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AMY ALEXANDER, et al. v. NAM KY DUONG, et al, and SENTINEL INSURANCE CO., LTD., et al.

2026 OK 76

Case Number: 120320

Decided: 10/19/2026

THE SUPREME COURT OF THE STATE OF OKLAHOMA

Cite as: 2026 OK 76, __ P.3d __

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

AMY ALEXANDER, individually, and as the Personal Representative of the ESTATE OF JEREMY S. ALEXANDER, and TAMARA DEAN, as the guardian, next friend, and mother of T.A., Plaintiffs/Appellees,

v.

NAM KY DUONG, individually, THUY NGUYEN, individually, and THE NAIL CENTER, located at 108 S. 2nd Avenue, Madill, OK. Defendants,

and SENTINEL INSURANCE CO., LTD., and RENT-A-CENTER, INC., Intervenor/Appellants.

ON CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION I

HONORABLE MARK R. CAMPBELL, TRIAL JUDGE

¶0 The decedent was killed in a motor vehicle accident while in the course and scope of his employment. Plaintiffs, the decedent's wife and the mother of his minor child, filed suit in tort against the driver who caused the accident. The decedent's employer and the employer's insurance carrier were allowed to intervene in Plaintiffs' action against the tortfeasor. Pursuant to 85A O.S.2014, § 43, Intervenor asserted a right to a portion of any proceeds Plaintiffs may recover in the action against the tortfeasor as repayment for the workers' compensation death benefits paid to Plaintiffs. Plaintiffs moved for summary judgment, arguing that Section 43 is an unconstitutional violation of Article 23, section 7 of the Oklahoma Constitution. The trial court granted summary judgment in favor of Plaintiffs. Intervenor appealed the trial court's decision, and COCA reversed the trial court. Plaintiffs petitioned this Court for Certiorari, which was granted. We hold that 85A O.S.2014, § 43 is constitutional and does not contravene Article 23, section 7 of the Oklahoma Constitution.

CERTIORARI PREVIOUSLY GRANTED;

COURT OF CIVIL APPEALS' OPINION VACATED;

ORDER OF THE TRIAL COURT VACATED; CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION

Phillip P. Owens, II, Owens Law Office, PC, Oklahoma City, Oklahoma for Appellants Sentinel Insurance Co., Ltd. and Rent-A-Center, Inc.

Blake Sonne, Norman, Oklahoma for Appellee Amy Alexander

Bob Burke, Oklahoma City, Oklahoma for Appellees Amy Alexander and Tamara Dean

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GURICH, J.

¶1 On March 17, 2018, Jeremy S. Alexander was driving eastbound on U.S. Highway 70 over the Roosevelt Bridge. Nam Ky Duong was driving westbound over the same bridge when he attempted to pass a vehicle on the right shoulder, lost control of his vehicle, crossed the center line, and hit Alexander's car head-on, causing the death of Alexander. Alexander was in the course and scope of his employment with Rent-A-Center when the fatal collision occurred. Rent-A-Center, through its insurance carrier Sentinel Insurance Co., Ltd., paid statutory workers' compensation death benefits, pursuant to 85A O.S.2014, § 47 of the Oklahoma Administrative Workers' Compensation Act, 1 to Amy Alexander, the decedent's widow, and to T.A., the decedent's son. It is alleged that T.A. has a severe learning disability.

¶2 In May of 2018, Plaintiffs, Amy Alexander and Tamara Dean, as mother and next friend of T.A., jointly filed suit in the District Court of Bryan County against Duong, businesses allegedly owned by Duong, and the owner of the vehicle, Thuy Nguyen, for Alexander's death. 2 On July 1, 2019, Rent-A-Center and Sentinel Insurance filed a motion to intervene in the case, asserting a right to recover a portion of the death benefits paid to Alexander's dependents under 85A O.S.2014, § 43(A)(1)(c). Over Plaintiffs' objection, the trial court granted the motion to intervene on August 23, 2019. On November 15, 2021, Plaintiffs filed a motion for summary judgment which advised the trial court that a settlement had been reached and asked the trial court to determine that 85A O.S.2014, § 43(A)(1)(c) is unconstitutional as applied to death benefits. After briefing and a hearing on January 4, 2022, the trial court entered an order granting Plaintiffs' motion for summary judgment on March 11, 2022.

¶3 Intervenor's appealed the trial court's order. On December 2, 2022, the Court of Civil Appeals (COCA) Division I reversed the trial court's summary judgment and, relying on an unpublished federal order and cases from other states, held that Section 43(A) is constitutional. Although we agree with the result reached by COCA, we granted certiorari to provide precedential guidance. We find that Section 43(A) should be construed in a way that does not offend the Oklahoma Constitution. COCA's opinion is vacated. The trial court's order of March 11, 2022, is vacated, and the case is remanded for further proceedings.

STANDARD OF REVIEW

¶4 At issue in this case is the constitutionality of 85A O.S.2014, § 43(A) as applied to death benefits. Issues of a statute's constitutional validity, construction, and application are questions of law subject to this Court's *de novo* review. *Lee v. Bueno*, 2016 OK 97, ¶ 6, 381 P.3d 736, 739. "*De novo* review involves a plenary, independent, and non-deferential examination of the trial court's rulings of law." *Sheffer v. Buffalo Run Casino, PTE, Inc.*, 2013 OK 77, ¶ 3, 315 P.3d 359, 361.

¶5 "In considering a statute's constitutionality, courts are guided by well-established principles and a heavy burden is cast on those challenging a legislative enactment to show its unconstitutionality." *Douglas v. Cox Ret. Props., Inc.*, 2013 OK 37, ¶ 3, 302 P.3d 789, 792. "The party seeking a statute's invalidation as unconstitutional has the burden to show the statute is clearly, palpably, and plainly inconsistent with the Constitution." *Strickland v. Stephens Prod. Co.*, 2018 OK 6, ¶ 4, 411 P.3d 369, 372.

ANALYSIS

¶6 The sole issue on appeal in this case is whether Section 43 violates Article 23, section 7 of the Oklahoma Constitution, as it relates to the Intervenor's entitlement to a portion of the settlement proceeds from Plaintiffs' tort action against Duong and the other defendants. Intervenor seeks a portion of the settlement funds as repayment for death benefits they paid to Alexander's surviving spouse and son on account of his death. In order to understand Section 43, we must consider it in the context of Article 23, section 7 of the Oklahoma Constitution, the creation of a workers' compensation death benefit, and the evolution of subrogation and indemnity for employers or insurance carriers who provide workers' compensation benefits.

History of Workers' Compensation Death Benefit

¶7 At the time of the adoption of the Oklahoma Constitution in 1907, Article 23, section 7 stated: "The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation." OKLA. CONST. art. XXIII, § 7 (1907). Eight years later, in 1915, the first iteration of the Oklahoma Workmen's Compensation Act was enacted. This original Oklahoma Workmen's Compensation Act only covered workplace injuries--not deaths--and therefore did not contain any provision for payment of a death benefit by an employer or its insurance carrier. See *Okla. Sess. Laws*, chap. 546, § 1, *et seq.* (1921). In *Roberts v. Merrill*, 1963 OK 250, 386 P.2d 780, our court observed:

Consistent with the constitutional inhibition against limitation of the amount recoverable for death, before the 1950 amendment of Art. 23, Sec. 7,... the Oklahoma Workmen's Compensation Act did not, and could not, comprehend any provisions for death benefit. It expressly excluded from its operation those cases where the accident resulted in death. The effect of the Compensation Act was to afford to the employee a special procedure under which to maintain his action where the injuries did not result in death. After his death his representatives could maintain their action (for wrongful death pursuant to the pertinent provisions of the Code of Civil Procedure, now designated as 12 O.S.1961 §§ 1053, 1054), but not under the Compensation Act.

1963 OK 250, ¶ 8, 386 P.2d at 782 (internal citations omitted). ³ The employer was prohibited from paying workmen's compensation benefits for the death of an employee, even when benefits were paid for a prior compensable injury and death later resulted from the injury. ⁴ Instead, if death were caused by the negligence of an employer, the dependents and heirs of the deceased employee could still sue the employer for wrongful death.

¶8 This was true until the early 1950s, when State Question 345 was placed on the ballot and approved. It amended Article 23, section 7 of the Oklahoma Constitution to read:

The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, *provided however, that the Legislature may provide an amount of compensation under the Workmen's Compensation Law for death resulting from injuries suffered in employment covered by such law, in which case the compensation so provided shall be exclusive.*

OKLA. CONST. art. XXIII, § 7 (adopted at election held on July 4, 1950) ⁵ (emphasis added to the language added in 1950). Following this constitutional amendment, the Legislature passed the Death Benefit Act, which amended Title 85, Section 22 to provide the very first Oklahoma workers' compensation death benefit (of \$13,500):

If the injury causes death within two (2) years from the date of the accident or, if the injury causes continuous disability and causes death within five (5) years from the date of accident, notice of which was given as provided in this Act, compensation shall be payable in the amount of Thirteen Thousand Five Hundred Dollars (\$13,500.00) and to the dependents of the deceased employee as defined herein.

85 O.S.1951, § 22(7). ⁶ The Death Benefit Act also added statutory dependents to 85 O.S.1951, § 48. ⁷ This statutory death benefit became the exclusive remedy of these statutory dependents against the employer, even if the employer were negligent in causing the death of the employee. ⁸

¶9 In 1952, this Court authored its first opinion--*Capitol Steel & Iron Co. v. Fuller*, 1952 OK 209, 245 P.2d 1134--construing the new Death Benefit Act. Notably, the Court explained that "the injured employee's cause of action for damages for personal injuries was and is one at common law, now abrogated by the Workmen's Compensation Law, but that the right of others to recover for his death is purely statutory and exists in this jurisdiction solely by virtue of [the wrongful death statute]." 1952 OK 209, ¶ 15, 245 P.2d at 1139 (citing *St. L. & S.F. Ry. Co. v. Goode*, 1914 OK 237, 142 P. 1185). "No cause of action for death is created by Article XXIII, sec. 7 (originally or as amended) or by the Workmen's Compensation Law which now applies to and controls both causes of action." *Id.* Consequently, "the Legislature may under the 1950 amendment [of Article 23, section 7], modify the provisions of [the wrongful death statutes], *only insofar* as necessary to fit the right to, and award for, death benefits within the overall procedural framework of the Workmen's Compensation Law." *Roberts*, 1963 OK 250, ¶ 15, 386 P.2d at 784 (emphasis in original). This same concept was recently reaffirmed in *Farley v. City of Claremore*, 2020 OK 30, 465 P.3d 1213, where we noted "Historically, the right to workers' compensation death benefits was statutorily created to be consistent with 12 O.S. § 1053⁹ and 84 O.S. § 213 [Intestacy -- Descent and Distribution], and the workers' compensation death benefits were treated as an exclusive statutory remedy substituted for the statutory wrongful death action guaranteed by an Oklahoma constitutional provision and approved by a vote of the People in Oklahoma." ¹⁰ 2020 OK 30, ¶ 46, 465 P.3d at 1236.

¶10 Then, in 1963, the 1951 version of the death benefits statute (85 O.S.1951, § 22(7)) was found to be unconstitutional in one regard--it created a time bar for workers' compensation death benefit claims. *Roberts*, 1963 OK 250, 386 P.2d 780. In *Roberts*, the employee was awarded permanent total disability from a compensable injury in 1954, yet his death occurred in 1959, more than 5 years later. *Id.* ¶¶ 1, 2, 386 P.2d at 781. The widow and child of decedent Roberts brought a claim for death benefits within a year of his death. *Id.* ¶ 28, 386 P.2d at 787. The *Roberts* court affirmed the authority of the Legislature to set a limitations period of one year for any workman to file any claim for workman's compensation, but held that the Legislature could not restrict the right to recover damages for injuries resulting in death protected by Article 23, section 7. ¹¹ *Id.* ¶ 29, 386 P.2d at 787.

The terms of 85 O.S.1961 § 22, subdiv. 7, we reiterate, effect such a modification of 12 O.S.1961 § 1053, that operates to substantially abridge the right of action (which is the right to effectively pursue a remedy) for injuries resulting in death. These provisions extend beyond the limits of authority vested in the Legislature by Art. 23, Sec. 7, as amended by the 1950 proviso. The modification so engrafted amounts to an abrogation of a right protected by the Fundamental Law and is hence unconstitutional.

Id. ¶ 22, 386 P.2d at 785.

¶11 In 2011, the Workers' Compensation Act of Title 85 was repealed and recodified as the Workers' Compensation Code, and Section 22 was replaced by Section 337. The 2011 Workers' Compensation Code was then repealed in 2014 when the Administrative Workers' Compensation Act (AWCA) was adopted. The 2014 AWCA was in effect at the time of Alexander's death. Alexander's widow and son received workers' compensation death benefits pursuant to 85A O.S.2014, § 47. ¹²

History of Subrogation and Indemnity

¶12 As discussed above, there was originally no death benefit in the Oklahoma workers' compensation system, so workers' compensation benefits were only paid if the employee survived their injuries. ¹³ The ability of the entity who paid these injury benefits to step into the shoes of the injured employee and pursue a claim against a third-party tortfeasor has never been in dispute. Specifically, the original 1915 workers' compensation law for claims against third persons provided in relevant part:

If a workman entitled to compensation under this act be **injured** by the negligence or wrong of another not in the same employ, such injured workman shall, before any suit or claim under this act, elect whether to take compensation under this act, or to pursue his remedy against such other.... If he elects to take compensation under this act, the cause of action against such other shall be assigned to the insurance carrier liable for the payment of such compensation, and if he elects to proceed against such other person or insurance carrier, as the case may be, [the insurance carrier] shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this act for such case....

85 O.S.1915, § 44 (which later became 85 O.S.1951, § 44(a)) (emphasis added).

¶13 But, upon the creation of a death benefit via the 1951 Death Benefit Act, the Legislature prohibited employers and insurance carriers from asserting a right of "subrogation" to recover paid death benefits. Section 44 was amended to include a new subsection (b) that stated:

There shall be no subrogation to recover money paid by the employer of his insurance carrier for death claims or death benefits under this Act from third (3d) persons, with all common law rights against other than the employer and his employees preserved and to be in those persons who would have had such rights had there been no death claim or death benefits under this Act.

85 O.S.1951, § 44(b). ¹⁴ By definition, subrogation is the "substitution of one person for another; that is, one person is allowed to stand in the shoes of another and assert that person's rights against the defendant." 1 Dan B. Dobbs, Law of Remedies § 4.3(4), at 604 (2d ed. 1993). But in Section 44(b), the term "subrogation" was used to mean the right of an employer or insurance carrier to recover all or a portion of the death benefits they paid to a beneficiary from the proceeds of an action against a third-party tortfeasor alleged to have caused the employee's injury--regardless of whether the action is brought by the decedent's survivors or directly by the employer of insurance carrier. As such, the term encompassed both the concept of indemnity as well as actual subrogation. Indemnity is defined in Black's Law Dictionary as:

1. A duty to make good any loss, damage, or liability incurred by another. 2. The right of an injured party to claim reimbursement for its loss, damage, or liability from a person who has such a duty. 3. Reimbursement or compensation for loss, damage, or liability in tort; esp., the right of a party who is secondarily liable to recover from the party who is primarily liable for reimbursement of expenditures paid to a third party for injuries resulting from a violation of a common-law duty.

Indemnity, Black's Law Dictionary (12th ed. 2024).

¶14 By 1986, the Legislature diverged from an absolute prohibition on subrogation in death benefit cases when it amended Section 44 to add subsection (c) to provide a limited right of subrogation, for both employers and insurance carriers, to recover money paid for last illness or accident benefits:

The employer or his insurance carrier shall have the right of subrogation to recover money paid by the employer or his insurance carrier *for the expenses of the last illness or accident* under the Workers' Compensation Act from third persons, with all common law rights against [someone] other than the employer and his employees preserved and to be in those persons who would have had such rights had there been no benefits under the Workers' Compensation Act.

85 O.S.1986, § 44(c) (emphasis added). ¹⁵ Then, in 2005, the Legislature amended Section 44 again to add subsection (d), which provided a more expansive subrogation right, but only to employers:

An employer shall have a cause of action against a third party whose wrongful or negligent conduct causes the death of an employee entitled to compensation under this title to recover any money paid *for death benefits on behalf of the employee*. Nothing contained in this section shall allow an employer or insurance carrier for an employer to seek an interest in either the death benefits received by the employee or the employee's beneficiary or in a life insurance policy procured by the employee.

85 O.S.2005, § 44(d) (emphasis added).

¶15 Section 44(d) was put to the test in *McBride v. Grand Island Express, Inc.*, 2010 OK 93, 246 P.3d 718, when an employer *and an insurance carrier* sought to intervene in a third-party action brought by a personal representative in district court. The would-be intervenors sought reimbursement of death benefits paid to a decedent. Our Court did not strike Section 44(d) but, instead, strictly construed the text as enacted. The Court held:

[T]he Oklahoma State Legislature has not [given] the insurance company [a right of] subrogation for monies paid to employee's beneficiaries and [the insurance company] has no standing in the present matter. The language is neither ambiguous nor uncertain. [The insurance carrier] may not stand in the shoes of the Employer and since the Employer did not pay any benefits to the employee's beneficiaries, the trial court was correct in granting Plaintiff's motion to dismiss/sever, and motion for summary judgment, thereby terminating the action as to all claims by [the employer and insurance carrier].

McBride, 2010 OK 93, ¶ 17, 246 P.3d at 722.

¶16 In 2011, the Workers' Compensation Act of Title 85 was repealed and recodified as the Workers' Compensation Code. Section 44 was replaced by Section 348. Section 348 greatly expanded the statutory right of subrogation on behalf of employers and insurance carriers. The new statute provided:

A. If an employee entitled to compensation under the Workers' Compensation Code is injured or killed by the negligence or wrong of another not in the same employ, such injured employee, surviving spouse or surviving dependent shall, before any suit or claim under the Workers' Compensation Code, elect whether to take compensation under the Workers' Compensation Code, or to pursue the employee's remedy against such other. Such election shall be evidenced in such manner as the Administrator may by rule or regulation prescribe. If the employee, surviving spouse or surviving dependent elects to take compensation under the Workers' Compensation Code, the cause of action against such other shall be assigned to the insurance carrier liable for the payment of such compensation, and if the employee, surviving spouse or surviving dependent elects to proceed against such other person or insurance carrier, as the case may be, the employer's insurance carrier shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by the Workers' Compensation Code for such case. The compromise of any such cause of action by the employee, surviving spouse or surviving dependent at any amount less than the compensation provided for by the Workers' Compensation Code shall be made only with the written approval of the Court. Whenever recovery against such other person is effected without compromise settlement by the employee, surviving spouse or surviving dependent or his or her representatives, the employer or insurance company having paid compensation under the Workers' Compensation Code shall be entitled to reimbursement as hereinafter set forth and shall pay from its share of the reimbursement a proportionate share of the expenses, including attorney fees, incurred in effecting the recovery to be determined by the ratio that the amount of compensation paid by the employer bears to the amount of the recovery effected by the employee, surviving spouse or surviving dependent. After the expenses and attorney fees have been paid, the balance of the recovery shall be apportioned between the employer or insurance company having paid the compensation and the employee or the employee's representatives in the same ratio that the amount of compensation paid by the employer bears to the total amount recovered; provided, however, the balance of the recovery may be divided between the employer or insurance company having paid compensation and the employee or the employee's representatives as they may agree. In the event that recovery is effected by compromise settlement, the expenses, attorney fees and the balance of the recovery may be divided between the employer or insurance company having paid compensation and the employee, surviving spouse or surviving dependent or the employee's representatives as they may agree. Provided, that in the event they are unable to agree, then the same shall be apportioned by the district court having jurisdiction of the employee's action against such other person in such manner as is just and reasonable.

B. The employer or employer's insurance carrier shall have the right of subrogation to recover money paid by the employer or employer's insurance carrier for death claims or death benefits under the Workers' Compensation Code from third persons, with all common law rights against other than the employer and his or her employees preserved and to be in those persons who would have had such rights had there been no death claim or death benefits under the Workers' Compensation Code.

C. The employer or employer's insurance carrier shall have the right of subrogation to recover money paid by the employer or employer's insurance carrier for the expenses of the last illness or accident under the Workers' Compensation Code from third persons, with all common law rights against other than the employer and his or her employees preserved and to be in those persons who would have had such rights had there been no benefits under the Workers' Compensation Code.

D. In the event of a third party recovery by an injured employee or surviving spouse or surviving dependent, the employer or insurance carrier shall be granted a credit against future benefits under this act in an amount equal to the net recovery of the employee, surviving spouse or surviving dependent.

¶17 This statute, along with the entire Workers' Compensation Code, was repealed in 2014 when the AWCA was adopted. The 2014 AWCA, 85A O.S.2014, § 1 et seq., became effective February 1, 2014. This law was in effect at the time of Alexander's death in 2018 and has remained unchanged. The relevant section on subrogation--Section 43--provides as follows:

A. Liability Unaffected.

1. a. The making of a claim for compensation against any employer or carrier for the injury or death of an employee shall not affect the right of the employee, or his or her dependents, to make a claim or maintain an action in court against any third party for the injury.

b. The employer or the employer's carrier shall be entitled to reasonable notice and opportunity to join in the action.

c. If the employer or employer's carrier join in the action against a third party for injury or death, they shall be entitled to a first lien on two-thirds (2/3) of the net proceeds recovered in the action that remain after the payment of the reasonable costs of collection, for the payment to them of the amount paid and to be paid by them as compensation to the injured employee or his or her dependents.

2. The commencement of an action by an employee or his or her dependents against a third party for damages by reason of an injury to which this act is applicable, or the adjustment of any claim, shall not affect the rights of the injured employee or his or her dependents to recover compensation, but any amount recovered by the injured employee or his or her dependents from a third party shall be applied as follows:

a. reasonable fees and costs of collection shall be deducted,

b. the employer or carrier, as applicable, shall receive two-thirds (2/3) of the remainder of the recovery or the amount of the workers' compensation lien, whichever is less, and

c. the remainder of the recovery shall go to the injured employee or his or her dependents.

B. Subrogation.

1. An employer or carrier liable for compensation under this act for the injury or death of an employee shall have the right to maintain an action in tort against any third party responsible for the injury or death. However, the employer or the carrier shall notify the claimant in writing that the claimant has the right to hire a private attorney to pursue any benefits to which the claimant is entitled in addition to the subrogation interest against any third party responsible for the injury or death.

2. After reasonable notice and opportunity to be represented in the action has been given to the injured employee, the liability of the third party to the compensation beneficiary shall be determined in the action, as well as the third party's liability to the employer and carrier.

3. If the employer recovers against the third party, by suit or otherwise, the injured employee shall be entitled to any amount recovered in excess of the amount that the employer and carrier have paid or are liable for in compensation, after deducting reasonable costs of collection.

4. An employer or carrier who is liable for compensation under this act on account of injury or death of an employee shall be entitled to maintain a third-party action against the employer's uninsured motorist coverage or underinsured motorist coverage.

¶18 It is important to explain the difference between Section 43(A) and Section 43(B). Section 43(A) establishes a right of indemnity. ¹⁶ Section 43(A)(1) and (2) apply when the employee or his or her dependents have pursued a claim against the party responsible for the injury or death of the employee. True subrogation is covered in Section 43(B). Section 43(B) applies when the employer or insurance carrier proceed directly against the third party responsible for the employee's injury or death to recover the benefits paid to the statutory dependents. ¹⁷

Constitutionality of Section 43

¶19 Here, the Plaintiffs are the statutory dependents of the deceased employee and filed an action against the third-party tortfeasors pursuant to Section 43(A)(1). The Intervenor in this case rely on Section 43(A)(1) for their claim against the Plaintiffs for a portion of the proceeds of that action as repayment for the death benefits paid to Plaintiffs. Plaintiffs argue that Title 85A, Section 43(A) is unconstitutional as it conflicts with Article 23, section 7. To support their argument, Plaintiffs relied on *Updike Advertising System v. State Industrial Commission*, 1955 OK 19, 282 P.2d 759, and its progenies, asserting that this Court has already addressed the issue. We disagree.

¶20 The original proceeding in *Updike* was brought by an insurance carrier at a time when subrogation to recover money paid for death benefits was expressly prohibited by statute. The insurance carrier contended this statutory prohibition against recovery was unconstitutional. In *Updike*, Syllabus 2 opined:

The Workmen's Compensation Law as amended by House Bill No. 312, Session Laws 1951, requires employers covered by the Act to provide insurance against accidental death arising out of and in the course of hazardous employment, or pay the death benefit if they carry their own risk. Such insurance or the obligation to pay said death benefit if the employer is a carrier of his own risk is in the nature of accidental death insurance. The right of subrogation against a third-party tort-feasor never existed in favor of an employer or insurance carrier. *Specific provision therefor would have to be made by the Legislature for same to exist.* There is no such provision.

Id. ¶ 0, 282 P.2d at 761 (emphasis added). This statement does not support the Plaintiffs' position but, instead, affirms the authority of the Legislature to add a right of subrogation. ¹⁸

¶21 Here, Intervenor argued that: (1) Section 43 is not an abrogation of the right of action to recover damages for injuries resulting in death because it does not impede an heir's right to maintain an action against a third party; and (2) Section 43(A) indemnity is not a limitation on the death benefit, but rather an instruction on how recovery in a third-party action should be apportioned between the heirs and the employer and/or its insurance carrier.

¶22 Intervenor is accurate in stating there is nothing in Section 43 that takes away the rights of the Plaintiffs to bring a third-party action. In fact, Section 43(A)(1)(a) affirms the long-standing statutory remedy of the dependents and heirs of a deceased employee who received workers' compensation death benefits bringing a third-party lawsuit. The COCA opinion relies on the case of *In F.W. Woolworth Co. v. Todd*, 1951 OK 36, ¶ 11, 231 P.2d 681, 684, wherein our court said that the "words 'shall never be abrogated,'" in Article 23, section 7 "mean: Shall never be annulled or repealed by an authoritative act, that is, shall never be withdrawn or taken away by the authority which bestowed it, that is, the legislative act, or other legislative authority." We agree that Section 43 does not abrogate or do away with those rights. Instead, the Legislature balanced that right of action with the right of the employer or insurance carrier to reclaim benefits paid to statutory dependents on account of the negligence of the third party.

¶23 In support of their position that Section 43(A) indemnity is not a limitation on the death benefit, Intervenor rely on an unpublished federal case from the Western District of Oklahoma, *Akins v. C&J Energy Services, Inc.*, No. CIV-18-485-R, 2019 WL 3728284 (W.D. Okla. Aug. 7, 2019). ¹⁹ In *Akins*, worker's compensation death benefits were paid to the surviving spouse and child (the dependents) of employee Akins, who was killed in the course and scope of his employment. *Id.* at *1. The dependents pursued a third-party action and reached a settlement with the tortfeasor. *Id.* The employer's insurance carrier intervened, asserting a right of reimbursement against

Plaintiff's settlement proceeds under 85A O.S.2014, § 43(A)(2). *Id.* The dependents filed a motion for summary judgment challenging the statute as unconstitutional. *Id.* In arriving at his decision, the federal judge determined that the beneficiaries had not met their burden to establish a violation of the Oklahoma Constitution because the *Updike* case was not on point, was not authority on the issue presented, and Plaintiff relied on *dictum*. *Id.* at *4. Curiously, finding no Oklahoma authority on point and declining to certify this question to the Oklahoma Supreme Court, (which would have been appropriate with a question of unsettled state law), the order then relies on cases from Arizona²⁰ and Utah²¹ and concluded that the statutory subrogation lien right in favor of employers was constitutional. *Id.* at *5--6. An analysis of the two state court opinions, *see supra* n. 20 and 21 reveals that they are distinguishable. Reliance on outside authority is not helpful or necessary for construing the Oklahoma statute at issue. Further, as a matter of state law, this Court is not restrained by federal cases and first looks to its own decisions for authority. *Johnson v. Ford Motor Co.*, 2002 OK 24, ¶ 26, 45 P.3d 86, 95; *Aircraft Equip. Co. v. Kiowa Tribe of Okla.*, 1996 OK 81, ¶ 7, 921 P.2d 359, 361.

¶24 As evidenced in our discussion above, there is a long history of Oklahoma authority on subrogation and the questions presented herein. Although Alexander's death occurred in 2018 and the 2011 Workers' Compensation Code is not directly applicable in this case, there are significant similarities between the 85 O.S.2011, § 348 and 85A O.S.2014, § 43 which make the unpublished COCA opinion *Stump v. Vargas*²² relevant to our analysis.²³ In *Stump*, COCA was confronted with a constitutional challenge similar to the case now before us. Peggy Stump received death benefits from her husband's employer's insurance carrier, National American Insurance Company. Stump then filed a wrongful death action against third-party tortfeasors who allegedly caused her husband's accident. Stump added National as a defendant and sought a declaratory judgment that National was not entitled to any portion of her recovery from the third-party tortfeasors. National asserted it had a right of subrogation under 85 O.S.2011, § 348. Judge Fischer, writing for Division II of COCA, determined that Section 348(B) did not infringe upon Article 23, section 7 because it "[t]here is nothing [S]ection 348(B) that prevents a wrongful death plaintiff from filing or prosecuting a wrongful death action against a third party tortfeasor, nor does [S]ection 348(B) limit the damages a wrongful death defendant may be required to pay... What [S]ection 348(B) purports to do through subrogation is apportion the damages recovered in a wrongful death action among the wrongful death plaintiffs and an employer or its insurer who has paid wrongful death benefits pursuant to the Workers' Compensation Code." *Stump* at 11. "Section 348(B) of the Workers' Compensation Code provides a right of indemnity in favor of employers and their workers' compensation insurers with respect to death benefits paid pursuant to the Code. That statutory right of indemnity did not previously exist. It is within the Legislature's authority to change the contract between employees covered by the Code and their employers in this regard." *Id.* at 28. We agree that the expansion of the rights of indemnity and subrogation to claims involving death benefits by the Legislature does not offend the Oklahoma Constitution.

CONCLUSION

¶25 Based upon an exhaustive review of the employer or insurance carrier's statutory ability to recover amounts paid because of the negligence of a third party, we determine that Section 43 is constitutional. The historical exclusion of the rights of indemnity and subrogation in death benefit claims did not offend the Oklahoma Constitution, nor do their inclusion today. There is no constitutional prohibition against the Intervenor's recovering a portion of the Plaintiffs' settlement with the third party. The COCA opinion is vacated, and the trial court's holding is vacated. The case is remanded to the trial court for further proceedings consistent with this opinion.

CERTIORARI PREVIOUSLY GRANTED;

COURT OF CIVIL APPEALS' OPINION VACATED;

ORDER OF THE TRIAL COURT VACATED; CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION

CONCUR: ROWE, C.J., KUEHN, V.C.J., EDMONDSON, COMBS, GURICH, DARBY, AND KANE, JJ.

CONCUR IN RESULT: JETT, J.

FOOTNOTES

GURICH, J.

¹ 85A O.S.2014, § 47 (omitting Subsections A, B, C(3)-(4), D(1)-(2), E, and F because they are not at issue):

C. Beneficiaries - Amounts. If an injury or occupational illness causes death, weekly income benefits shall be payable as follows:

1. If there is a surviving spouse, a lump-sum payment of One Hundred Thousand Dollars (\$100,000.00) and seventy percent (70%) of the lesser of the deceased employee's average weekly wage and the state average weekly wage. In addition to the benefits theretofore paid or due, two (2) years' indemnity benefit in one lump sum shall be payable to a surviving spouse upon remarriage;

2. If there is a surviving spouse and a child or children, a lump-sum payment of Twenty-five Thousand Dollars (\$25,000.00) and fifteen percent (15%) of the lesser of the deceased employee's average weekly wage and the state average weekly wage to each child. If there are more than two children, each child shall receive a pro rata share of Fifty Thousand Dollars (\$50,000.00) and thirty percent (30%) of the deceased employee's average weekly wage;

5. The employer shall pay the actual funeral expenses, not exceeding the sum of Ten Thousand Dollars (\$10,000.00).

D. The weekly income benefits payable to the surviving spouse under this section shall continue while the surviving spouse remains unmarried. In no event shall this spousal weekly income benefit be diminished by the award to other beneficiaries. The weekly income benefits payable to any child under this section shall terminate on the earlier of death, marriage, or reaching the age of eighteen (18). However, if the child turns eighteen (18) and is:

3. Physically or mentally incapable of self-support,

then he or she may continue to receive weekly income benefits under this section until the earlier of reaching the age of twenty-three (23) or, with respect to paragraphs 1 and 2 of this subsection, no longer being enrolled as a student, and with respect to paragraph 3 of this subsection, becoming capable of self-support.

² The Record on Accelerated Appeal includes the Petition which alleged that Duong owned Luxury Nails in Madill, Luxury Nails in Durant, Elite Nails & Hair in Durant, and Happy Nails in Kingston. The Petition alleged Duong was in the course and scope of his employment with his four businesses at the time of the accident. The Petition also alleged that Thuy Nguyen negligently entrusted her vehicle to Duong. Plaintiffs amended their Petition to name The Nail Center in Madill, which Nguyen admitted to owning. Answers were filed by counsel for Duong, Nguyen, The Nail Center located at 108 S. 2nd Avenue in Madill, Oklahoma.

Duong was charged with first degree manslaughter in Bryan County CF-2018-351 but fled to Vietnam before he could be prosecuted.

On July 19, 2021, Plaintiffs dismissed Nguyen without prejudice. On April 26, 2022, Plaintiffs dismissed Duong with prejudice. The Joint Response to the Court Order of April 12, 2022, indicates that Plaintiffs and Intervenor "are the only parties that remain in the district court case."

³ 85 O.S.1941, § 121, which specified that no provision of the 1915 Workmen's Compensation Act applied "in cases of accidents resulting in death and no right of action for recovery of damages for injuries resulting in death is intended to be denied or affected", was repealed in 1951. Death Benefit Act, Ch. 2, § 11, 1951 Okla. Sess. Laws, Serv. 267, 270.

⁴ *Black Gold Petroleum Co. v. Hirschfield*, 1938 OK 49, ¶ 10, 79 P.2d 566, 569: "If an employee dies as the result of an accidental injury sustained in his employment, the State Industrial Commission is without jurisdiction to make any award to his dependents, and they are relegated to the other remedies provided by law."

⁵ In 1985, Article 23, section 7 was amended again; this time to include a statement at the end that "the Legislature may enact statutory limits on the amount recoverable in civil actions or claims against the state or any of its political subdivisions." Amended by Laws 1985, SJR 3, Section 1, State Question 586, Legislative Referendum 250, adopted at election held April 30, 1985. This provision does not modify the 1950 amendment but permitted the Legislature to set limits on damages available under the Governmental Tort Claims Act, 12 O.S.2026, §§ 151, 154(A), "for accident or occurrence happening after October 1, 1985...."

⁶ Death Benefit Act, Ch. 2, § 4, 1951 Okla. Sess. Laws, Serv. 267, 268 (amending 85 O.S.1941, § 22).

⁷ Death Benefit Act, Ch. 2, § 8, 1951 Okla. Sess. Laws, Serv. 267, 269 (amending 85 O.S.1941, § 48 and adding (a) through (d)).

⁸ Death Benefit Act, Ch. 2, § 8, 1951 Okla. Sess. Laws, Serv. 267, 269 (amending 85 O.S.1941, §§ 11, 12).

⁹ *Farley*, 2020 OK 30, n. 91 (quoting 12 O.S.2011, § 1053) (omitting subsection F regarding death of an unborn child):

A. When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, or his or her personal representative if he or she is also deceased, if the former might have maintained an action, had he or she lived, against the latter, or his or her representative, for an injury for the same act or omission. The action must be commenced within two (2) years.

B. The damages recoverable in actions for wrongful death as provided in this section shall include the following: Medical and burial expenses, which shall be distributed to the person or governmental agency as defined in Section 5051.1 of Title 63 of the Oklahoma Statutes who paid these expenses, or to the decedent's estate if paid by the estate.

The loss of consortium and the grief of the surviving spouse, which shall be distributed to the surviving spouse.

The mental pain and anguish suffered by the decedent, which shall be distributed to the surviving spouse and children, if any, or next of kin in the same proportion as personal property of the decedent.

The pecuniary loss to the survivors based upon properly admissible evidence with regard thereto including, but not limited to, the age, occupation, earning capacity, health habits, and probable duration of the decedent's life, which must inure to the exclusive benefit of the surviving spouse and children, if any, or next of kin, and shall be distributed to them according to their pecuniary loss.

The grief and loss of companionship of the children and parents of the decedent, which shall be distributed to them according to their grief and loss of companionship.

C. In proper cases, as provided by Section 9.1 of Title 23 of the Oklahoma Statutes, punitive or exemplary damages may also be recovered against the person proximately causing the wrongful death or the person's representative if such person is deceased. Such damages, if recovered, shall be distributed to the surviving spouse and children, if any, or next of kin in the same proportion as personal property of the decedent.

D. Where the recovery is to be distributed according to a person's pecuniary loss or loss of companionship, the judge shall determine the proper division.

E. The above-mentioned distributions shall be made after the payment of legal expenses and costs of the action.

¹⁰ In *Farley* the employee's widow sought and received workers' compensation death benefits on account of the death of her husband while employed by the City of Claremore and filed a separate wrongful death action against his employer. "We conclude: ... A tort action seeking damages for a surviving spouse, surviving child, and parents of a deceased adult child does not survive in a 12 O.S. § 1053 wrongful death action when ... an exclusive worker's compensation remedy for survivors is substituted for a wrongful death action...." 2020 OK 30, ¶ 67, 465 P.3d at 1243. *Farley* did not involve a third party action.

¹¹ "[A]nd the amount recoverable shall not be subject to any statutory limitation." OKLA. CONST. Art. XXIII, § 7.

¹² See *supra* n. 1.

¹³ If an employee died, their estate and heirs were left to bring a wrongful death action.

¹⁴ Death Benefit Act, Ch. 2, § 7, 1951 Okla. Sess. Laws, Serv. 267, 268--69 (amending 85 O.S.1941, § 44).

¹⁵ In the case of *ACCOSIF v. American States Insurance Company*, 2000 OK 21, 1 P.3d 987, Justice Opala coined the phrase *pro tanto recoupment* to describe the statutory right of the insurance carrier who paid workers' compensation benefits to the employee to reclaim those benefits from the third-party tortfeasor. *ACCOSIF*, 2000 OK 21, ¶¶ 7,12, 1 P.3d at 992, 994.

¹⁶ See *supra* ¶ 13.

¹⁷ The parties and the trial court referred to Intervenor's claim as one for "subrogation" but, technically, it is one for indemnity under Section 43(A)(1) and we will address it as such. But our decision herein would apply equally to Section 43(B). It is important to note that in the case of death benefits, the employer or insurance carrier may "step into the shoes" of the specified dependents in 85A O.S.2014, § 47, but not others who may be wrongful death beneficiaries. Those specified dependents who are statutorily entitled to death benefits encompass some but not all the potential plaintiffs in a wrongful death action. The employer and insurance carrier would have no right to pursue an action on behalf of those not included in the statutory benefits. *Stump v. Vargas, et al.*, No. 112,448, op. at 14--21. Compare 12 O.S.2020, § 1053 with 85A O.S.2024, § 47 (which provides limited funeral expenses (\$10,000), no loss of consortium and grief or mental pain and suffering suffered by the decedent prior to death, no pecuniary loss, no grief and loss of companionship of parents, and no punitive damages). OKLA. CONST. art. XXIII, § 7; *Whipple v. Phillips and Sons Trucking*, 2020 OK 75, 474 P.3d 339.

¹⁸ *Updike* was revisited in the 1980 case, *Earnest, Inc. v. LeGrand*, 1980 OK 180, 621 P.2d 1148. In *Earnest*, the Court was asked to determine whether an employer and/or its insurance carrier had a common law right of subrogation against a negligent third-party. An amendment to Title 85, Section 44(a) included the word "killed" in a section that otherwise required that an injured worker elect to either receive workers' compensation benefits or pursue a right of action against the third party as a result of an on-the-job injury. *Id.* ¶ 4, 621 P.2d at 1150. Another subsection of Section 44(b) specifically prohibited subrogation in death cases. The Court found that there was no right to subrogate wrongful death benefits pursuant to Section 44(a) because someone killed in the line of work could not make such an election and the statute made no provision for another to make the election on the decedent's behalf. *Id.* ¶¶ 5--7, 621 P.2d at 1151.

¹⁹ The COCA opinion also relies on this federal court order.

²⁰ The Arizona case, *Stout v. State Compensation Fund*, 3 P.3d 1158(Ariz. Ct. App. 2000), involved a lien claim by the Arizona State Compensation Fund against Stout's widow and son due to significant medical bills incurred before Stout died and death benefits paid after his death. The Arizona Constitution is not identical to the Oklahoma Constitution and was only asserted in attempt to bar the Fund's statutory lien from applying to damages for loss of consortium suffered by Stout's spouse and dependents prior to his death. The trial court ruled that the Fund's lien did apply to amounts recovered for loss of consortium. The Arizona Court of Appeals affirmed the trial court in part but reversed the finding that the Fund's lien applied to any recovery of Stout's mother, who had not received any benefits from the Fund. While this appeal was pending, Stout's family and the third party allegedly partially responsible for his death stipulated to a bench trial to establish the amount of damages and the negligence of the employer, Stout, and the third party in the wrongful death action. The Fund was not given notice of this trial. As such, the Arizona Court of Appeals reasoned that the trial was structured to avoid the Fund's lien and held that the result of the trial was not binding on the Fund. *Stout v. State Comp. Fund*, 44 P.3d 178, 179 (Ariz. Ct. App. 2002).

²¹ In the Utah case, *Anderson v. United Parcel Service*, 2004 UT 57, 96 P.3d 903, the Supreme Court of Utah turned away a constitutional challenge to a 2001 Utah statute which contained a detailed statutory scheme that permitted a third party action by employee's decedents as well as a right of the employer's insurance carrier to maintain an action against the third party directly. The Utah court relied upon the language of the statute rather than equitable principles urged by Anderson. Further, Article 16, section 5 of the Utah Constitution is not identical to Article 23, section 7 of the Oklahoma Constitution.

²² *Peggy Stump, Pers. Representative of the Est. of Danny Joe Stump, Sr. deceased, v. Miguel A. Vargas, Sr., individually and d/b/a Mav Trucking; Rosario Terrazas-Pinon and Nat'l Am. Ins. Co., and Northland Ins. Co.*, No. 112,448 (Okla. Civ. App. June 19, 2015), cert. denied Nov. 2, 2015.

²³ Although most of Title 85, including Section 348, was repealed in 2013 and replaced by Title 85A, it remains the controlling law for injuries and death prior to February 1, 2014. See 85A O.S.2026, § 400(J).

Citationizer® Summary of Documents Citing This Document

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<u>1914 OK 237, 142 P. 1185, 42 Okla. 784,</u>	<u>ST. LOUIS & S. F. R. CO. v. GOODE</u> Discussed
<u>1938 OK 49, 79 P.2d 566, 182 Okla. 634,</u>	<u>BLACK GOLD PETROLEUM CO. v. HIRSHFIELD</u> Discussed
<u>1952 OK 209, 245 P.2d 1134, 206 Okla 638,</u>	<u>CAPITOL STEEL & IRON CO. v. FULLER</u> Discussed at Length
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<u>1963 OK 250, 386 P.2d 780,</u>	<u>ROBERTS v. MERRILL</u> Discussed at Length
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<u>1996 OK 81, 921 P.2d 359, 67 OBJ 2302,</u>	<u>Aircraft Equipment Co. v. Kiowa Tribe of Oklahoma</u> Discussed
<u>2010 OK 93, 246 P.3d 718,</u>	<u>McBRIDE v. GRAND ISLAND EXPRESS, INC.</u> Discussed at Length
<u>2013 OK 37, 302 P.3d 789,</u>	<u>DOUGLAS v. COX RETIREMENT PROPERTIES, INC.</u> Discussed
<u>2013 OK 77, 315 P.3d 359,</u>	<u>SHEFFER v. BUFFALO RUN CASINO, PTE, INC.</u> Discussed
<u>2016 OK 97, 381 P.3d 736,</u>	<u>LEE v. BUENO</u> Discussed
<u>2018 OK 6, 411 P.3d 369,</u>	<u>STRICKLAND v. STEPHENS PRODUCTION COMPANY</u> Discussed
<u>2020 OK 30, 465 P.3d 1213,</u>	<u>FARLEY v. CITY OF CLAREMORE</u> Discussed at Length
<u>1980 OK 180, 621 P.2d 1148,</u>	<u>Earnest, Inc. v. LeGrand</u> Discussed
<u>2020 OK 75, 474 P.3d 339,</u>	<u>WHIPPLE v. PHILLIPS AND SONS TRUCKING</u> Discussed
<u>2000 OK 21, 1 P.3d 987, 71 OBJ 778,</u>	<u>ACCOSIF v. American States Ins. Co.</u> Discussed at Length
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<u>85 O.S. 348,</u>	<u>Repealed</u> Discussed at Length

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<u>85 O.S. 11,</u>	<u>Repealed</u>	Cited
<u>85 O.S. 22,</u>	<u>Repealed</u>	Discussed at Length
<u>85 O.S. 44,</u>	<u>Repealed</u>	Discussed at Length
<u>85 O.S. 48,</u>	<u>Repealed</u>	Discussed

Title 85A. Workers' Compensation

Cite	Name	Level
<u>85A O.S. 1,</u>	<u>Short Title</u>	Cited
<u>85A O.S. 43,</u>	<u>Compensation Insurance - Liability - Subrogation</u>	Discussed at Length
<u>85A O.S. 47,</u>	<u>Time of Death - Common Law Spouse - Beneficiaries</u>	Discussed at Length
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