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COMMENT

WHIPPLE V. PHILLIPS AND SONS TRUCKING, LLC: WRONGFUL DEATH AND THE OKLAHOMA CONSTITUTION—VINDICATING A CONSTITUTIONAL RIGHT THAT “SHALL NEVER BE ABROGATED”

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INTRODUCTION

This Comment will discuss the topic of whether a person, as a decedent’s next-of-kin, has a right to workers’ compensation recovery under Oklahoma’s workers’ compensation system. The Oklahoma Supreme Court recently released its opinion on the issue in *Whipple v.*

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Phillips and Sons Trucking, LLC.¹ This Comment will examine this decision in detail after giving a historical account of Oklahoma's workers' compensation system and how the system came to exist in its modern form. Viewing *Whipple* in this light will help establish the proper perspective and context from which the Oklahoma Supreme Court's decision can be viewed.

With this foundation laid, the bulk of this Comment will consist of analyzing the Court's decision within the constraints of the Oklahoma Constitution. Next, the Comment will address why the Court's decision may or may not be correct. In so doing, the Comment will consider the facts of the case and compare them to existing law. The body of existing law the Comment will rely upon includes statutory texts from Oklahoma and other states which are relevant to the same issue presented in *Whipple*. The use of these texts will help answer the question of whether, as the Court puts it in its opinion, "[t]he Legislative attempt to limit recovery"² is consistent with the framework of Oklahoma's workers' compensation system and the Oklahoma Constitution. Moreover, the use of these texts will enable the Comment to address whether Oklahoma's system is consistent with provisions from other states. To accomplish this, the Comment will highlight texts from several states which include provisions for parental recovery at least as broad as Oklahoma's statute,³ and, in at least one instance, more expansive⁴ than Oklahoma's. By comparing *Whipple* to these various texts, the Comment will be able to assess whether the Court's interpretation of the law in *Whipple* was reasonable.

FACTS

The event giving rise to the complaint Sharla Whipple (Whipple) alleged against Phillips Trucking occurred on October 6, 2016, when her son, Taylor Borth (Borth), was "crushed to death by a gin pole truck operated during an oilfield mud pump unloading procedure."⁵ Borth was "twenty-three year[s] old, unmarried, [and] childless."⁶ At the time of Borth's death, the Workers' Compensation Act provided for wrongful death benefits to be distributed "to a spouse, child, or legal guardian" so

1. *Whipple v. Phillips & Sons Trucking, LLC*, 2020 OK 75, 474 P.3d 339.

2. *Id.* ¶ 15, 474 P.3d at 345.

3. OKLA. STAT. tit. 12, § 1053(3) (2011 & Supp. 2020).

4. *See* LA. STAT. ANN § 23:1231(2) (2017).

5. *Whipple*, ¶ 2, 474 P.3d at 340.

6. *Id.*

long as the guardian was dependent on the employee.⁷ Whipple did not fall into any of these categories.⁸ Thus, to recover following the accident, she filed an action against Borth's employer, Phillips Trucking, LLC, in district court to recover wrongful death benefits.⁹

PROCEDURAL POSTURE

The Beginning: Challenging the Statute

Whipple brought her action in the District Court for Canadian County, Oklahoma alleging the wrongful death of her son.¹⁰ In keeping with the wrongful death cause of action, she specifically alleged "that the employer 'knew or should have known that the injury' to Borth and 'the resulting death was substantially certain to occur.'"¹¹ Upon Whipple's commencement of the action, Phillips Trucking filed for summary judgment on May 29, 2019.¹² The corporation argued in its motion that Borth's mother was trying to circumvent Oklahoma's workers' compensation system.¹³ On this motion, the trial court granted summary judgement to Phillips Trucking on July 25, 2019, because the court agreed that Whipple's remedy could only be found within the confines of the workers' compensation system.¹⁴ Following Phillips Trucking's successful motion for summary judgement, the District Court certified its ruling as interlocutory and ready for appeal on October 2, 2019, and stayed all further proceedings until any issues with the case were resolved on appeal.¹⁵ The Oklahoma Supreme Court granted certiorari to Whipple's appeal from the District Court's judgment.¹⁶ The issue on appeal arises out of the District Court's finding that Whipple's exclusive remedy should be found within the statutory confines of the Oklahoma worker's compensation system. The text of the relevant provision can be found in

7. OKLA. STAT. tit. 85A, § 47, (2011) *invalidated by* Whipple v. Phillips & Sons Trucking, LLC, 2020 OK 75, 474 P.3d 339.

8. *Whipple*, ¶ 2, 474 P.3d at 340.

9. *Id.* ¶ 3, 474 P.3d at 341.

10. *Id.* ¶ 0, 474 P.3d at 339.

11. *Whipple*, ¶ 3, 474 P.3d 339, 341.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* ¶ 4, 474 P.3d at 341.

16. *Id.*

the 2014 amended version of the Oklahoma Statutes, title 85A, section 47 (title 85A, section 47).¹⁷

CONFRONTING THE ISSUE

Constitutional Basis

Justice Kauger wrote the opinion of the Court with Justices Winchester, Kane, and Rowe dissenting (with no dissent included in the text).¹⁸ Justice Darby did not vote.¹⁹ Upon granting certiorari, the Oklahoma Supreme Court focused its attention on answering the question of whether title 85A, section 47,²⁰ as relied upon by the District Court and Phillips Trucking, places an unconstitutional limitation on a parent's right to recover for wrongful death.²¹ This issue arises from provisions contained within Oklahoma Statutes, title 12, section 1053 (title 12, section 1053)²² and article XXIII, section 7 of the Oklahoma Constitution.²³ These documents directly conflict with the text of title 85A, section 47. The text of title 12, section 1053 and article XXIII, section 7 of the Oklahoma Constitution specifically provide for a parent's right to recovery in an action alleging wrongful death whereas title 85A, section 47 purports to effectively terminate this right.²⁴ The Court only addressed the discrepancies between provisions contained within article XXIII, section 7 and title 12, section 1053 compared to those within title 85A, section 47.²⁵ In keeping with the Court's narrow focus, this Comment's analysis of the issue will be similarly limited to whether a parent should have a right to seek recovery based on the parent being classified as decedent's next-of-kin.

17. *Id.* ¶ 3, 474 P.3d at 341.

18. *Id.* ¶ 16, 474 P.3d at 346.

19. *Id.*

20. OKLA. STAT. tit. 85A, § 47, (2011) *invalidated by* Whipple v. Phillips & Sons Trucking, LLC, 2020 OK 75, 474 P.3d 339.

21. *Whipple*, ¶ 0, 474 P.3d at 339-40.

22. OKLA. STAT. tit. 12, § 1053 (2011 & Supp. 2020).

23. OKLA. CONST. art. XXIII, § 7.

24. *Whipple*, ¶¶ 11-12, 474 P.3d at 343-44.

25. *Id.* ¶ 1, 474 P.3d at 340.

REASONING: THE OKLAHOMA SUPREME COURT'S VIEW

Oklahoma Constitution Article XXIII, Section 7: History of the Text

Due to the nature of the Court's reasoning, this section could probably be titled "Common Law Beginnings." Regardless of alternative titles, the Court began the *Whipple* opinion by laying a foundation for its reasoning based almost solely on the text of the Oklahoma Constitution—it specifically noted that article XXIII, section 7 clearly states "[t]he right of action to recover damages for injuries resulting in death shall never be abrogated."²⁶ The Court next discussed the original foundation on which wrongful death actions in Oklahoma have been based.²⁷ At the time of statehood, wrongful death actions were maintained under section 4313 of the Oklahoma Statutes of 1893 which was, at the time, the only provision for wrongful death actions in Oklahoma.²⁸ The Court also identified title 12, section 1053 as being one of many versions of the "widely adopted Lord Campbell's Act" (the Act).²⁹

Breaking Common Law Barriers: Lord Campbell's Act

The Act plays a significant role in the history of modern wrongful death law because it "was intended to make an exception to the common law rule by creating a new statutory right of action in favor of the family of the decedent."³⁰ It is important to note the words "new statutory right"³¹ are particularly significant because, at the time the original common law of wrongful death was developing, a person's rights were deemed to have terminated the moment they died; these rights could not be transferred to any other person, regardless of one's status as a family member, relative, or next-of-kin.³² Since the common law did not allow recovery after death, the Act was a novel advancement because it effectively allowed family members to overcome the common law barrier to recovery death had

26. *Id.* ¶ 6, 474 P.3d at 342 (quoting OKLA. CONST. art. XXIII, § 7).

27. *Id.* ¶¶ 6-11, 474 P.3d at 342-43.

28. *Id.* ¶ 8, 474 P.3d at 342 (quoting *Riley v. Brown & Root, Inc.*, 1992 OK 114, ¶¶ 10-12, 836 P.2d 1298, 1300).

29. *Id.*

30. 6 Thomas D. Sawaya, FLORIDA PRACTICE, PERSONAL INJURY AND WRONGFUL DEATH ACTIONS § 16:3 (2020-2021 ed. 2021).

31. *Id.*

32. *Whipple*, ¶ 8, 474 P.3d at 343 (quoting *Riley*, ¶¶ 10-12, 836 P.2d at 1300-01).

traditionally presented.³³ Lord Campbell's Act and versions based on it have been adopted, often in the form of a statute, to artificially transfer to personal representatives any rights the decedent would have had in life.³⁴ As in many states where a version of Lord Campbell's Act has been adopted, Oklahoma adopted section 4313, which evolved over time to become what we recognize today as title 12, section 1053.³⁵

Oklahoma Constitution Article XXIII, Section 7: Analyzing the Text

The text of title 12, section 1053 effectively guarantees the right to a wrongful death action, which, as the Court notes, is a right not provided for in the Oklahoma Constitution's common law heritage.³⁶ However, because the Constitution adopted language from section 4313, a right to a wrongful death action is protected because it is enshrined within the text of the Constitution.³⁷ The final modification to the Oklahoma Constitution regarding provisions for wrongful death was adopted in 1950.³⁸ This amendment³⁹ formally included a provision stating wrongful death suits must be brought under the workers' compensation system.⁴⁰ According to the Court's interpretation of *Capitol Steel and Iron Co. v. Fuller* in its *Whipple* opinion, the 1950 amendment did not give the Legislature any authority to determine the applicability of workers' compensation except to the extent of determining the amount of recovery.⁴¹ The Court based its reasoning and analysis on observations gleaned from past Oklahoma Supreme Court rulings as well as directly from the text of article XXIII, section 7 of the Oklahoma Constitution.

Reviewing Past Cases

The first in the series of cases reviewed by the Court was *Riley v. Brown and Root, Inc.* which noted the history of article XXIII, section 7 and how its adoption as part of the Constitution set in stone an individual's

33. *Id.* ¶ 8, 474 P.3d at 342 (quoting *Riley*, ¶ 10, 836 P.2d at 1300-01).

34. *Id.* ¶ 8, 474 P.3d at 342-43 (quoting *Riley*, ¶¶ 10, 12 836 P.2d at 1300-01).

35. *Id.* ¶ 8, 474 P.3d at 342 (quoting *Riley*, ¶ 10, 836 P.2d at 1300).

36. *Id.* ¶ 10, 474 P.3d at 342.

37. *Id.* ¶ 11, 474 P.3d at 342.

38. *Capitol Steel & Iron Co. v. Fuller*, 1952 OK 209, ¶ 5, 245 P.2d 1134, 1137.

39. OKLA. CONST. art. XXIII, § 7.

40. *Whipple*, ¶ 9, 474 P.3d at 343 (quoting *Capitol Steel*, ¶ 14, 245 P.2d at 1139).

41. *Id.*

right to recovery for wrongful death.⁴² Next was *Fuller*, which was chosen because the Court held article XXIII, section 7 did not authorize the Legislature to determine applicability of workers' compensation laws except as required to fix the amount of recovery allowed.⁴³ The third case the Court chose was *Hammons v. Muskogee Medical Center Authority*, which held article XXIII, section 7 did not allow the elimination of the right to recover damages following injuries resulting in death.⁴⁴ Finally, *F.W. Woolworth Co. v. Todd* was chosen for its strong language regarding the Court's interpretation of the text contained within article XXIII, section 7.⁴⁵

The Court spent more time discussing *Woolworth* than any of the other cases.⁴⁶ While the Court chose each case to illustrate a point regarding article XXIII, section 7, *Woolworth* is notable among them because it displays with unambiguous clarity the importance the Court places on the words "shall never be abrogated."⁴⁷ The Court found these words should be understood as being the equivalent of "shall never be annulled or repealed by an authoritative act"⁴⁸ or alternatively, "shall never be withdrawn or taken away by the authority which bestowed it, that is, the legislative act, or other legislative authority."⁴⁹

In further considering the issue, the Court found title 12, section 1053 allowed a decedent's representative to bring an action against a tortfeasor, and in the case that no personal representative has been appointed, the action may be successfully maintained by a surviving spouse, or by a next of kin if there is no spouse.⁵⁰ Under the text of title 12, section 1053, the Court found (before the overhaul of Oklahoma's workers' compensation system in 2014), dependent parents, brothers, sisters, grandparents, and grandchildren were eligible for benefits following the death of a worker.⁵¹ The Court then compared the system as it existed prior to 2014 to the post-

42. *Id.* ¶ 6, 474 P.3d at 342.

43. *Id.* ¶ 9, 474 P.3d 343 (quoting *Capitol Steel*, ¶ 14, 245 P.2d at 1139).

44. *Id.* (quoting *Hammons v. Muskogee Med. Ctr. Auth.*, 1985 OK 22, ¶ 7, 697 P.2d 539, 542).

45. *Id.* ¶ 10, 474 P.3d at 343.

46. *See generally, id.*

47. *Id.* ¶ 10, 474 P.3d at 343 (quoting *F.W. Woolworth Co. v. Todd*, 1951 OK 36, ¶ 11, 231 P.2d 681, 684).

48. *Id.*

49. *Id.*

50. *Id.* ¶ 11, 474 P.3d at 343-44.

51. *Id.* ¶ 11, 474 P.3d at 344

2014 system being impugned by Whipple in her case.⁵² In doing so, the Court found, under the overhauled system, decedents' parents, brothers, sisters, grandparents, and grandchildren have been foreclosed from seeking recovery—thus leaving only a spouse or child with an ability to recover, or in the absence of one of these, legal guardians who are financially dependent on the decedent.⁵³ Additionally, pecuniary loss is no longer recoverable under any circumstance.⁵⁴ The Court found such a statutory construction would effectively “abrogate[] the right of action to recover for damages resulting in death.”⁵⁵

The Court plainly stated that the Legislature is free to limit the amount of damages which may be recoverable under the workers' compensation system, but also held that in no case may the Legislature categorically eliminate one's right to such recovery.⁵⁶ Taking this interpretation into consideration, the Court concluded title 85A, section 47 amounted to an unconstitutional “Legislative attempt to limit recovery for wrongful death.”⁵⁷ The Court found such an attempt was improper according to the constitutional “caveat” which specifically precludes the Legislature from entirely abrogating an individual's right to recovery.⁵⁸ The Court suggested Whipple should file her action in the District Court to avoid the constitutional prohibition on the abrogation of her rights.⁵⁹ Finally, the Court suggested the Legislature should make a simple amendment to title 85A, section 47 which would reinstate statutory heirs as included prior to the 2014 amendments.⁶⁰ This would make the statute more effective as well as cure it of any constitutional defects.⁶¹

52. *Id.* ¶¶ 11-12, 474 P.3d at 343-44.

53. *Id.* ¶ 12, 474 P.3d at 344.

54. *Id.*

55. *Id.*

56. *Id.* ¶¶ 12-15, 474 P.3d at 344-46.

57. *Id.* ¶ 15, 474 P.3d at 345.

58. *Id.*

59. *Id.* ¶ 16, 474 P.3d at 346.

60. *Id.*

61. *Id.*

ANALYSIS

Did the Oklahoma Supreme Court Rule Correctly?

In my view, the Court ruled correctly. Even if I were to disagree with the result of the Court's ruling, it would be dishonest if I did not acknowledge the compelling historical basis for the ruling. I need not dwell on this issue because I agree with the ruling. I argue there is only one logical way to arrive at the proper conclusion in *Whipple*, and this conclusion is the one the Court reached. I would start with the constitution's text, as the Court did.⁶² The text is not ambiguous; it leaves little question as to the intent of the writers at the time the amendment was adopted.

While the text is the foundation of my perspective on the issue, I believe it is still of paramount importance to keep in mind how the statute in question came to be. The Legislature enacted title 85A, section 47 pursuant to its legislative prerogative. This is to say, the Legislature enacted the statute without direct approval of the people. Under normal circumstances this is nothing to be concerned about. However, when a constitutional provision is in question the issue becomes more grave because the constitutional amendment process requires approval by the people of Oklahoma.⁶³ I place a great deal of weight on maintaining the structure of a representative government in the United States. With that in mind, one could interpret the holding in *Whipple* as the Court acknowledging this importance as well. I find the Court's reasoning compelling that a next-of-kin cannot be constitutionally deprived of their right to recovery.

The action taken by the Legislature did not appear to be in keeping with the text of the Oklahoma Constitution. Although I can understand why the Legislature might have a desire to amend the statute to remove non-dependent next-of-kin out of concern the workers' compensation system could be abused, doing so by statutory amendment rather than by constitutional amendment was not proper. The Court wisely chose not to judge or speculate as to why the Legislature amended the statute,⁶⁴ but rather confined its ruling and guidance to whether the amendment was

62. OKLA. CONST. art. XXIII, § 7.

63. *Id.* art. XXIV, §§ 1-3.

64. OKLA. STAT. tit. 85A, § 47, (2011) *invalidated by Whipple v. Phillips & Sons Trucking, LLC*, 2020 OK 75, 474 P.3d 339 .

constitutional and what could be done to cure its constitutional ailments.⁶⁵ I have chosen to follow the Court's lead and refrain from any speculation as well.

I find this ruling to be very agreeable because the Court gave the Legislature only the instruction needed to render title 85A, section 47 constitutional.⁶⁶ The Court did not say anything directly on this point, but arguably left open the possibility for the Legislature to offer to the people a constitutional amendment eliminating or abrogating next-of-kin rights. I respect the Court's decision to refrain from giving too much advice because in doing so they leave intact the roles of both the Legislature and the Judiciary as independent branches of government. I think this is a very desirable trait in a case dealing with a constitutional issue.

FUTURE EFFECTS ON THE LAW

The *Whipple* ruling is one of those which is important to people dealing with a similar situation as *Whipple*, but one which many individuals may never have need to take note of. In this regard, the ruling will probably not have a large impact on the law in the future compared to other court rulings. Nonetheless, *Whipple* is important because it subdues alleged legislative overreach by rendering a statute unconstitutional. *Whipple* potentially stands as a sounding board from which future constitutional challenges may be projected. Thus, although the subject of the opinion may not impact society as greatly as some other cases, the implications for future constitutional challenges almost certainly will have an impact which remains to be seen.

Following *Whipple*, the Legislature must choose from one or a combination of likely options. The first, and probably easiest, option would be for the Legislature to introduce an amendment to title 85A, section 47 essentially reverting the statute to its pre-2014 form (allowing next-of-kin to recover in a wrongful death action). As an alternative option, the Legislature could introduce an amendment to the Oklahoma Constitution bringing article XXIII, section 7 within the bounds of title 85A, section 47. The Court addressed the first of these options but stopped short of giving any other suggestions or advice to the Legislature regarding a preferred course of action. The Court's opinion really left the issue open-

65. *Whipple*, ¶ 16, 474 P.3d at 346.

66. *Id.*

ended, only suggesting in a short statement that rendering the statute constitutional would not be a difficult task.⁶⁷

Overall, if the Legislature should decide to act on the issue and amend the statute, nothing is likely to change in the future. On the other hand, should the Legislature decide to propose a constitutional amendment to reflect title 85A, section 47, wrongful death recoveries in Oklahoma will look a little different than in the past. Under a potentially amended constitution, there would be whole classes of individuals unable to maintain an action for the wrongful death of a relative or next-of-kin. The consequences of such an amendment are hard to predict since wrongful death cases are often very unique and factually dependent. The uniqueness of each case presents special predictive problems since each case is different regarding who is related to the deceased worker. Due to the inherent factual variations, a case-by-case analysis rather than a bright-line rule would probably result in the greatest overall fairness to families and next-of-kin of the deceased.

MY PERSPECTIVE

Supporting My Position

As discussed above, it is my position the Court ruled properly in this matter. The Oklahoma Constitution, in pertinent part, says “[t]he right of action to recover damages . . . shall never be abrogated”⁶⁸ and there is to be no limit set forth by statute aside from the amount which the Legislature should determine under Oklahoma workers’ compensation law. I want to disclose my tendencies toward an originalist viewpoint when it comes to constitutional matters, whether state or federal. Thus, when I consider the text of the Oklahoma Constitution, I believe the Court arrived at the proper conclusion. With this bias in mind, I will support my conclusion below.

The text of article XXIII, section 7 clearly states no law can be passed which would supplant the constitutional provision.⁶⁹ Article XXIII, section 7 also says the Legislature is only free to make changes as to the amount of recovery.⁷⁰ It is on these grounds I concur with the Court’s decision. The Constitution was adopted by a vote of the people and

67. *Id.*

68. OKLA. CONST. art. XXIII, § 7.

69. *Id.*

70. *Id.*

because of this, the people's voice should factor into decisions made by the Legislature. The people should have a chance to accept or reject legislative proposals materially affecting their ability to recover for something as unfortunate and shocking as the death of a loved one at their place of employment. Thus, I support the Court's conclusion finding title 85A, section 47 unconstitutional and stating that it should be modified to bring it within the bounds of the Constitution. The Legislature is accountable to the people when their proposals effectively amend a section of the Oklahoma Constitution without the consent of the people. The sort of legislative action described by the Court in *Whipple*⁷¹ is precisely why article XXIV, sections 1 through 3 of the Oklahoma Constitution call for the people to give their input in matters related to constitutional amendments.⁷²

Comparing Oklahoma to Other States

The Oklahoma Supreme Court's decision in *Whipple* finding the provision unconstitutional⁷³ is not without precedent in the United States. Upon researching the issue, I found statutes from several other states which have similar workers' compensation provisions as found in title 12, section 1053. Notably, at the time of this writing, the provisions I will cite stand unquestioned. Due to the ruling in *Whipple*, the same cannot be said for title 85A, section 47.

To begin with, Texas offers a provision which provides for a chance at recovery: "[i]f there is no eligible spouse, . . . child, [or] grandchild, the death benefits shall be paid in equal shares to surviving dependents . . . who are parents, stepparents, siblings, or grandparents of the deceased."⁷⁴ Pennsylvania's guidelines say, "[i]f there be neither widow, widower, nor children entitled to compensation, then to the father or mother, if dependent to any extent upon the employee at the time of the injury."⁷⁵ Colorado provides for recovery where the parent is dependent to some extent on the decedent.⁷⁶ Kansas provides for parental recovery if the parent is at least partially dependent on their child's wages.⁷⁷ Finally, New

71. *Whipple*, ¶ 15, 474 P.3d at 345-46.

72. OKLA. CONST. art. XXIV, §§ 1-3.

73. *Whipple*, ¶ 15, 474 P.3d at 346.

74. TEX. LAB. CODE ANN. tit. 5, § 408.182(d) (West 2021).

75. 77 PA. STAT. AND CONS. STAT. § 561(5) (West 2021).

76. COLO. REV. STAT. ANN. § 8-41-502 (West 2021).

77. See *Baker v. Western Power & Light Co.*, 78 P.2d 36 (Kan. 1938).

York offers a chance at recovery in the amount of “twenty-five per centum of such wages for the support of . . . each parent, or grandparent, of the deceased if dependent upon him or her at the time of the accident.”⁷⁸ I chose to include the New York provision because some Oklahoma law regarding workers’ compensation traces its roots to New York law.⁷⁹

Louisiana: A Variation on the Theme

I have placed Louisiana’s system in its own section to show an interesting variation on the theme. Louisiana’s provision carves out what might be seen as a wider rule than most. However, there is a caveat. The Louisiana rule states “[i]f the employee leaves no legal dependents and no biological or adopted children entitled to benefits under any . . . compensation system, the sum of seventy-five thousand dollars shall be paid to each surviving parent of the deceased . . . which shall constitute the sole and exclusive compensation.”⁸⁰ Louisiana’s caveat is that no matter your situation, recovery is capped at seventy-five thousand dollars. I chose to include Louisiana’s provision in an effort to show how widely varied states may be regarding parental recovery guidelines while still allowing parents to recover.

Treatment of the Issue in Other States

The reason I cite provisions from various states is to show how the Oklahoma Legislature’s theory of recovery compares to our neighbor states. Had the Oklahoma Supreme Court ruled in favor of Phillips Trucking, Oklahoma would be rather unique among many of our neighboring states and even across the nation by allowing a parent to be effectively cut off from a chance at recovery. Before offering my closing, I want to make a note of two matters. First, I believe it is important to keep in mind many of the state provisions cited suggest a parent *may* recover if they meet certain criteria as opposed to suggesting a parent *shall* recover under any circumstances. Additionally, among the states cited, Louisiana is unique because its provision offers a “lump-sum”⁸¹ payment to a parent without requiring a showing of the parent’s dependency on the deceased.

78. N.Y. WORKERS’ COMP. LAW § 16 (McKinney 2021).

79. *Whipple v. Phillips & Sons Trucking, LLC*, 2020 OK 75, ¶ 6, 474 P.3d 339, 342.

80. LA. STAT. ANN. § 23:1231(2) (2012).

81. *Id.*

Second, I in no way want my writing to suggest the Legislature purposefully violated the Constitution by writing title 85A, section 47 as it did. To suggest as much would be speculative and unfairly critical of whatever the Legislature's end goal might have been.

I conclude my perspective by suggesting *Whipple* should not be seen as something more than it is. *Whipple* is a decision which should be viewed as the Court maintaining the delicate balance existing between the branches of government. As one previous Oklahoma Supreme Court case put it, the Court must fulfill its "adjudicative function that requires it to hear and determine . . . disputes."⁸² When the Court fulfills this requirement, it is helping to maintain the balance of power which has traditionally been so highly regarded in our system of governance. The Oklahoma Supreme Court has recognized "[g]eneral constitutional order is offended when one department of government usurps power expressly delegated to another."⁸³ This order is why the delicate balance between branches of government must stay intact.

Potential Flaws and Alternative Arguments

I want to briefly note the facts of *Whipple* do not explain (or maybe the courts left out for want of importance) whether *Whipple* was, at the time of Borth's death, dependent upon his income. Nonetheless, this small detail is arguably noteworthy and potentially of significance because even though she "won" her case at the Oklahoma Supreme Court, she could still end up recovering nothing from Phillips Trucking. This outcome would be likely if the Oklahoma Legislature chose to pass legislation requiring a parent to show dependency on the decedent's income. Most of the state provisions (New York,⁸⁴ Kansas,⁸⁵ and Pennsylvania⁸⁶) I cited include language providing dependency on the decedent factors in some way as a prerequisite to recovery. Louisiana is the notable outlier among the others

82. Hill v. Am. Med. Response, 2018 OK 57, ¶ 21, 423 P.3d 1119, 1128.

83. Dank v. Benson, 2000 OK 40, ¶ 6, 5 P.3d 1088, 1091.

84. N.Y. WORKERS' COMP. LAW § 16(4) (McKinney 2021) (allowing recovery if the parent is dependent on the decedent).

85. KAN. STAT. ANN. § 44-508 (West 2021) (allowing recovery if the parent is partially dependent on the decedent).

86. 77 PA. STAT. AND CONS. STAT. § 561(5) (West 2021) (allowing recovery is the parent is dependent to "any" extent on the decedent).

because it allows a parent to recover, but limits recovery to a specific amount.⁸⁷

Even in the face of a statutory text requiring dependency, a parent in Whipple's position could potentially argue whether the dependency requirement would still effectively "abrogate"⁸⁸ a parent's right to recovery within the *Whipple* Court's understanding of the Oklahoma Constitution.⁸⁹ Against this, the Legislature might argue allowing a dependent parent to recover would qualify as a limitation "within [the Legislature's] constitutional authority"⁹⁰ thereby taking it out of reach of the Oklahoma Constitution's prohibition against abrogating one's right to recovery.⁹¹ These arguments end up being speculative or hypothetical without any signals from the Legislature as to its intentions following *Whipple*.

Oklahoma's workers' compensation provisions are somewhat broad and vague thus leaving it up to interpretation. However, broadness and vagueness aside, I agree with the Court's finding that the Legislature had effectively abrogated Whipple's parental right to attempt recovery in this circumstance. The Constitution is very clear on this matter, stating "[t]he right of action to recover damages . . . shall never be abrogated."⁹² The Legislature has good options open to it, including copying a provision from another state. I believe Oklahoma would do well to create a statute similar to one from the states I cited. The provisions I cited to all seem to allow a parent a fair chance at recovery. I believe Oklahoma should take note of the Louisiana provision⁹³ offering a fixed amount of recovery. The Louisiana rule is intriguing because it is simple and mechanical to apply which would have the effect of leaving almost no question as to whether one does or does not qualify for recovery.

Treatment of this Decision Across the Country

While researching the issue confronting the Court in *Whipple*, I found few direct references to the case at issue. Of the limited source material available at the time of this writing, all seem to treat the decision with

87. LA. STAT. ANN. § 23:1231(2) (2012).

88. *Whipple v. Phillips & Sons Trucking, LLC*, 2020 OK 75, ¶ 10, 474 P.3d 339, 343.

89. OKLA. CONST. art. XXIII, § 7.

90. *Whipple*, ¶ 5, 474 P.3d at 341.

91. OKLA. CONST. art. XXIII, § 7.

92. *Id.*

93. LA. STAT. ANN. § 23:1231(B)(2) (2012).

neutrality, if not favorably. One secondary source citing to *Whipple* suggests “limiting recovery for wrongful death to a spouse, child or legal guardian dependent on the worker, as opposed to allowing recovery by statutory heirs, violated [a] constitutional provision precluding the abrogation of the right of action to recover damages for injuries resulting in death” because the “constitution allowed limitation of amount of damages but not elimination . . . altogether.”⁹⁴ The article offers no other commentary. However, at the time of this writing, *Whipple* is about to face its first real challenge as there is a pending case which cites *Whipple* favorably in support of a brief for a motion to dismiss.⁹⁵ Only time will tell whether the Court will adhere strictly to its decision in *Whipple*.

CONCLUSION: WHAT DOES *WHIPPLE* MEAN?

I think at this point it would be wise to step back from the Court’s reasoning for a moment and review some of the ground that has been covered. However, before doing so we should remember that the subject matter of a wrongful death case is, quite obviously, death. This death is often (if not always) the death of a family member. Something such as wrongful death recovery can be very emotionally difficult for the decedent’s family or next-of-kin. The Court seemed to recognize this fact, and by its decision in *Whipple*, attempted to protect the rights of families to recover something for loss of life. Money will never replace relationships or the loved-one’s physical presence, but the opportunity to recover may at least soften the harshness of being suddenly deprived of one’s child, sibling, mother, or father.

Another key takeaway from *Whipple* is how the Court does not in any way attempt to strip the Legislature of its authority to manage the Oklahoma workers’ compensation system. Rather, the Court by its holding declared the Legislature’s actions in this circumstance as a mere overstep of its authority without an inquiry into whether it was intentional or not. Additionally, the Court did not scold the Legislature, instead suggesting options the Legislature could follow which would cure title 85A, section 47 of constitutional defects and would restore the rights of certain family members and next-of-kin. The Court accomplished this while preserving

94. 82 AM. JUR. 2D *Workers’ Compensation* § 55 (2022).

95. Defendant’s Motion to Dismiss and Brief in Support at 3-4, *Fred’s Tire & Battery, LLC v. Compsource Mut. Ins. Co.* (No. CJ-2020-4891), 2020 WL 8099566 at *5 (Okla. Dist. filed November 19, 2020).

the integrity of the Legislature's authority over the workers' compensation regime. *Whipple* should be viewed as a simple and mechanical approach to preserving the integrity and primacy of the Oklahoma Constitution and the separation of powers among the branches of government. This outcome is very agreeable if governmental integrity and respect for the Oklahoma Constitution are one's main concerns.