STATE COURT
DocketWatch®

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Citing Rule Against "Log Rolling," Oklahoma Supreme Court Overturns Comprehensive State Tort Reform

*By Glenn G. Lammi**

The practice of tucking tax breaks or other legislative favors for special interests into "must pass" federal legislation has become commonplace in the U.S. Congress, as nothing in the U.S. Constitution limits or forbids this tactic. However in the vast majority of states, such "log rolling" is prohibited by constitutional provisions limiting legislation to a "single subject." On June 4, the Oklahoma Supreme Court invoked that state constitution's version of this rule and invalidated the Comprehensive Lawsuit Reform Act of 2009. This article will briefly explain state rules against log rolling, discuss how the Oklahoma Court applied its rule in *Douglas v. Cox Retirement Properties*,[1] and note the decision's impact in Oklahoma and nationally.

I. Log Rolling and the Single Subject Rule

Black's Law Dictionary defines log rolling as "a legislative practice of embracing in one bill several distinct matters, none of which, perhaps, could singly obtain the assent of the legislature."[2] As one assessment of single subject rules related, "Not surprisingly, legislative log rolling is as old as the legal system itself."[3] By inserting unpopular and unrelated provisions into a popular bill, the log rolling legislator forces her colleagues to vote for ideas they might otherwise oppose.

Beginning with New Jersey in 1844, over the years, forty-three states have added single subject rules for state legislation to their respective constitutions.[4] The precise wording of these rules differs from state to state, but the Oklahoma constitutional provision at issue in *Douglas* is generally representative: "Every act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title . . ."[5] As one would expect, state courts have been called upon regularly to interpret and apply the very general terms of these general constitutional mandates, resulting in "thousands of cases."[6]

II. Judicial Nullification and the Comprehensive Lawsuit Reform Act of 2009

Over the last two decades, plaintiffs' lawyers and others who oppose state civil justice reforms—commonly known as

... *continued page 8*

Florida Supreme Court Requires Fourth Amendment Protections for Emerging Technology

*By Caroline Johnson Levine**

In *Smallwood v. State of Florida*, the Florida Supreme Court 2013 FL 1130 (Fla. 2013), the Florida Supreme Court held by a 4-2 margin that law enforcement officers are required to obtain a search warrant to view information contained within a cell phone found in the possession of an arrested suspect.[1] The May 2, 2013 decision restricted an arresting officer's ability to search property found on an arrestee.

... *continued page 10*

INSIDE

FROM THE EDITOR

In an effort to increase dialogue about state court jurisprudence, the Federalist Society presents *State Court Docket Watch*. This newsletter is one component of the State Courts Project, presenting original research on state court jurisprudence and illustrating new trends and ground-breaking decisions in the state courts. These articles are meant to focus debate on the role of state courts in developing the common law, interpreting state constitutions and statutes, and scrutinizing legislative and executive action. We hope this resource will increase the legal community's interest in tracking state jurisprudential trends.

Readers are strongly encouraged to write us about noteworthy cases in their states which ought to be covered in future issues. Please send news and responses to past issues to Maureen Wagner, at maureen.wagner@fed-soc.org.

CASE IN FOCUS

Indiana Supreme Court Upholds Constitutionality of Vouchers for K-12 Education

*By Leslie Davis Hiner**

In a landmark 5-0 decision, Chief Justice Brent Dickson of the Indiana Supreme Court delivered a clear and decisive opinion supporting the constitutionality of vouchers for K-12 education. On March 26, 2013, the Court ruled that the constitutional prohibition against using public funds to benefit religious institutions does not apply when public funds are used by parents for primary or secondary education provided by a religious institution.

I. Education Reform in Indiana

Indiana has a long history of education reform. In 1987, the Indiana legislature passed the most "sweeping educational overhaul" in the country.[1] Gov. Bob Orr's education agenda, the A+ Plan, included such bold reforms as financial rewards for most improved schools and penalties for schools promoting students who failed to meet new, strictly defined levels of achievement.

A voucher plan was not included in A+ Plan. This was probably because the authors feared a constitutional challenge.

Vouchers allow parents to choose where to spend money the state has allocated for their children's education; tuition funding may be used at a school of the parents' choice, including private religious schools. Private school choice was first envisioned by Nobel laureate economist Milton Friedman in 1955.[2] Whereas government may fund education, Friedman argued it is unwise for government to maintain a monopoly position in providing educational services. Dr Friedman believed that a public education monopoly would follow the path of all monopolies, offering an increasingly inferior product for an increasingly greater cost.

Indiana's attempts to adopt private school choice in years following the A+ Plan failed. As a result, in 1991, a local businessman and philanthropist, J. Patrick Rooney, created the nation's first privately funded scholarship program.[3] Determined to serve the needs of poor children living in the inner city of Indianapolis who were assigned to chronically failing public schools, Mr. Rooney's Choice Charitable Trust Scholarship program drew a strong demand for the scholarships.

Yet legislators remained unconvinced that such a program funded by the state could withstand a constitutional challenge. Then in 2002, the United States Supreme Court ruled in *Zelman v. Simmons-Harris* that publicly funded vouchers for K-12 education did not offend the United States Constitution because the choice of a voucher was voluntary and the parent, not the state, made the decision to choose a sectarian or non-sectarian school.[4]

Emboldened by the *Zelman* decision, Indiana legislators renewed their interest in creating publicly funded vouchers for K-12 education, passing the Choice Scholarship Program.[5] Called "the nation's broadest private school voucher system," Indiana once again enacted the most sweeping education reform in the country.[6]

II. Constitutional Challenge

Perhaps recognizing that a challenge to vouchers in federal court could fail after *Zelman*, on July 1, 2011, Indiana State Teachers Association leaders, teachers, and parents filed suit in state court seeking declaratory and injunctive relief from Indiana's private school voucher system, in *Meredith v. Daniels*.[7] The court also granted intervenor status to two parents expecting to use vouchers to pay in part for their children's tuition at private schools in Indiana.

Plaintiffs argued three points under the Indiana Constitution: 1) that Article 8, Section 1 restricts the General Assembly from adopting any educational system other than a "general and uniform system of Common Schools" and that private schools are not part of a "uniform system";[8] 2) that Article 1, Section 4 restricts the General Assembly from allowing vouchers paid with public funds to be used at religious institutions where children will be trained in religious beliefs, thus compelling support from citizens to "attend, erect, or support any place of worship, or to maintain any ministry" against their consent;[9] and 3) that Article 1, Section 6 restricts the General Assembly from allowing money "drawn from the state treasury, to be used for the benefit of any religious or theological institution."[10]

III. Trial and Supreme Court Decisions

On January 13, 2012, Judge Michael Keele of the Marion Superior Court granted defendant-intervenors' motion for summary judgment and denied plaintiff's motion for summary judgment.[11] Appellant's verified joint motion to transfer appeal to the Indiana Supreme Court was granted March 16, 2012. The case then proceeded as if it were originally brought before Indiana's Supreme Court.

The Indiana Supreme Court affirmed Judge Keele's lower court decision.[12] Both the trial court and Supreme Court relied on historical documentation of the 1851 revision of the Indiana Constitution.

A. Article 8, Section 1

In 1851, during the Constitutional Convention, an amendment to prohibit public funding of schools other than district or township schools was defeated; the trial court noted that Indiana's practice of funding private schools, including those offering religious

... continued page 5

Pennsylvania Supreme Court Permits Waivers for Future Negligence by Third Parties

*By Michael I. Krauss & Samantha Rocci**

On April 25, 2013, in *Bowman v. Sunoco*, a divided Pennsylvania Supreme Court held that Pennsylvania public policy does not prohibit waivers of liability for future negligence by a non-contracting party.[1] The implications of this decision are significant.

I. Background

The plaintiff worked as a private security guard with Allied Barton Security Services. As a condition of her employment, she signed a "Workers' Compensation Disclaimer." This "disclaimer" purported to waive plaintiff's right to sue any of Allied's clients for damages related to injuries that were covered under the state's Workers' Compensation Act.[2] Subsequently, while guarding one of Sunoco's refineries, plaintiff slipped on snow or ice and was injured. After collecting workers' compensation benefits, she proceeded to sue Sunoco for negligence, asserting that its negligent failure to clear the ice in an obscure location was the proximate cause of her injury.

During discovery, Sunoco learned of the Workers' Compensation Disclaimer, and invoked it in its motion for summary judgment. Plaintiff responded that the waiver contained in the disclaimer violated Pennsylvania's public policy, particularly as clearly embodied in the first sentence of section §204(a) of the Pennsylvania Workers' Compensation Act, which reads: "No agreement, composition, or release of damages made before the date of any injury shall be valid or shall bar a claim for damages resulting therefrom; and any such agreement is declared to be against the public policy of this Commonwealth."[3]

Finding that the disclaimer did not violate public policy as articulated in §204(a), the trial court granted Sunoco's motion and dismissed plaintiff's suit.[4] On appeal, the Superior Court affirmed, ruling that plaintiff waived only her right to sue third-party customers for damages that were covered under workers' compensation. While she waived those rights, she still retained the right to receive damages through Workers' Compensation, the protection of which *is* a

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matter of public policy. The disclaimer itself therefore did not violate public policy, because it did not attempt to deprive her of the rights granted by the Act.[5] The Superior Court found no precedent to support applying §204(a) to waivers benefiting third parties.

II. The Pennsylvania Supreme Court's Ruling

Plaintiff appealed to the Pennsylvania Supreme Court. She reasserted her claim that the disclaimer violated Pennsylvania public policy since it was clearly contrary to the plain language of §204(a) of the Pennsylvania Workers' Compensation Act.[6] Since the language of §204(a) is unambiguous, she argued, the court must apply the statute as written, without "interpreting" it as had done the Superior Court. Plaintiff also argued that the disclaimer conflicted with the subrogation clause of §319 of the Act, which allows a liable employer to be subrogated to the right of the employee when the latter's injury is caused in whole or in part by the act or omission of a third party.[7] Finally, plaintiff asserted that the disclaimer is incompatible with the common law of contract, as it purports to waive a cause of action not yet accrued.

Sunoco reiterated that, properly understood, §204(a) does not apply to releases benefiting third parties, but only to an employer's attempt to reduce its own liability.[8] It supported its argument by citing a Pennsylvania case holding that §204(a) only prohibited agreements to hold *the employer* harmless for future injury.[9] Since plaintiff did recover Workers' Compensation for her injuries, the disclaimer did not contravene the public policy behind the Act.

The Pennsylvania Supreme Court rejected plaintiff's plain language argument after looking at §204(a) as a whole, noting that the majority of §204(a) addresses the employer's obligation under the act, not third party duties.[10] Therefore the court found the section ambiguous as to the issue of third party liability.[11] The court believed that the legislature likely intended the "agreements" and "release of damages" exclusions in §204(a) to refer to employer obligations, though it conceded that the statute does not make this conclusion inevitable. In light of this ambiguity,

... continued page 7

Louisiana Supreme Court Strikes Down Statewide Voucher Program

*By Leslie Davis Hiner**

On May 7, 2013, the Supreme Court of Louisiana ruled that its state's statewide voucher program, an expansion of the New Orleans/Jefferson Parish voucher adopted in 2008, violated the Minimum Foundation Program (MFP) of the Louisiana Constitution.[1] Article 8, Section 13(B) of the Louisiana Constitution specifies that:

> [MFP] funds appropriated shall be equitably allocated to parish and city school systems according to the formula as adopted by the State Board of Elementary and Secondary Education, or its successor, and approved by the legislature prior to making the appropriation.[2]

The Supreme Court held that once funds are dedicated to the MFP, they cannot be used for any purpose other than to support public school systems. The court also rejected defendant's claim that funds appropriated in excess of necessary public school funding could be used for vouchers. The court determined that using the MFP process for vouchers was also constitutionally impermissible.

The court also rejected the argument that voucher students are public students entitled to state funding under MFP, citing the constitution's specific language requiring the funding of public schools, not school children.

Finally, the Supreme Court clearly stated that this ruling did not address the merits of the voucher program, only the funding mechanism. Subsequent to this decision, the Louisiana Legislature funded the voucher program through a line item appropriation; no child's education has been interrupted as a result of this decision.

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Endnotes

1. Louisiana Federation of Teachers v State, Nos. 2013–CA–0120, 2013–CA–0232, 2013–CA–0350, (La. May 7, 2013).

2. LA. Const. art. 8, § 13(B).

Indiana Supreme Court Upholds Constitutionality of Vouchers for K-12 Education

Continued from page 2...

instruction, was left intact. Simply put, when there was an opportunity to specifically prohibit the funding of private and religious schools, the authors of Indiana's 1851 constitution passed.

The Supreme Court, relying on *Bonner ex rel Bonner v. Daniels*, interpreted Article 8, Section 1, to impose a duty to encourage educational improvement *and* to establish a system of common schools.[13] The court reasoned that the word, "and" between the two phases was deliberate and was intended to express two duties.

Giving weight to the fact that citizens voted to ratify the constitutional language currently in dispute, which remains unaltered since the affirmative vote for the constitution in 1851, Chief Justice Dickson determined that the General Assembly has not one but two duties regarding education: 1) to provide a "general and uniform system" of tuition-free common schools open to all, and 2) to "encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement."[14]

Furthermore, the court stated that the phrase, "by all suitable means" could mean only that the General Assembly had broad discretion, within the constitution, to determine policy for encouraging educational improvement.

Both the trial court and Supreme Court were not persuaded that the school voucher program infringed upon the constitutional duty to maintain tuition-free public schools open to all. The Supreme Court found that the school voucher program does not conflict with or alter the system of public schools, and because it falls under the constitutional duty to "encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement," it also does not fall under the directive to be uniform, common, open to all, or tuition-free.

B. Article 1, Section 4

Prohibition against compelled support of religious institutions was considered in 1851 to apply to support of houses of worship, and more specifically, to prohibit direct taxation of individuals for the purpose of a sectarian objective. The trial court noted that under Indiana's voucher plan, general tax revenues were used to fund the education of children through direct aid to families who would choose a school. The families, not the state, would voluntarily choose a school, which could be secular or sectarian; it would be impossible for the state to advance a sectarian objective because the family, not the state, would choose.

The Supreme Court, noting that there is very little discussion of Article, 1 Section 4 in historical documents, interpreted this section using the text as its primary source for guidance. Comparing Sections 4 and 6 of Article 1, the court distinguished the two; Section 4 prohibits the state from compelling individuals to support a place of worship or ministry and Section 6 limits government taxing and spending for certain purposes. The court furthermore considered the terms "worship" and "ministry" to be related specifically to "ecclesiastical function" and, as such, Section 4 acts to preserve religious liberty.[15] The court did not support plaintiff's expansive view of Section 4.

C. Article 1, Section 6

Finally, plaintiff argued that vouchers convey an unconstitutional benefit to religious institutions. To this point, the court relied on its prior decision in *Embry v. O'Bannon*.[16] In *Embry*, the court upheld a "duel enrollment" program, which allowed private religious school students to also enroll in public schools for certain services. Whereas this allegedly conveyed a financial benefit to the private schools, any such benefits were ruled by the court to be incidental to the state's larger mission of providing educational services to children. Furthermore, again citing that selecting a school is a private, individual choice under Indiana's school voucher plan, the court distinguished Indiana's constitutional provision from other state constitutions that have more restrictive language.

The court was furthermore persuaded that the benefits language of Article 1, Section 6, if unconstitutional under plaintiff's theory, would also "cast doubt" on the constitutionality of long-standing state programs using taxpayer funds for college tuition.[17] Under numerous programs, including the Frank O'Bannon Grant Program and the Twenty-First Century Scholars Program, students are awarded scholarships, which might otherwise be named "vouchers," to attend public or private religious colleges.

The Supreme Court scoffed at the idea that religious or theological institutions could receive no benefit whatsoever from government, citing police protection,

streets, sidewalks and other examples. Whereas a religious institution may receive substantial benefits, these benefits are more properly attributable to the public rather than the religious institution. The public is protected by the police, and uses the streets and sidewalks to get to their chosen religious institution. The court determined that benefits to the religious institution are "ancillary and indirect."[18]

Creating a new test for determining whether government expenditures violate Article 1, Section 6, the court stated:

> We hold today that the proper test for examining whether a government expenditure violates Article 1, Section 6, is not whether a religious or theological institution substantially benefits from the expenditure, but whether the expenditure directly benefits such an institution.[19]

In creating this test, the Supreme Court also clarified the language in *Embry*. The term, "substantial benefits" used in Embry was not intended to establish a line to divide what is too much or too little state benefit to a religious institution; it was not meant to create a constitutional line of demarcation.

The Supreme Court held the following regarding Article 1, Section 6:

> First, the voucher program expenditures do not directly benefit religious schools but rather directly benefit lower-income families with school-children by providing an opportunity for such children to attend non-public schools if desired. Second, the prohibition against government expenditures to benefit religious or theological institutions does not apply to institutions and programs providing primary and secondary education.[20]

IV. Twist of Fate

The 2011 November elections delivered two new defendants: Mike Pence succeeded term-limited Mitch Daniels as governor, and Dr. Tony Bennett was defeated for re-election as Superintendent of Public Instruction. In an ironic twist of fate, Dr. Bennett was defeated by a plaintiff in this case, Glenda Ritz. Mrs. Ritz could not be both plaintiff and defendant, pursuant to Indiana Appellate Rule 17(C)(1):"When a public officer who is sued in an official capacity dies, resigns or otherwise no longer holds public office, the officer's successor is automatically substituted as a party."

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Endnotes

1. Jim Mellowitz, *Indiana Assembly Session Ends*, Chicago Tribune News, May 4, 1987, Special to *The Tribune*, *available at* http://articles.chicagotribune.com/1987-05-04/news/8702020989_1_school-days-education-reform-tax-increases .

2. Milton Friedman, *The Role of Government in Education in* Economics and the Public Interest Robert A. Solo ed., 1955).

3. Fritz Steiger, *Putting Children First*, Imprimis, Sept.1999, at 7.

4. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

5. Vouchers provided under the *Choice Scholarship Program*, Ind. Code §§ 20-51-4-1 to 11; Pub. L. No. 92-2011, § 10, 2011 Ind. Acts 1024.

6. Deanna Martin, *Indiana Lawmakers Approve Nation's Largest School Voucher Program*, Huffington Post, July 2, 2013, http://www.huffingtonpost.com/2011/04/27/indiana-education-reform_n_854575.html.

7. Meredith v. Daniels, No. 49D07-1107 -PL-025402 (Super. Ct. Ind. Aug. 15, 2011).

8. Ind. Const. art. 8, § 1:

> Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.

9. Ind. Const. art. 1, § 4:

> No preference shall be given, by law, to any creed, religious society, or mode of worship; and no person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent.

10. Ind. Const. art. 1, § 6:

> No money shall be drawn from the treasury, for the benefit of any religious or theological institution.

11. Meredith v. Daniels, No. 49D07-1107 -PL-025402 (Ind. Super. Ct. Jan. 13, 2012).

12. Meredith v. Pence, ___N.E.2d ___, No. 49S00-1203-PL-172 (March 26, 2013).

13. Bonner *ex rel* Bonner v. Daniels, 907 N.E.2d 516 (Ind. 2009).

14. Ind. Const. art. 8, § 1.

15. *Meredith v. Pence*, No. 49S00-1203-PL-172 , at *14.

16. Embry v. O'Bannon, 798 N.E.2d 157 (Ind. 2003).

17. *Meredith v. Daniels,* No. 49D07-1107 -PL-025402, at *9.

18. Meredith v. Pence, No. 49S00-1203-PL-172, at *16.

19. *Id.*

20. *Id.* at 21.

Pennsylvania Supreme Court Permits Waivers for Future Negligence by Third Parties

Continued from page 4...

the court submitted the Act to a more thorugh statutory analysis.

Looking at the history of the statute, the court determined that the legislature intended §204(a) to apply only to employers.[12] The original statutory setup established a dual scheme of recovery using Articles II and III. Originally, provisions in Article III were elective, and Article II applied if the employer and employees did not accept those provisions. Since the Act originally provided this dual recovery scheme, a public policy violation occurred only when the employer attempted to avoid *both* avenues of recovery.[13] Plaintiff was still covered under the compensation scheme detailed in Article III and thus the disclaimer did not violate the public policy behind the Act.

The court did not find plaintiff's other assertions compelling. Turning to her subrogation argument, the court found that an employer may choose to waive its subrogation right, and that such a waiver was clearly not contrary to public order, as it had no effect on workers. The disputed clause had the practical effect of accomplishing just such a waiver.[14]

Plaintiff relied on two Pennsylvania cases, *Henry Shenk Company v. City of Erie* and *Vaughn v. Didizan*, to support her claim that the disclaimer violated contract law by releasing liability for an action not yet accrued.[15] The court distinguished each of them, finding that waivers of future actions are permissible in Pennsylvania if the parties contemplated the actions at the time of release.[16] In each of the two cases cited, the actions could not have been contemplated by the parties, and could be distinguished from her case since here the purpose of the disclaimer was precisely to encompass future causes of action. Therefore, the parties in *Bowman* obviously contemplated such future actions.[17] Furthermore, the court cites multiple cases where releases for claims not yet accrued have been upheld.

Finally, the court looked to two cases from other jurisdictions that upheld similar waivers, *Horner v. Boston Edison Company*[18] and *Edgin v. Entergy Operations, Inc.*[19] In *Horner*, the Appeals Court of Massachusetts found a similar waiver valid since it only prevented the employee from recovering amounts in addition to those recovered from workers' compensation. The Supreme Court of Arkansas, in *Edgin*, found that such a waiver did not violate public policy since the employer was not attempting to "escape liability entirely, but [was] instead, attempting to shield its clients from separate tort liability" for injuries covered by workers' compensation.

The dissent would have denied defendant's summary judgment motion, and found fault with the majority's finding of ambiguity within the statute. Finding the statutory language prohibiting waivers "clear and unambiguous," the dissent argued that the waiver that plaintiff signed therefore contravened Pennsylvania public policy.[20] Furthermore, the dissent asserted that its interpretation was consistent with other portions of the Worker's Compensation Act that permit an employee to bring action against a third party when that party causes him or her injury.[21] Condemning the majority's "journey into the forbidden land of impermissible statutory interpretation," the dissent accused the majority of activism that disregarded the plain meaning of §204(a) in its decision.

III. Implications

This decision has many interesting implications. Clearly, employers whose employees work at remote client sites may now protect those clients from tort liability, and not merely via an indemnity clause as had previously been practiced. An indemnity clause shifts the risk of client negligence from the client to the employer (and depends crucially on the solvency of the employer), while the waiver in *Bowman* shifts the risk to the employee.

A second and quite interesting consideration is that the reasoning of the Pennsylvania Supreme Court majority could logically extend to products liability claims against tool manufacturers for workplace injuries. Since the court stressed that waivers of future tort recovery by an employee do not violate public policy so long as the employee can still recover through workers' compensation, and since it construed §204(a) to apply to only employer-employee relationships, it is difficult to see why its rationale would not apply to a suit by an employee against the manufacturer of an allegedly defective product that injured that employee, assuming an appropriate waiver had been signed. Such an extension of the rationale in *Bowman* would likely lead to employers receiving better deals on tool and other product purchases from manufacturers, in exchange for including "*Bowman* waivers" in their employment contracts. A very significant component of American products liability law involves "end runs" around workers compensation, wherein an employee of a negligent employer, banned from suing that employer

under the state workers' compensation statute, instead sues a product manufacturer, and recovers moneys (pain and suffering, etc.) not recoverable under workers' comp. *Bowman* may now offer a way to prevent such end runs.

The Pennsylvania Supreme Court may soon be called upon to determine the scope of this decision. In the meantime, it is likely that Pennsylvania employees will encounter more waivers of liability for third parties, as employers seek to test the limits of the court's decision in *Bowman*.

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Endnotes

1 Bowman v. Sunoco, Inc., 2013 WL 1767731 (Pa. Apr. 25, 2013).

2 The disclaimer stated:

> I hereby waive and forever release any and all rights I may have to:
>
> -make a claim, or
>
> -commence a lawsuit, or
>
> -recover damages or losses
>
> from or against any customer (and the employees of any customer) of Allied Security to which I may be assigned, arising from or related to injuries which are covered under the Workers' Compensation statutes.

Id.

3 77 P.S. § 71(a).

4 Bowman v. Sunoco, Inc., 2008 WL 8833338 (Pa. Com. Pl. May 21, 2008).

5 Bowman v. Sunoco, Inc., 986 A.2d 883 (Pa. Super. 2000).

6 2013 WL 1767731 at *2.

7 Section 319 reads: "Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated to the right of the employe, . . . against such third party to the extent of the compensation payable under this article by the employer." 77 P.S. § 671.

8 Bowman v. Sunoco, 2013 WL 1767731 (Pa. Apr. 25, 2013).

9 Inman v. Nationwide Mutual Ins. Co., 641 A.2d 329, 331 (Pa. Super. 1994).

10 Section 204(a) reads, in its entirety:

> (a) No agreement, composition, or release of damages made before the date of any injury shall be valid or shall bar a claim for damages resulting therefrom, and any such agreement is declared to be against the public policy of this Commonwealth. The receipt of benefits from any associating, society, or fund shall not bar the recovery of damages by action at law, nor the recovery of compensation under article three hereof; and any release executed in consideration of such benefits shall be void: Provided, however, That if the employe receives unemployment compensation benefits, such amount or amounts so received shall be credited against the amount of the award made under the provisions of sections 108 and 306, except for benefits payable under section 306(c) or 307. Fifty per centum of the benefits commonly characterized as "old age" benefits under the Social Security Act (49 Stat. 620, 42 U.S.C. §301 et seq.) shall also be credited against the amount of payments made under sections 108 and 306, except for benefits payable under section 306(c): Provided, however, That the Social Security offset shall not apply if old age Social security benefits were received prior to the compensable injury. The severance benefits paid by the employer directly liable for the payment of compensation and the benefits from a pension plan to the extent funded by the employer directly liable for the payment of compensation which are received by an employe shall also be credited against the amount of the award made under sections 108 and 306, except for benefits payable under section 306(c). The employe shall provide the insurer with proper authorization to secure the amount which the employe is receiving under the Social Security Act.

77 P.S. § 71(a) (internal citations omitted).

11 Bowman v. Sunoco, 2013 WL 1767731 at *4 (Pa. Apr. 25, 2013).

12 *Id.* at *5–6.

13 *Id.*

14 *Id.* at *6.

15 Henry Shenk Company v. City of Erie, 352 Pa. 481, 43 A.2d 99 (1945); Vaughn v. Didizian, 436 Pa.Super. 436, 648 A.2d 38 (1994)

16 Bowman v. Sunoco, 2013 WL 1767731 at *6–7.

17 *Id.* at *7.

18 Horner v. Boston Edison Co., 695 N.E.2d 1093 (Mass. App. Ct. 1998).

19 Edgin v. Entergy Operations, Inc., 961 S.W.2d 724, 727 (Ark. 1998).

20 Bowman v. Sunoco, 2013 WL 1767731 at *8–9 (Baer, J., dissenting).

21 *Id.*

Oklahoma Supreme Court Overturns Comprehensive Tort Reform

Continued from front cover...

"tort reforms"—have sought invalidation of these laws in state courts. This "judicial nullification" strategy, first described in detail in a 1997 Washington Legal Foundation Monograph,[7] utilizes state constitutional provisions to prevent reform proponents from appealing their losses in federal court.

Tort reform opponents took this approach to challenge

Oklahoma's Comprehensive Lawsuit Reform Act of 2009 (CLRA). The CLRA took aim at a range of subjects and practices which, supporters argued, encouraged corrosive tort litigation in Oklahoma. Provisions addressed, among other subjects, joint and several liability; class actions; expert witness testimony; and asbestos litigation. The Oklahoma House of Representatives approved the CLRA 86-13, and the Senate voted 42-5.

Reform opponents got their chance to challenge the act in 2009, when a rehabilitative care center owner cited CLRA § 19—a requirement for an expert affidavit in personal negligence cases—in its attempt to dismiss a wrongful death suit. The decedent's estate argued in state trial court that the act violated Oklahoma's single subject rule. The trial court rejected this argument, granted Cox's motion to dismiss, and certified the dismissal for immediate appeal. The Oklahoma Supreme Court granted review on February 14, 2012.

III. The Oklahoma Supreme Court's *Douglas* Decision

In a twelve-paragraph opinion by Justice Gurich, the Oklahoma high court reversed the state trial court and found the entire CLRA unconstitutional. Justice Gurich stated that the court's evaluation of legislation under the single subject rule has turned on the concept of "germaneness." The "most relevant question," he wrote, is "whether a voter, or a legislator, is able to make a choice without being misled and is not forced to choose between two unrelated provisions." Key to this analysis is not similarity, but "whether it appears that the proposal is misleading or that the provisions in the proposal are so unrelated that those voting on the law would be faced with an all-or-nothing choice."

The CLRA of 2009 did not meet this test because its "90 sections" encompass subjects "that do not reflect a common, closely akin theme or purpose," Justice Gurich wrote. He asserted that the CLRA's first 24 sections address civil procedure but otherwise "have nothing in common." The other 66 sections include 45 "entirely new Acts, which have nothing in common." The legislature's reference to the "broad topic of lawsuit reform," the Court noted, "does not cure the bill's single-subject defects." Though the CLRA contained a severability clause, the majority opinion concluded that "severance is not an option," arguing that due to the number of articles, severance would be "both dangerous and difficult."

Justice Kauger authored a separate concurring opinion. The concurrence describes the Court's experience with the single subject rule, and expresses frustration with the legislature's refusal to follow the rule. "Perhaps guidelines . . . will prevent this Court from having to revisit the issue," Justice Kauger writes. He treated readers to "a culinary example" of a peanut butter cookie which can no longer be called that if one adds "pecans, coconut, M&Ms" etc.

Justice Winchester authored a dissent for himself and Justice Taylor. The justices did not hide their frustration with the court's single subject jurisprudence and the *Douglas* majority opinion. The CLRA's purpose "is tort reform," Justice Winchester wrote. Relating the overwhelming majorities the CLRA attracted, the dissent argued that "it is more likely that the legislature and the public understood the common themes and purposes embodied in the legislation." It reminded the majority that the legislature had previously passed a 78-section law on evidence, and the 368-section Uniform Commercial Code. Such comprehensive laws, under the rationale of *Douglas*, "could be found unconstitutional" and lead to "chaos."

The dissent intimates in a footnote that the majority utilized the subjective "germaneness" test to strike down a law which it found unwise or undesirable.[8] The dissenters also chided the majority for creating a "chilling effect on the legislative process" by offering little guidance and refusing to respect the CLRA's severance clause. Justice Winchester urged the court to be more mindful of separation of powers by "adopt[ing] a more deferential approach toward the [single subject] rule."

IV. Implications: Oklahoma and Elsewhere

The plaintiffs' bar's victory in *Douglas* has energized those who want to eliminate tort reform measures through judicial review. On the other hand, reform proponents, as well as civil litigants, are contemplating the case's impact to determine their next steps. Several bills passed in 2011 modified provisions of the 2009 law, including a cap on damages and a full elimination of joint and several liability.[9] Such changes further complicate Oklahoma's legal landscape for plaintiffs and defendants in the wake of *Douglas*. One tort reform opponent remarked, "I'd hate to have to figure out what law applied right now. It's kind of a mishmash."[10]

Legislators are reportedly eager to reinstate the 2009 reforms. As this article went to print, Oklahoma Governor Fallin is considering some legislators' demands for a special legislative session to address the *Douglas* decision.[11] No matter when the legislature moves forward, the challenge will be devising a strategy that comports with the ruling, which offered very little guidance, beyond

the concurrence's peanut butter cookie analogy, on what would be constitutional. Opinions at this early stage vary from one former Senator saying "Based on [the Court's] interpretation, you'd have to pass at least 90 separate bills,"[12] to a current Senator remarking, "It seems very simple to me."[13] That latter Senator's approach: break up the CLRA into five separate bills.[14]

The court's ruling has also prompted legislators to reevaluate how judges are selected in the state; limits on judicial tenure are also being cosidered.[15] Oklahoma is one of thirteen states that use the "Missouri Plan," a method in which judges are appointed by the governor after nomination by a commission.[16] Oklahoma may consider changing to a method that is more like the federal approach to selection, as nearby states Tennessee and Kansas utilize. In Kansas, the legislature recently adopted that approach for choosing its intermediate appellate court judges. Similarly, Tennessee abandoned the Missouri Plan in favor of the federal method for its Supreme Court Justices; state voters will have the final say on the new plan in November 2014.

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Endnotes

1. 2013 OK 37, __ P.3d __ , *available at* http://www.oscn.net/applications/oscn/deliverdocument.asp?citeid=469532.

2. Black's Law Dictionary 849 (5th ed. 1979).

3. Stanley R. Kaminski and Elinor L. Hart, *Log Rolling Versus the Single Subject Rule*, 80 USLW 1156 (Feb. 28, 2012), *available at* http://www.duanemorris.com/articles/static/kaminski_hart_bloombergbna_022812.pdf.

4. *Id.* (citing Kurt G. Kastorf, *Logrolling Gets Logrolled*, 54 Emory L. J. 1633, 1641 (2005)).

5. Okla. Const. art. 5, § 57.

6. Kaminski and Hart, *supra* note 3, at 3 (citing Michael D. Gilbert, *Single Subject Rule and the Legislative Process*, 67 U. Pitt. L. Rev. 803, 806 (2006)).

7. Victor E. Schwartz, Mark A. Behrens, and Mark D. Taylor, *Who Should Make America's Tort Law: Courts or Legislatures?*, WLF Monograph (Mar. 1997); *see also Fact Sheet: Cases Where "Tort Reforms" Have Been Held Unconstitutional*, Center for Justice and Democracy, *available at* http://centerjd.org/content/fact-sheet-cases-where-tort-reforms-have-been-held-unconstitutional-2011.

8. Douglas v. Cox Retirement Properties, No. 110270, slip op. at 15 n.3 (Okla. June 4, 2013)

(Winchester, J. dissenting).

9. HB 2128, 53rd Leg., 1st Sess. (Okla. 2011) ("An Act relating to damages"); SB 862, 53rd Leg., 1st Sess. (Okla. 2011) ("An Act relating to liability").

10. Michael McNutt, *Oklahoma lawsuit reform measure tossed out*, The Oklahoman, June 4, 2013, *available at* http://newsok.com/oklahoma-lawsuit-reform-measure-tossed-out/article/3841673.

11. Patrick B. McGuigan, *OK Gov. Fallin now has the call on special session to remedy Court's tort slap down*, OkalahomaWatchdog.org, July 18, 2013, http://watchdog.org/96294/ok-gov-fallin-now-has-the-call-on-special-session-to-remedy-courts-tort-slap-down/.

12. *Id.*

13. *Oklahoma Law Makers to Revive Lawsuit Limits*, Ins. J., June 10, 2013, *available at* http://www.insurancejournal.com/news/southcentral/2013/06/10/294903.htm.

14. Press Release, Oklahoma State Senate, Sen. Loveless Plans to File Bills Restoring Tort Reform after State Supreme Court Strikes Down 2009 Measure (June 4, 2013), *available at* http://www.oksenate.gov/news/press_releases/press_releases_2013/pr20130604a.htm.

15. McGuigan, *supra* note 11.

16. See www.statecourtsguide.com for more information.

Florida Supreme Court Requires Fourth Amendment Protections for Emerging Technology

Continued from front cover...

I. The Trial Court

Cedric Tyrone Smallwood was a convicted felon who was suspected of committing a robbery while using a firearm.[2] On the day of the robbery, a masked man entered a convenience store, displayed a silver handgun and demanded money from the clerk.[3] The clerk testified that he knew the identity of the robber, who was a frequent customer.[4] Additionally, two witnesses observed Smallwood fleeing the store.[5]

Upon arresting Smallwood, an officer collected a cellular telephone from Smallwood's pocket and viewed the photographs contained therein.[6] The officer discovered that the photographs were taken subsequent to the robbery and depicted a similar handgun and a stack of money.[7] Upon hearing about this evidence, the prosecutor obtained a search warrant in order to view the photographs. However, the defendant's attorney argued that the police officer had previously violated the defendant's Fourth Amendment right to be free from an unreasonable search and seizure by viewing the photographs without a warrant.[8]

The trial court allowed the photographs to be used in the trial and denied the defendant's suppression arguments

by relying on *New York v. Belton*[9] (authorizing a search incident to arrest of a motor vehicle's containers within an arrestee's reach) and *United States v. Finley*[10] (authorizing a search of the contents of an arrestee's cellular telephone).[11]

II. The Appellate Court

Florida's First District Court of Appeal affirmed the trial court's ruling, while recognizing that "such searches have been held both valid and invalid by various state and federal courts."[12]

The appellate court noted that some federal courts have authorized the search of data devices discovered on arrested suspects in order to ensure the preservation of evidence. In *United States v. Young*,[13] the Fourth Circuit authorized a warrantless search when "officers arrested the defendant for drug-related crimes and discovered a cell phone on his person, and then searched the phone and copied down text messages found therein."[14] Additionally, in *United States v. Ortiz*,[15] the "Seventh Circuit found it was 'imperative' that officers be permitted to retrieve numbers from electronic pagers incident to [a drug related] arrest to 'prevent its destruction as evidence,' because incoming pages may destroy stored numbers on pagers that have limited memory, and the contents of some pagers can be destroyed by turning off the pager or pushing a button."[16]

Nevertheless, the appellate court expressed concern that the United States Supreme Court ruling in *Robinson*,[17] which authorized a complete and thorough search of an arrested suspect and his possessions, relied upon by the trial court, could not have anticipated the subsequent development of a portable telephone capable of containing a large amount of personal information about an arrested suspect.[18] In *Robinson*, an officer arrested a suspect for driving with a revoked driver's license and during a search incident to arrest of the suspect, the officer located a cigarette pack containing heroin.[19] However, the appellate court felt constrained by the conformity clause of "article I, section 12 of the Florida Constitution, which mandates we follow United States Supreme Court precedent in the area of search and seizure."[20]

Therefore, the appellate court felt compelled to rely upon the holding in *Robinson*, "in which the United States Supreme Court held that the search-incident-to-arrest warrant exception permits a search and inspection of the contents of personal items found on the arrestee, even if it is unlikely that the arrestee has a weapon or evidence related to the crime on his person."[21] Accordingly, the appellate court certified this issue to the Florida Supreme Court as a matter of "great public importance."[22]

III. The Supreme Court

Overruling the trial and appellate court decisions, the Florida Supreme Court found that "*Robinson* is neither factually nor legally on point"[23] in this case and held "that the conformity clause does not require Florida courts to apply the holding of *Robinson* to the search of the electronic device cell phone incident to an arrest."[24] Additionally, the court found that the conformity clause "does not apply with regard to [contrary] decisions of other federal courts."[25]

The court relied on the United States Supreme Court ruling in *Arizona v. Gant*[26] to hold that an arrested suspect's cellular telephone cannot be searched, without a warrant, by law enforcement to discover evidence of a crime. Interestingly, *Gant* did not involve a law enforcement search or seizure of an electronic device. Gant committed the crime of driving with a suspended driver's license and after he exited his vehicle and walked towards officers, Gant was arrested and his vehicle was searched, resulting in the discovery of cocaine in Gant's vehicle.[27] *Gant* held that officers could not search the vehicle of an arrested suspect, if the suspect had been safely removed from the vehicle and there existed no demonstrable concern regarding officer safety or preservation of evidence, without first obtaining a search warrant.[28]

The seminal finding of this decision is the court's view that a cellular telephone is essentially a miniature computer and that "allowing law enforcement to search an arrestee's cell phone without a warrant is akin to providing law enforcement with a key to access the home of the arrestee. . . .We refuse to authorize government intrusion into the most private and personal details of an arrestee's life without a search warrant simply because the cellular phone device which stores that information is small enough to be carried on one's person."[29]

IV. Dissent

The Florida Supreme Court decision in *Smallwood* revealed strong opposition between the four justices in the majority opinion and the two dissenting justices.

Chief Justice Polston concurred in the dissenting opinion authored by Justice Canady, which noted that four "of the federal circuit courts of appeals have addressed the issue we consider in this case. And they all have concluded that a search of the contents of a cell phone found on the person of an arrestee is within the proper scope of a search incident to arrest under *United States v. Robinson*."[30]

The dissent noted that *United States v. Murphy*[31]

recognized "prior holdings 'that officers may retrieve text messages and other information from cell phones and pagers seized incident to an arrest' and rejecting defendant's 'argument that the government must ascertain a cell phone's storage capacity in order to justify a warrantless search of that phone incident to arrest.'"[32] Additionally, *United States v. Finley*[33] held that "'the call records and text messages retrieved from [defendant arrestee's] cell phone' were not subject to suppression."[34] Further, both *United States v. Pineda-Areola*[35] and *Silvan W. v. Briggs*[36] held that the officers could search the contents of cellular telephones found on an arrestee's person.[3]

The dissent argued that the majority's view in this case held "the potential to work much mischief in Fourth Amendment law."[38] Further, the dissent notes that there existed no issue in this case, as argued by the majority, regarding law enforcement's access to "remotely stored data" through the portal of Smallwood's telephone.[39] Finally, the dissent reasons that "it is unquestionable that individuals frequently possess on their persons items with 'highly personalized and private information,'" however, items "found on the person of an arrestee are subject to inspection as a consequence of the arrest."[40]

The majority responded to the dissent by arguing that the dissent's statements defy "logic and common sense in this digital and technological age."[41] Further, the majority finds that for "the dissent to contend that a cellular phone does not carry information of a different 'character' than other types of personal items an individual may carry on his person is to ignore the plainly (and painfully) obvious."[42] Therefore, the majority "decline[d] to adopt the contrary positions of the decisions relied upon by the dissent."[43]

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Endnotes

1 Smallwood v. State of Florida, No. SC11-1130 (Fla. 2013), *available at* http://www.floridasupremecourt.org/decisions/2013/sc11-1130.pdf.

2 *Smallwood,* slip op. at 2.

3 *Id.*

4 *Id.*

5 *Id.* at 3.

6 *Id.* at 4.

7 *Id.*.

8 *Id.* at 5.

9 New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860 (1981).

10 United States v. Finley, 477 F.3d 250, 260 (5th Cir. 2007).

11 *Smallwood,* slip op. at 6.

12 *Id.* at 8.

13 United States v. Young, 278 Fed. Appx. 242, 245 (4th Cir. 2008).

14 Smallwood v. State of Florida, 61 So.3d 448, 454 (Fla. 1st DCA 2011).

15 United States v. Ortiz, 84 F.3d 977, 984 (7th Cir. 1996).

16 Smallwood, 61 So.3d at 454.

17 414 U.S 218, 94 S.Ct. 467 (1973).

18 *Id.* at 448.

19 United States v. Robinson, 414 U.S 218, 220-223, 94 S.Ct. 467 (1973).

20 Smallwood v. State of Florida, 61 So.3d 448 (Fla. 1st DCA 2011).

21 *Smallwood*, slip op. at 8.

22 *Id.* at 9.

23 *Id.* at 11.

24 *Id.* at 12.

25 *Id.* at 11.

26 Arizona v. Gant, 556 U.S 332, 129 S.Ct. 1710 (2009).

27 *Id.* at 336.

28 *Id.* at 351.

29 *Smallwood*, slip op. at 28.

30 *Id.* at 34.

31 United States v. Murphy, 552 F.3d 405, 411 (4th Cir. 2009).

32 *Smallwood,* slip op at 34.

33 United States v. Finley, 477 F.3d 250, 259 (5th Cir. 2007).

34 *Smallwood*, slip op. at 28.

35 United States v. Pineda-Areola, 372 Fed. Appx. 661, 663 (7th Cir. 2010)(unpublished).

36 Silvan W. v. Briggs, 309 Fed. Appx. 216, 225 (10th Cir. 2009) (unpublished).

37 *Smallwood,* slip op. at 28.

38 *Id.* at 35

39 *Id.* at 36.

40 *Id.* at 37.

41 *Id.* at 17.

42 *Id.*

43 *Id.* at 28.

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