l]egislature might make on the amount of fees levied in association with jury trials. The Oklahoma Constitution does not anticipate that litigants will be burdened with the entire bill for maintenance of the court system . . . . The constitutional right to a jury trial is a personal right, which the [l]egislature cannot waive through creating a fiscal barrier so unreasonable as to eliminate the right itself. When comparing the jury fee charge with a jury proceeding utilizing [six] jurors, it would appear that the $349.00 fee charge approaches the barrier beyond which the charge could not survive constitutional scrutiny.[36]

Thus, the *Barzellone* court held that the maximum threshold for appropriate fees associated with bringing a lawsuit in Oklahoma is close to $349.00.

In *Zeier*, the court calculated that the cost of obtaining a professional's opinion to support the affidavit of merit (required by statute for claims asserting medical liability) could range from $500.00 to $5000.00.[37] This cost, even if mitigated as to fall at the bottom end of the

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33. *Id.* Although *Thayer* and some of its progeny clearly impose traditional strict scrutiny—requiring a compelling governmental interest—for restrictions on access to the courts, the Supreme Court of Oklahoma does not overtly walk through the strict scrutiny analysis in more recent cases, including *Wall* and *Zeier*.

34. Wall v. Marouk, 302 P.3d 775, 785 (Okla. 2013). This reasonableness requirement is a slight deviation of a more general two-prong test, used by other courts, which balances the nature of a court fee against the purposes for which it was exacted. *See, e.g.*, Flood v. State *ex rel.* Homeland Co., 117 So. 385, 387 (1928).

35. 126 P.3d 588 (Okla. 2005).

36. *Id.* at 601 (citations omitted).

37. Zeier v. Zimmer, Inc., 152 P.3d 861, 873 (Okla. 2006).

cost scale created by the court, clearly crossed the line of reasonableness established in *Barzellone* and was held unconstitutional as a result.[38]

IV. THE COURT'S REASONING

A. The Majority

The *Wall* majority held that section 19's affidavit of merit requirement constituted a special law in violation of article 5, section 46.[39] The court found that the requirement was functionally identical to the affidavit requirement deemed unconstitutional in *Zeier*. Section 19, according to the majority, created two sub-classes of tort victims: those who were bringing their claims against professionals and those who were not.[40] The statute then created a duty—to procure an affidavit of merit—upon one sub-class of tort victims and not the other. The court found such blatant unequal treatment among members of the same class to violate the Oklahoma Constitution's prohibition on special laws.[41]

The primary grounds for discussion in *Wall* focused on the sole textual distinction between section 19's affidavit requirement and the one found unconstitutional in *Zeier*: section 19's applicability to all "professional negligence" plaintiffs as opposed to the *Zeier* statute's applicability to all "medical liability" plaintiffs.[42] After undergoing a significant contextual analysis of both statutes' history, the court found that the statutory framework surrounding section 19 had used the two terms interchangeably.[43] Because the terms "professional negligence" and "medical liability" were used synonymously in the *Zeier* statute, the court held that the legislature intended the professional negligence language in section 19 to be functionally identical to the medical liability language in the *Zeier* statute.[44]

The more interesting discussion of the court, however, raises the possibility that the legislature specifically used the term "professional negligence" in section 19 to create a broader class of litigants than the statute struck down in *Zeier*, thereby circumventing the constitutional

38. *Id.* at 873–74.
39. *Wall*, 302 P.3d at 779.
40. *Id.*
41. *Id.*
42. *Id.* at 781.
43. *Id.*
44. *Id.* at 782–83.

prohibition on special laws.[45] Even if this was the legislature's intention, the majority was not persuaded that the statute would be constitutional. The biggest problem for the court was that the term "professional negligence" was not defined in section 19, thus it would be impossible to tell how broadly applicable the legislature intended it to be.[46] Rather than enabling the statute to survive a constitutional challenge, the legislature's failure to define the term "caused more problems than it solved."[47] The court suggested that professional negligence could plausibly be interpreted broadly, encompassing negligence by lawyers, doctors, clergymen, funeral services, barbers, cosmetologists, plumbers, foresters, sanitarians, environmental specialists, bail bondsmen, pawnbrokers, and many more professions.[48] Despite the potential for a much larger class of affected people, the vagueness as to legislative intent led the court to reject any interpretation of "professional negligence" which contradicted the term's usage—as a synonym for "medical liability"—in the *Zeier* statute.[49]

Using the analytical framework put in place by *Barzellone* and *Zeier*, the *Wall* majority also held that the affidavit requirement created an unconstitutional burden on access to the courts.[50] Unlike the need for discussion as to the functional distinction, or lack thereof, between the terms "professional negligence" and "medical liability," a new inquiry was not necessary to determine the constitutionality of the burdens imposed

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45. *Wall*, 302 P.3d at 782–83. In other words, the inquiry was whether the legislature's use of the term "professional negligence," rather than the term "medical liability," would enable the statute to pass constitutional muster. The theory conceived by the legislature and presented by the defendants, presumably, was that the category of plaintiffs alleging professional negligence is much broader than those merely alleging medical malpractice. It would naturally be more difficult for a court to render the statute unconstitutional as a special law if it affected, in comparison to the statute in *Zeier*, a much larger class of litigants. The equal protection concerns about creating a sub-class of litigants would be alleviated if the statute affected a group which could conceivably be categorized as a "class" rather than a "sub-class."

46. The court elaborated on this problem:

> Even without the definition of professional negligence found [in the statutory framework] there are problems with vagueness. If the [l]egislature did not intend professional negligence to mean "a negligent act or omission to act by a health care provider in the rendering of health care services," then what did they mean?

Id. at 782.

47. *Id.* at 784.

48. *Id.* at 782–83. The court failed to address whether the term "professional negligence," with this very broad interpretation, would expand the class of affected litigants enough to circumvent the prohibition on special laws.

49. *Id.* at 782–84.

50. *Id.* at 784–85.

on those bringing a suit for professional negligence. The question of reasonableness as to section 19's associated burden on plaintiffs was identical in every way to the inquiry undergone in *Zeier*. The court in *Zeier* determined that it would cost anywhere from $500.00 to $5000.00 for plaintiffs to produce an affidavit of merit signed by a medical expert.[51] The *Wall* majority applied those same figures to approximate the financial burden on plaintiffs who need to produce an affidavit of merit by an expert, even though the number might vary depending on what kind of expert is necessary.[52] These costs, just like the costs in *Zeier*, clearly exceeded the maximum threshold of $349.00 established by the *Barzellone* court.[53]

With regard to the indigency exemption, the majority took the position that even if a plaintiff qualified for the exemption, the non-refundable forty-dollar fee for applying for indigency was still a constitutionally significant economic hurdle to the indigent.[54] Although deferring the payment of the fee was an option to some who qualified, the fee could not be waived altogether.[55] This fee, although much smaller in cost than obtaining an affidavit of merit signed by an expert, was an unconstitutional economic burden on the rights of poor people to access the courts.[56]

B. The Dissents

1. Justice Winchester

In his one page dissent, Justice Winchester contended that the affidavit requirement was not a special law. He argued that the statute did not *create* a new sub-class of tort victims; rather, the sub-class—professional negligence plaintiffs—had already existed before the legislature passed section 19. He reasoned that tort law is inherently comprised of sub-classes, including those who are alleging professional

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51. Zeier v. Zimmer, Inc., 152 P.3d 861, 874 (Okla. 2006).

52. *Wall*, 302 P.3d at 785.

53. *Id.*

54. *Id.* at 786. For in-depth discussions on court fees as applied to the indigent, in the context of the right to court access, see generally Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protections*, 86 HARV. L. REV. 1 (1972), Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights, Part I*, 6 DUKE L.J. 1153 (1973), and Note, *Litigation Costs: The Hidden Barrier to the Indigent*, 56 GEO. L.J. 516 (1968).

55. *Wall*, 302 P.3d at 786.

56. Although this fee was small, the majority reasoned: "Claimants may not have their fundamental right of court access withheld merely for nonpayment of some liability or conditioned coercive collection devices." *Id.*

negligence.[57] Oklahoma common law has long required plaintiffs in malpractice actions to establish a professional's negligence through expert testimony.[58] The statute, by imposing the affidavit requirement on only professional negligence plaintiffs, merely reflected pre-existing legal distinctions. Justice Winchester saw no reason to force the legislature to turn a blind eye to the significant legal distinction between negligence and malpractice at the filing stage. He opined: "Is it reasonable to require expert testimony in a malpractice case, but forbid the legislature from requiring that an expert submit an affidavit at the front end of a lawsuit? I do not believe it is."[59]

Justice Winchester also took issue with the majority's characterization of the affidavit requirement as an unconstitutional economic burden on the right to court access. Admittedly using the reasoning of the Supreme Court of Georgia in a similar case, he emphasized that the costs associated with the procurement of an expert affidavit are not directly imposed by section 19.[60] Rather than being imposed by a state actor, the costs facing professional negligence plaintiffs are in fact levied by private parties.[61] Absent any state-imposed cost, the justice argued that the state did not impose any unconstitutional burden on litigants.[62]

Further, Justice Winchester again recognized the pre-existing differences between ordinary negligence claims and professional negligence claims as applied to the right of access question: "If this Court reasons that the legislature's requirement of an expert affidavit is financially burdensome, is it somehow less burdensome to require an expert to testify to the negligence of the defendant during the trial stage?

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57. *Id.* at 787 (Winchester, J., dissenting).

58. *Id.*

59. *Id.* at 788. Although Justice Winchester refers to malpractice plaintiffs as a "sub[-]class" which had already been long-existing in the state's common law, his argument seems to categorize malpractice plaintiffs into a class of their own rather than a sub-class of negligence plaintiffs. Either way, the crux of his dissent implies that requiring equal treatment for all tort victims is entirely too broad.

60. *Id.*

61. *Wall*, 302 P.3d at 788 (Winchester, J., dissenting). The Georgia case, *Walker v. Cromartie*, involved a due process challenge to an affidavit requirement. 696 S.E.2d 654 (Ga. 2010). The Georgia Supreme Court observed: "The 'costs' appellants object to are created by private actors, not any state actor. Since no state actor has exacted the harm of which appellants complain, the statute does not violate the right to due process." *Id.* at 656.

62. *Wall*, 302 P.3d at 788 (Winchester, J., dissenting).

Case law requires such expert testimony."[63] Additionally, he found no objection, unlike the majority, with the indigency exemption.[64]

2. Justice Taylor

In his dissent, Justice Taylor disagreed with the majority's characterization of "professional negligence" as a synonym of "medical liability."[65] He supported his argument with the general principle that "every statute is presumed constitutional and will be upheld until its constitutional invalidity is clearly shown."[66] Rather than construing the statute in a way which would infer the legislature was fruitlessly attempting to create laws which it knew were unconstitutional, Justice Taylor believed that the court should give deference to legislative intent.[67] Assuming that the legislature intended to expand the class of litigants affected by the affidavit of merit requirement, he would find that the class created by the statute was broad enough to alleviate the concerns raised by special laws.[68]

Further, Justice Taylor would have held that section 19 did not violate the right to access the courts.[69] Again, he expressed his displeasure with the majority's unnecessarily expansive display of power over the legislature. He explained that the indigency exemption alleviated all concerns about burdening those who could not afford the fees associated with filing an affidavit of merit.[70] If the forty-dollar fee for applying for indigency was too high or burdensome, as the majority concluded, Justice Taylor would have elected to strike down that fee rather than strike down section 19 entirely.[71] He saw no reason for reaching further than was absolutely necessary to ensure adherence to the Oklahoma Constitution.

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63. *Id.*

64. *Id.* Here, Justice Winchester's very brief remarks concerning the indigency exemption suggest that he considers the issue a "no-brainer." Unlike the majority, he does not seem to be phased at all by the forty-dollar fee for filing for indigency.

65. *Id.* at 789 (Taylor, J., dissenting).

66. *Id.* at 788–89 (citing Wilson v. Fallin, 262 P.3d 741, 748 (Okla. 2011)).

67. "Further, this Court is to presume that the [l]egislature has not done a vain and useless act." *Id.* at 789 (citing Surety Bail Bondsmen of Okla., Inc. v. Ins. Comm'r, 243 P.3d 1177, 1185 (Okla. 2010)).

68. *Wall*, 302 P.3d at 789 (Taylor, J., dissenting). Although the justice does not address whether he believes professional negligence plaintiffs are indeed a "sub-class" of tort plaintiffs, his dissent suggests that he does not believe that they are. Rather, the group of professional negligence plaintiffs would be large enough to constitute its own class.

69. *Id.*

70. *Id.*

71. *Id.*

V. ANALYSIS

Section 19 was enacted as part of what was perhaps the most comprehensive tort reform measure in Oklahoma's history.[72] The legislature's goal was to reduce the number of frivolous lawsuits filed, thus resulting in reduced costs to the judicial system and the state generally.[73] The main premise was that frivolous medical malpractice claims would not likely be endorsed by experts, resulting in only meritorious claims—with affidavits of merit—being filed.[74]

The legislature intended to re-shape the civil procedure of medical malpractice claims, but it did not intend section 19 to include only medical malpractice plaintiffs. Against the backdrop of *Zeier*, Justice Taylor was correct when he noted that the Oklahoma legislature did not intend for the term "professional negligence" to exclusively encompass plaintiffs alleging medical negligence, because such an intention would be redundant and pointless.[75] Instead, in light of the clear legislative rhetoric proclaiming the need for tort reform and the reduction of frivolous litigation, the most logical conclusion is that the legislature intended to make medical malpractice lawsuits more difficult to initiate, and constructed section 19's language to further that policy while mitigating the possibility of constitutional (or perhaps more appropriately—judicial) pushback. If the legislature intended to evade

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72. *See* Press Release, Okla. Office of the Governor, Gov. Henry Signs Comprehensive Tort Reform (May 21, 2009) (on file with author); Press Release, Okla. House of Representatives, Health Care, Lawsuit Reform Set to Go into Effect Nov. 1 (Oct. 30, 2009) (on file with author); Press Release, Okla. House of Representatives, Trial Lawyer Email Demonstrates Need for Tort Reform (Sept. 1, 2009) [hereinafter Okla. House of Representatives, Trial Lawyer Email Demonstrates Need for Tort Reform] (on file with author).

73. Press Release, Okla. House of Representatives, Trial Lawyer Email Demonstrates Need for Tort Reform, *supra* note 72.

74. This Comment refers to "medical malpractice" claims, rather than "professional negligence" claims, because, despite the legislature's use of more general language in section 19 than its predecessor found unconstitutional in *Zeier*, it is clear from the legislative history of the Act that it was collaboratively drafted by legislators and the healthcare lobby. This author came across no evidence that any groups of professionals, outside of the healthcare industry, were a moving force behind the legislation. Although section 19 was specifically a small piece of the greater tort reform legislation passed, it was enacted in the same year that Oklahoma's comprehensive healthcare reform legislation was signed into law. *Id.* In light of this context, the affidavit requirement is not surprising: every claim for medical malpractice in Oklahoma state court would require a medical expert's testimony—for a price. It is apparent to this author that such a result was the primary objective of the affidavit requirement.

75. *Wall*, 302 P.3d at 788 (Taylor, J., dissenting). There is no readily apparent reason for the legislature to enact a law intentionally identical to a prior law which was determined to be unconstitutional in *Zeier*.

the proscription of special laws, the only way to do so would have been to pass a law that is more generally applicable than that found unconstitutional in *Zeier*. Therefore, for the rest of this analysis, this Comment will presume that the legislature intended "professional negligence" to include a greater class of litigants than simply medical malpractice plaintiffs.

Under this assumption, the majority's opinion, with regard to the special laws prohibition, creates a paradox. The court insists that the term "professional negligence," without being clearly defined, is too vague to deviate from the legislative intent—evidenced by the contextual framework of the larger statute—for the term to mean "medical liability."[76] However, using the assumption above, the legislature's *actual* intent was to make the term broader so that it could pass constitutional muster. The court's argument against the constitutionality of the "professional negligence" classification, as being too narrow and special, is based on legislative intent, yet the legislature's intent was clearly to create a broad—and constitutional—scope for section 19. This indicates that the majority was not *interpreting* the legislature's intent; it was, subtly, *rejecting* it.

Despite the court's holding against section 19 as a special law, a thought-provoking inquiry remains unanswered from this case. Even if the legislature intended for the law's purview to extend to a clearly-defined scope of professional negligence plaintiffs (as to alleviate the majority's concerns about vagueness), how broad does the class of litigants need to be in order to be considered a general law, rather than a special law?[77] The answer to this question would have required a line-drawing inquiry—an undertaking the court likely had no desire to endeavor upon.[78]

The other holding of the Supreme Court of Oklahoma, that the statutory imposition of an affidavit of merit requirement was an unconstitutional economic burden on the fundamental right to access the courts, also raises some interesting questions. Justice Winchester's indication that non-governmental actors impose the costs associated with obtaining an affidavit is unequivocally accurate; however, this fact is not

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76. *See supra* text accompanying note 49.

77. For example, if all malpractice victims are not broad enough, what about all negligence plaintiffs? All tort plaintiffs? All civil plaintiffs? Is there anything short of the entire litigant population that could comprise a constitutionally-adherent class?

78. The majority labels the applicable general class as all "tort victims." *See supra* text accompanying note 27. The majority does not provide a reason why they draw the line there, as opposed to any other classification.

(and appropriately was not in the majority's eyes) dispositive of the matter.

There are very different policies behind requiring a plaintiff: (1) to provide expert testimony in order to ultimately fulfill his burden of proof[79] and (2) to provide expert testimony at the onset of litigation. Contrary to general public belief, most claims do not take shape until discovery has commenced and evidence has been gathered.[80] How is an expert supposed to determine the validity of a claim without the production of any evidence? Oftentimes the most critical facts for formulating a medical opinion are not readily apparent from the initial allegations of a plaintiff. Instead, they are discovered through an extensive effort to gather documentation and testimony regarding the pertinent issues.

Further, the overarching policy of giving a plaintiff his day in court remains strong in jurisprudence nationwide.[81] Placing an impediment upon individuals before even stepping foot inside the courtroom, merely because the wrongs against them were purportedly committed by professionals rather than laypeople, diametrically opposes this policy. The purpose of the legislation was to stop litigation before it even had a chance to start. It would seem that such a legislative intent would per se violate the fundamental right to access the courts.[82]

Regardless of whether the affidavit of merit provision was over-burdensome, the dissents argue that it would not restrict any person

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79. For detailed explanations of why expert testimony is necessary for a plaintiff in medical malpractice cases, see generally H. H. Henry, *Necessity of Expert Evidence to Support an Action for Malpractice Against a Physician or Surgeon*, 81 A.L.R. 2D 597 (1962), and Joseph H. King, *The Common Knowledge Exception to the Expert Testimony Requirement for Establishing the Standard of Care in Medical Malpractice*, 59 ALA. L. REV. 51 (2007).

80. The public belief that cases can be easily defined as either frivolous or meritorious at the onset of litigation is evident from the legislative outcry for the need to place a roadblock in front of frivolous claims at the time of filing. *See* press releases cited *supra* note 72.

81. In fact, the federal courts have consistently found affidavit of merit requirements to directly conflict with federal pleading standards. *See, e.g.*, Long v. Adams, 411 F. Supp. 2d 701, 709 (E.D. Mich. 2006); Boone v. Knight, 131 F.R.D. 609, 612 (S.D. Ga. 1990).

82. Again, as evidenced by this example, the dichotomy between state court-access provisions and federal equal protection can deviate from its typical parallelism. Restrictions on court access, as previously mentioned, are traditionally reviewed under strict scrutiny in state courts as deprivations of a fundamental right. *See supra* note 33. If a court-access provision was challenged under the Equal Protection Clause, it would likely be reviewed under the deferential rational basis standard unless it specifically targeted a suspect class. *See* Walker v. Bain, 257 F.3d 660, 667–68 (6th Cir. 2001) (holding that the Prisoner Litigation Reform Act, which deterred frivolous litigation by prisoners and made it more difficult for them to bring claims, was subject to rational basis review).

from accessing the courts because the costs associated with obtaining an affidavit could be alleviated by the indigency exemption if a prospective litigant could not afford to pay them. Two questions arise from this argument: (1) does the indigency exemption ensure court access to all people; and (2) even if it allows all people to ultimately reach the courts, does this allay the reason why court-access provisions were created in the first place?

With regard to the first question, the answer will depend almost entirely on perspective. The majority takes the position that the indigency exemption, although allowing a litigant to waive his responsibility to produce an affidavit, still imposes an unnecessary economic burden on the indigent because even the poorest of litigants would be required to pay the non-refundable, non-waivable forty-dollar court fee.[83] In contrast, Justice Winchester finds the court fee to be nominal, and ultimately unavoidable as a pre-existing condition of bringing a lawsuit.

Even if, theoretically, every professional negligence victim were able to afford the affidavit of merit, the conditioning of court access upon the payment of a fee is the exact evil that the framers of court-access provisions sought to prevent. Whether or not access is ultimately attainable, the imposition of economic burdens on that access catalyzed institutional reforms designed to prevent that imposition, beginning with the Magna Carta in 1215. The concerns with requiring parties to pay a fee/bribe to the court system are not mitigated by the mere fact that the parties can afford it. The policy of court access reaches beyond pragmatism and lays its foundation in principles of fairness and justice.

Section 19 essentially allowed medical professionals to triple charge litigants in need of their services—once at the time of filing, once for services rendered during discovery, and again for testimony if the case were to go to trial. It took a class of third parties, which benefits from continuing litigation, and guaranteed it a paycheck at the onset of a court case. This was, perceivably, the intent of the collaboration between the legislature and the healthcare industry.[84] It also directly addresses

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83. This assertion seems to contradict the court's decision in *Barzellone*, where it held that a $349.00 court fee was constitutionally permissible. Court fees have been consistently deemed allowable, as long as they are reasonable. To say that a forty-dollar fee is unreasonable, in comparison with the fee in *Barzellone*, is contradictory to the general principles the court had previously established.

84. Another obvious intention of the legislature/healthcare collaboration was the ultimate reduction in healthcare liability. This is not a nefarious goal, as less liability imposed on healthcare providers would presumably result in lower healthcare costs. This Comment does not intend to evaluate the morality of the legislature's motives; rather, it

Justice Winchester's argument—that the costs associated with the affidavit requirement were imposed by third parties and not government actors. The reality of the Oklahoma situation is that these costs, although technically imposed by third parties, were direct products of legislative action. For this reason, the majority's holding is sound, albeit for different reasons than those elaborated by the court. Even though a forty-dollar fee might not amount to an unconstitutional burden on litigants' access to the courts, costs imposed by the private sector, but directed by the legislature, which amount to anywhere from $500.00 to $5000.00 essentially condition court access on paying a fee—a practice which violates the Oklahoma Constitution regardless of the litigants' ability to pay the fee.

VI. CONCLUSION

The Supreme Court of Oklahoma's opinion in *Wall v. Marouk* employed several flawed rationales to reach what was ultimately the right outcome. The court clearly recognized the political undertones that lead to the creation of the affidavit of merit requirement by the Oklahoma legislature, and acted to protect the judicial system from the influence of the private sector and corresponding political pressure. It did so, however, at the cost of jurisprudential clarity. For now, affidavit requirements at the time of filing are illegal under the Oklahoma Constitution. How long this status quo will last, in the advent of the tort reform movement, remains to be seen.

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seeks to juxtapose them with the equal protection principles found in the Oklahoma Constitution.