

# STATE COURT Docket Watch®

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INSIDE

## 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*,<sup>1</sup> 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.”<sup>2</sup> As one assessment of single subject rules related, “Not surprisingly, legislative log rolling is as old as the legal

system itself.”<sup>3</sup> 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.<sup>4</sup> 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 . . . .”<sup>5</sup> 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.”<sup>6</sup>

### 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

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

Pennsylvania Supreme Court Permits Waivers for Future Negligence by Third Parties

Louisiana Supreme Court Strikes Down Statewide Voucher Program

## 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.<sup>1</sup> The May 2, 2013 decision restricted an arresting officer’s ability to search property found on an arrestee.

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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 Sherk 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

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"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,<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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."<sup>10</sup>

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.<sup>11</sup> 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,"<sup>12</sup> to a current Senator remarking, "It seems very simple to me."<sup>13</sup> That latter Senator's approach: break up the CLRA into five separate bills.<sup>14</sup>

The court's ruling has also prompted legislators to reevaluate how judges are selected in the state; limits on judicial tenure are also being considered.<sup>15</sup> 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.<sup>16</sup> 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](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*, OKLAHOMAWATCHDOG.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](http://www.oksenate.gov/news/press_releases/press_releases_2013/pr20130604a.htm).
15. McGuigan, *supra* note 11.
16. See [www.statecourtsguide.com](http://www.statecourtsguide.com) for more information.

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### I. THE TRIAL COURT

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

Upon arresting Smallwood, an officer collected a cellular telephone from Smallwood's pocket and viewed the photographs contained therein.<sup>6</sup> The officer discovered that the photographs were taken subsequent to the robbery and depicted a similar handgun and a stack of money.<sup>7</sup> 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.<sup>8</sup>

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