

In the
Supreme Court of Ohio

DOUGLAS GROCH, *et al.*, : Case No. 2006-1914
: :
Plaintiffs-Petitioners, : On Review of Certified Question from the
: United States District Court, Northern
v. : District of Ohio, Western Division
: :
GENERAL MOTORS : District Court Case
CORPORATION, *et al.*, : No. 3:06-CV-1604
: :
Defendants-Respondents. :

**RESPONDENT STATE OF OHIO'S MEMORANDUM
URGING THE COURT TO ANSWER THE CERTIFIED QUESTIONS**

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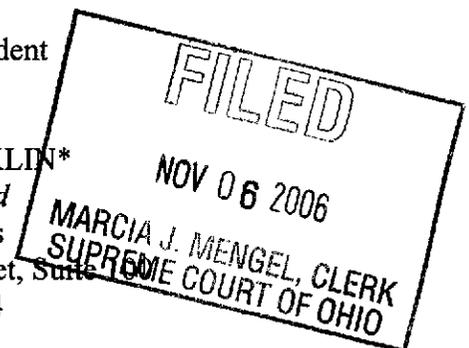
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INTRODUCTION

Workers' compensation and tort law are critical issues in Ohio. This case involves constitutional challenges to both the new workers' compensation subrogation statute—R.C. 4523.931 (the “subrogation statute”)—and the new statute of repose for products liability—R.C. 2305.10 (the “statute of repose”). These issues occur together with some regularity, as workers are often injured by allegedly defective or dangerous products while on the job. Here, these issues came together in a *federal* lawsuit, and the federal court has asked this Court to answer certified questions. The State of Ohio urges the Court to accept the invitation and to answer the certified questions, because these are issues important to Ohioans and it is important for an Ohio court to answer them.

First, subrogation is a critical issue of workers' compensation law. It affects thousands of Ohioans who have been injured at work by negligent third parties or reckless employers. It also affects the parties who pay the workers' compensation bill for the injuries: either the State Fund administered by the Ohio Bureau of Workers' Compensation (“Bureau” or “BWC”), or the self-insuring employer. Over 5,200 subrogation cases are now pending involving the State Fund alone. The General Assembly has passed a law allowing a workers' compensation bill payer—the BWC or a self-insuring employer—to recoup from an injured party's tort judgment a reasonable amount of its benefits payments to the injured party, while allowing the injured worker to retain that part of the judgment that does not represent a windfall or double payment.

Second, tort reform directly affects the thousands of Ohioans who become plaintiffs or defendants in tort lawsuits. The General Assembly has reformed important aspects of tort law, including, among other provisions, the new statute of repose for products liability at issue here.¹

¹ Several of the new laws are at issue in *Arbino v. Johnson & Johnson*, No. 2006-1212.

Tort law indirectly affects every Ohioan, even those who are never in a lawsuit, as the price of insurance, health care, and all other goods and services includes a premium to cover the costs of torts—and these costs have skyrocketed. Not surprisingly, legislatures across the country have reformed tort law, as they seek to ensure that the injured receive fair compensation, while reining in a system that sometimes does nothing more than generate windfalls for some lawyers.

Because Ohio's workers' compensation and tort law are important to all Ohioans, questions about Ohio law in these areas should be resolved by Ohio courts, not a federal court—and that is why this case is here. The Ohio General Assembly, representing all Ohioans, has reformed Ohio's workers' compensation and tort laws, and some of those reforms have been attacked in federal court as unconstitutional under Ohio's Constitution. The federal court now has asked this Court to answer certified questions regarding the application of several Ohio constitutional provisions. The State of Ohio strongly urges the Court to answer the questions, so that these critical issues of Ohio law are addressed by Ohio's highest court, not by a federal court acting without this Court's guidance.

Here, the specific workers' compensation statute at issue is Ohio's workers' compensation subrogation statute, R.C. 4123.931. The Ohio General Assembly in 2003 rescinded former R.C. 4523.931 and passed the current law—also numbered as R.C. 4523.931—as part of Am. Sub. S.B. 227. The new law is aimed specifically at correcting the problems identified in *Holeton v. Crouse Cartage Co.* (2001), 92 Ohio St.3d 115, 2001-Ohio-109. In *Holeton*, this Court held that former R.C. 4123.931 violated certain provisions of the Ohio Constitution. However, the *Holeton* Court was careful to reject “the proposition that a workers' compensation/subrogation statute is *per se* unconstitutional.” 92 Ohio St.3d at 135. The new statute was drafted with input from the Bureau of Workers' Compensation, the Ohio Academy of Trial Lawyers, the Self-

Insured Employers Association and the Ohio Chamber of Commerce, and was carefully crafted to avoid the pitfalls in *Holeton*. Indeed, this Court has already held that “the manifest objective of the General Assembly in enacting S.B. 227 was to comply with our holding in *Holeton*.” *State ex rel. United Auto., Aerospace & Agric. Implement Workers of Am. v. Ohio Bureau of Workers’ Comp.*, 108 Ohio St.3d 432, 2006-Ohio-1327, at ¶17.

The new product liability statute of repose at issue here, R.C. 2305.10, was enacted in 2004 as part of Senate Bill 80 (the “2004 Tort Reform”). In enacting the tort reform statutes, the General Assembly took a measured approach, designed to address the concerns that this Court addressed in invalidating a previous, broader tort reform effort. See *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451.

The marked differences between the current laws and the laws addressed respectively in *Holeton* and *Sheward* are a key reason why this Court should answer the certified questions. As to the workers’ compensation subrogation law, several lower courts have considered the constitutionality of current R.C. 4123.931, and have come to varying conclusions. This Court’s guidance is needed to resolve these differences in lower courts and give certainty to litigants.

As to tort reform, the broad sweep of *Sheward* and the different approach to tort reform taken in the 2004 law have created uncertainty regarding how *Sheward* will apply to the new law. That is especially so because of *Sheward*’s approach, as that decision addressed specific provisions, but also broadly struck the entire law there because the Court found that its adoption violated the single-subject clause. In addition, the Court has never analyzed the specific issue of the constitutionality of a statute of repose for products liability.

Further, the Court should act because this case is not a rare occurrence, but is one of thousands of cases involving workers’ compensation subrogation, and hundreds of tort cases

pending in state and federal court that potentially involve the application of the challenged statutes. Those cases will go forward, and if this Court does not provide guidance now, the lower courts could reach different results on the issue of the statutes' constitutionality. As noted above, Ohio courts are already divided on the subrogation issue. If the Court delays addressing these issues, hundreds of litigants may have their cases wrongly decided in the interim. That could lead to massive reversals or retrials, or it could force parties to live with bad decisions if time has run out, or with bad settlements that cannot be re-opened. Or, it could lead to a massive and expensive redistribution of subrogated funds, as happened in *Santos v. Ohio Bureau of Workers' Comp.*, 101 Ohio St.3d 74, 2004-Ohio-28. The Court should prevent such effects by answering the certified questions and resolving these critical questions of Ohio law.

STATEMENT OF THE CASE AND FACTS

The Amended Complaint alleges the following: Plaintiff-Petitioner Douglas Groch ("Groch") was injured on March 3, 2005 when the trim press he was operating came down on his right arm and wrist. When he was injured, Groch was acting in the course and scope of his employment with Defendant General Motors Corporation ("GM"). Defendants Kard Corporation and Racine Federated, Inc. ("Kard" and "Racine") made the trim press that he was using.

Groch sued GM in intentional tort and Kard and Racine for products liability in the Lucas County Court of Common Pleas. Plaintiff Chloe Groch ("Chloe") sought damages for loss of consortium. GM removed the case to federal court on the basis of diversity.

GM has asserted a subrogation interest in Groch's tort recovery for its payment to him of workers' compensation benefits. Groch asserts that the Ohio statutes granting GM subrogation interests—R.C. 4123.93 and R.C. 4123.931—are unconstitutional. Kard and Racine assert that they are immune from liability based on R.C. 2305.10, the statute of repose for products liability

claims. Groch asserts that R.C. 2305.10 is unconstitutional. The State of Ohio intervened to defend the constitutionality of the challenged statutes.

Groch, Kard and Racine, and the State of Ohio moved the federal court to certify questions about the constitutionality of R.C. 4123.93, 4123.931 and 2305.01 to this Court. The federal court certified the following questions to this Court:

1. Do the statutes allowing subrogation for workers' compensation benefits, R.C. 4123.93 and 4123.931, violate the takings clause, Article I, Section 19, of the Ohio Constitution?
2. Do R.C. 4123.93 and 4123.931 violate the due process and remedies clause, Article I, Section 16, of the Ohio Constitution?
3. Do R.C. 4123.93 and 4123.931 violate the equal protection clause, Article I, Section 2 of the Ohio Constitution?
4. Does the statute providing for a statute of repose for product liability, R.C. 2305.10(C) and (F), violate the open courts provision of the Ohio Constitution, Article I Section 16?
5. Do R.C. 2305.10(C) and (F) violate the takings clause, Article I, Section 19, of the Ohio Constitution?
6. Do R.C. 2305.10(C) and (F) violate the due process and remedies clause, Article I, Section 16, of the Ohio Constitution?
7. Do R.C. 2305.10(C) and (F) violate the equal protection clause, Article I, Section 2, of the Ohio Constitution?
8. Do R.C. 2305.10 (C) and (F) violate the ban on retroactive laws, Article II, Section 28 of the Ohio Constitution?

THE COURT SHOULD ANSWER THE CERTIFIED QUESTIONS

The Court should answer the certified questions for one simple reason: the federal court ultimately must rule on these issues in this case, so the only question is whether the federal court will do so with or without this Court's guidance. These critical issues of Ohio law should be decided by an Ohio court, not a federal court. Further, this Court, not a federal court, should

address the differences between the new 2003 subrogation law and the law addressed in *Holeton*, as well as the differences between the 2004 Tort Reform law and the law addressed in *Sheward*.

A. The Ohio Supreme Court, and not a federal court, should address unsettled Ohio law affecting thousands of cases throughout the State.

The Court should answer the certified questions because the answers will affect thousands of cases now pending within Ohio's state and federal courts, along with thousands of future cases. Implicit in the Court's adoption of the Uniform Certification of Questions of Law Act is the understanding that state courts, not federal courts, should decide unsettled areas of state law. Here, not only is the law unsettled, but the law will apply to thousands of cases. The State knows of over 5,300 subrogation cases involving the State Fund alone—and surely many others exist that, as here, involve self-insuring employers. The State also knows of at least 500 pending court challenges to some aspect of the 2004 Tort Reform law.

Further, the questions here concern not only the interpretation of Ohio statutes, but also of the Ohio Constitution. The Court's answer to those state-law questions protects Ohio's sovereignty, which is "unquestionably implicated when federal courts construe state law." *Scott v. Bank One Trust Co.* (1991), 62 Ohio St.3d 39, 42. When a federal court unknowingly errs by applying state law differently than this Court would, it "does an injustice to one or more parties, and frustrates the state's policy that would have allocated the rights and duties differently." *Id.* And an erroneous decision has "a more lasting effect, because other potential litigants are likely to behave as if the federal decision were the law of the state." *Id.* This Court's strong belief "in the importance of accurately applying Ohio law in federal courts," *id.* at 43, counsels strongly in favor of answering the certified questions here.

B. The legal issues certified by the District Court are unsettled in Ohio.

The certified questions raise important issues of Ohio law that are unsettled. This Court has yet to consider the legislative changes to either workers' compensation law in the wake of *Holeton* or the new tort reform law post-*Sheward*. As shown below, the new subrogation law differs significantly from that invalidated in *Holeton*, and the new statute of repose deserves fresh analysis.

- 1. The Court should review the new workers' compensation subrogation statute because it differs significantly from its predecessors, the lower courts are split, and this case provides a good vehicle to address it.**

The Court should address the constitutionality of R.C. 4123.93 and 4123.931 for at least three reasons: First, the new statute differs greatly from its predecessor, curing the problems identified in *Holeton*. Second, lower Ohio courts have come to varying conclusions with regard to the new statute's constitutionality. Third, this case is an excellent vehicle to resolve the issues surrounding subrogation, because it involves both of the factual allegations that commonly arise with subrogation: an employer's intentional tort and a third-party tortfeasor.

First, the new statute specifically fixes the three constitutional flaws that the *Holeton* Court found in former R.C. 4123.931. The first flaw was that the provisions for estimated future values placed all the risk for overestimated future expenditures on the claimant because it required the claimant to disgorge funds for future benefits that the claimant may never receive. See 92 Ohio St.3d at 123-25. The second flaw was that the entire amount of a settlement was open to subrogation, even if no double recovery occurred. *Id.* at 125. The third problem was that the old law treated differently plaintiffs who tried their cases and those who settled. *Id.* at 125-26.

The new statute fixes all three problems. It provides a formula by which the types of damages in a tort award or settlement are calculated. This means that some part of a judgment or

settlement is always the claimant's, free of any subrogation. The estimated future amount may be put into an interest-bearing trust account that the claimant will cash in if the future value of compensation later turns out to have been overestimated. R.C. 4123.931 (E) and (F). And the formula is applied equally to claimants who try their cases and those who settle.

Second, the court should answer the certified questions because several Ohio courts have considered the constitutionality of R.C. 4123.93 and 4123.931, and have come to varying conclusions. Specifically, the Washington and Erie county courts of common pleas have held that the statutes are unconstitutional. *McKinley v. Ohio Bureau of Workers' Comp.*, Wash. Co. C.P. No. 05OT 122 (Dec. 27, 2005); *Forney v. Sandusky Limited*, Erie Co. C.P. No. 2003 CV 646 (July 18, 2006) (all attached). Meanwhile, the Lucas, Warren, Hancock, Montgomery and Cuyahoga county courts of common pleas have upheld the statutes. *Fry v. Surf City*, Lucas Co. C.P. No. CI05-2471 (April 3, 2006); *Raker v. Palmer*, Warren Co. C.P. No. 05CV64147 (Aug. 2, 2006); *Smith v. Jones*, Hancock Co. C.P. No. 2005-CV-00152 (Aug. 29, 2006); *Lasley v. Nguyen*, Montgomery Co. C.P. No. 05 CV 8507 (Sept. 18, 2006); *Dambolena v. Ohio Bur. of Workers' Comp.*, Cuyahoga Co. C.P. No. CV-06-584623 (Oct. 6, 2006) (all attached). Likewise, the Fourth District Court of Appeals reversed the common pleas court in *McKinley* and held the statutes constitutional. *McKinley v. Ohio Bureau of Workers' Comp.*, 2006-Ohio-5271. Motions are pending in several other courts.

Thus, the Court should resolve the split in the lower courts regarding the constitutionality of the new subrogation statutes. Resolution now will foreclose the extensive and complicated class-action litigation that was necessary to redistribute subrogated funds after *Holeton*. See *Santos*, 2004-Ohio-28. Here, the lower-court uncertainty means that a large-scale redistribution of funds might be necessary whether the statutes are ultimately found to be constitutional or not.

Consequently, the Court should decide these questions now, before even more cases are decided in Ohio's lower courts.

Third, this case is a good vehicle for resolving these issues. Most workers' compensation subrogation cases arise in one of two contexts: 1) the claimant is injured by a third-party tortfeasor, often in an automobile accident or as a result of defective equipment manufactured by another company, and 2) the claimant's employer has allegedly committed an intentional tort. Here, Groch alleged that his injuries were caused by both the recklessness of his employer GM, and the actions of third-party tortfeasors Kard and Racine. As this case presents both common fact patterns, it is more likely than other cases to take all possible issues into consideration and preclude further litigation on the constitutionality of the new subrogation statute.

2. The Court should review the statute of repose because the Court has never specifically analyzed a statute of repose for products liability.

The Court should review the statute of repose at issue here because the Court has never specifically analyzed a statute of repose for products liability. While the *Sheward* Court mentioned several statutes of repose—including one for products liability—it also broadly struck the entire law because the Court found that its adoption violated the single-subject clause. Neither at the time of *Sheward*, nor at any other time, has this Court analyzed in detail a statute of repose for a cause of action in products liability. Earlier cases dealing with statutes of repose deal exclusively with either medical malpractice, e.g., *Richards v. St. Thomas Hospital* (1986), 24 Ohio St.3d 27; *Mominee v. Scherbarth* (1986), 28 Ohio St.3d 270; *Hardy v. Vermeulin* (1987), 32 Ohio St.3d 45; *Gaines v. Preterm-Cleveland* (1987), 33 Ohio St.3d 54, or liability from improvements to real property by architects and builders, e.g., *Sedar v. Knowlton Construction Co.* (1990), 49 Ohio St.3d 193; *Brennaman v. R.M.I. Co.*, 70 Ohio St.3d 460, 1994 Ohio 322. The *Sedar* Court compared and contrasted statutes of repose for medical malpractice

(disapproved) and builders (approved), implying that the constitutionality of such statutes depends on the nature of the claim. 49 Ohio St.3d at 197-200. And, while *Brennaman* overruled *Sedar*, the point remains that statutes of repose can have different effects for different causes of action, so the constitutionality of such laws might turn on the cause of action involved.

The Court should take this opportunity to analyze for the first time a statute of repose in the context of a products liability claim.

ARGUMENT

At this stage, the only issue is whether the Court should review these questions, and the State urges the Court to do so. But further, as the brief preview below demonstrates, the State urges the Court to answer these questions in favor of the constitutionality of the statutes.

A. The new subrogation statute corrects all of the constitutional infirmities found in the statute analyzed in *Holeton*.

The *Holeton* Court found three constitutional infirmities in former R.C. 4123.931. The first was that the provisions for estimated future values placed all the risk for overestimated future expenditures on the claimant. The second was that the entire amount of a settlement was open to subrogation, even if it was limited by an insurance policy ceiling or some other cap and does not represent a double recovery. The third was that it treated differently plaintiffs who tried their cases and those who settled. The General Assembly addressed and corrected all three of these infirmities in revised R.C. 4123.931.

Respondent State of Ohio's Proposition of Law No. 1:

The new subrogation statute does not violate the takings provision of Section 19, Article I of the Ohio Constitution.

Tort cases based on a workplace injury often result in a lump-sum judgment long before the last workers' compensation payment is made, making it difficult to determine the subrogation

amount to set aside for potential future payments. Under former R.C. 4123.931, the entire risk for overestimated future workers' compensation was placed on the claimant, and the *Holeton* Court held that to be an unconstitutional taking. 92 Ohio St.3d at 125.

The General Assembly corrected the problem in two ways. First, the new statute provides a formula that guarantees some part of the judgment for the claimant, free of any subrogation. Second, the amount of estimated future benefits may be placed in an interest-bearing trust account from which the claimant makes reimbursement to the subrogee as benefits are paid.² R.C. 4123.931 (E) and (F). Any remainder after all benefits are paid belongs to the claimant. R.C. 4123.931(E). The claimant no longer risks losing overestimated future benefits.

Respondent State of Ohio's Proposition of Law No. 2:

The new subrogation statute does not violate the due process provision of Section 16, Article I of the Ohio Constitution.

The *Holeton* Court also found former R.C. 4123.931(D) unconstitutional because it made all settlement proceeds subject to subrogation, even if no double recovery occurred. 92 Ohio St.3d at 125-126. In other words, under the former statute, in some situations the claimant had to disgorge funds unrelated to reimbursable compensation or medical bills. The General Assembly remedied this by creating a formula under which both the claimant's and statutory subrogee's interest in the damages owed by the third-party tortfeasor are determined. (R.C. 4123.931(B)) (settlements); (R.C. 4123.931(D)) (awards following trial).

The formula set forth in revised R.C. 4123.931 ensures that the statutory subrogee is only reimbursed from amounts that constitute an impermissible double recovery. It also ensures that the claimant will always receive some amount of his judgment or settlement that is not subject to

² The trust fund concept enacted in division (E) was modeled in part after the Minnesota statute cited with approval in *Holeton*. See Minn. Stat. 176.061(6).

subrogation, and the subrogee will always receive some amount towards reimbursing its workers' compensation outlay. If the parties find that the statutory formula works an injustice, "the net amount recovered may instead be divided and paid on a more fair and reasonable basis that is agreed to by the claimant and statutory subrogee." R.C. 4123.931(B).

Respondent State of Ohio's Proposition of Law No. 3:

The new subrogation statute does not violate the equal protection clause in Article I, Section 2 of the Ohio Constitution.

Finally, *Holeton* held that the original statute violated equal protection because it treated those who try their cases differently from those who settle.³ 92 Ohio St.3d at 132. The General Assembly specifically dealt with that issue by applying the formula under which the claimant's and statutory subrogee's interest in the damages to both settlements (R.C. 4123.931(B)) and awards following trial (R.C. 4123.931(D)). Thus, claimants who go to trial and those who settle are subject to exactly the same formula for determining the proportion of a judgment or settlement that is subject to subrogation.

The General Assembly, by enacting the new subrogation statute, corrected the prior constitutional infirmities found in the old law by the *Holeton* Court. Revised R.C. 4123.931 does not violate Sections 2, 16 or 19 of Article I of the Ohio Constitution.

B. The new statute of repose does not violate the Ohio Constitution.

The current statute of repose for products liability does not violate the Ohio Constitution because it corrects the defects previously found in statutes of limitations and also because

³ Some claimants also assert that the new subrogation statute violates equal protection because it treats persons injured on the job differently than those injured elsewhere. The *Holeton* Court held that this distinction was rational and constitutional. "[E]qual protection does not require the General Assembly to pass a valid collateral-benefits-offset statute covering tort claims in general before it can enact a workers' compensation subrogation statute." 92 Ohio St.3d at 132.

products liability carries with it issues not necessarily present in previously-analyzed statutes of repose for medical malpractice or improvements to real property.

Respondent State of Ohio's Proposition of Law No. 4

The new statute of repose does not violate the open courts provision or the due process and remedies clauses in Article I, Section 16 of the Ohio Constitution.

The new statute of repose for products liability, R.C. 2305.10(C) and (F), does not violate open courts, due process or right to a remedy for at least two reasons. First, a statute of repose for products liability, unlike that for medical malpractice, does not deny a remedy for a *vested* cause of action, but bars the action before it ever arises.⁴ See *Sedar*, 49 Ohio St.3d at 199-203; *Brennaman*, 70 Ohio St.3d at 468-69 (Moyer, C.J., concurring in part and dissenting in part); but see *Brennaman*, 70 Ohio St.3d at 466. And, also unlike medical malpractice, a statute of repose for products liability does not cut off all recourse for the injured plaintiff, but only the liability of one potential defendant. The injured party still has remedies under workers' compensation, premises liability, and other possible tort remedies. Indeed, uncodified sections of S.B. 80 specifically state that the section is "not to affect civil actions against those in actual control and possession of a product at the time that [it] causes an injury" § 3(C)(8) S.B. 80.

Respondent State of Ohio's Proposition of Law No. 5:

The new statute of repose does not violate the takings clause in Article I, Section 19 of the Ohio Constitution.

Similarly, the statute of repose does not violate the takings clause, because, as explained above, a vested right has not accrued when a statute of repose is applied to a products liability case. The cause of action is denied before it occurs. With no vested right, no taking occurs, so the takings clause is not violated.

⁴ The only exception might be for those cases potentially subject to retroactivity, discussed below.

Respondent State of Ohio's Proposition of Law No. 6:

The new statute of repose does not violate the equal protection clause, in Article I, Section 2 of the Ohio Constitution.

In the absence of a fundamental right or a suspect class, the Ohio General Assembly need have only rational grounds for a legislative distinction that “impinge[s] on mere economic interests.” *Fabrey v. McDonald Village*, 70 Ohio St.3d 351, 353, 1994-Ohio-368; accord *Sedar*, 49 Ohio St.3d at 203. Here, no suspect class or fundamental right is involved; the only right is to an economic recovery. The General Assembly had several rational reasons for treating differently those injured before and after the expiration of a statute of repose. As uncodified sections of S.B. 80 explain, the law recognizes that 1) after the delivery of a product, the manufacturer lacks control over it, over uses made of it, and over the conditions under which it is used; 2) it is more appropriate for the party or parties who have had control over the product over the intervening time to be responsible for harm caused by it; 3) a manufacturer is disadvantaged in that more than ten years after the delivery of a product, it is difficult or impossible for a manufacturer to locate reliable evidence regarding its design and production; and 4) it is inappropriate to apply current legal and technological standards to products manufactured many years prior to a product liability claim. § 3(C)(3)-(6) S.B. 80.

Respondent State of Ohio's Proposition of Law No. 7:

The new statute of repose does not violate the ban on retroactive laws, in Article II, Section 28 of the Ohio Constitution.

In most applications, the new statute of repose will not be applied retroactively, as in most cases both the injury and filing of the claim will have occurred either before or after the effective date of the statute. In a few cases, the injury will have occurred before April 7, 2005, but the

claim will have been filed afterwards. In those cases, the statute might be applied “retroactively,” but only in the sense of measuring relative to the injury.

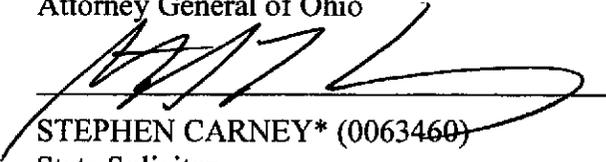
“A law may be applied retroactively if (1) there is an express legislative intent that it do so and (2) it affects a remedial, not substantive, right.” *State ex rel. Romans v. Elder Beerman Stores Corp.*, 100 Ohio St.3d 165, 167, 2003-Ohio-5363, citing *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100. In this case, the new statute of repose satisfies both conditions for those cases at issue. Section 2305.10(F) of the Revised Code states that the law is to be applied to “any civil action commenced on or after the effective date of this amendment . . . regardless of when the cause of action accrued” Thus, for a case in which the injury occurred before April 7, 2005, but filed after that date, the General Assembly expressly intended the statute to apply retroactively. However, R.C. 2305.10(F) also states that it “shall be considered to be purely remedial in operation and shall be applied in a remedial manner” Thus, the statute is intended to be retroactive and remedial for the small class of cases in which the injury occurred before, but the case was filed after, the effective date.

CONCLUSION

For the above reasons, the Court should answer the questions certified by the district court, and should uphold the constitutionality of the challenged statutes.

Respectfully submitted,

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Attorney General of Ohio



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State of Ohio

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Respondent State of Ohio's Memorandum Urging The Court To Answer The Certified Questions was served by U.S. mail this 6th day of November, upon the following counsel:

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Kard Corporation and Racine Federated, Inc.
National/Kard Division


Stephen P. Carney
State Solicitor

EXHIBIT A

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

DOUGLAS GROCH, et al.,	:	Case No. 3:06-CV-1604
	:	
Plaintiffs,	:	
	:	
vs.	:	Judge JAMES G. CARR
	:	
GENERAL MOTORS	:	
CORPORATION, et al.,	:	
	:	
Defendants.	:	

ORDER

There are issues of Ohio law that may be determinative of the present case and for which there is no controlling precedent in the decisions of the Supreme Court of Ohio. Therefore, this Court finds it appropriate to certify questions of Ohio law to the Supreme Court of Ohio.

A. NAME OF THE CASE AND NAMES OF ALL PARTIES

The name of this case is *Douglas Groch, et al. v. General Motors Corporation, et al.* case number 3:06-CV-1604. The parties in this case are: Plaintiffs Douglas Groch and Chloe Groch versus Defendants General Motors Corporation, Kard Corporation and

Racine Federated, Inc. The Attorney General of Ohio is a party for purposes of defending the constitutionality of the Ohio statutes at issue.

B. BRIEF STATEMENT OF FACTS

The Amended Complaint alleges the following: Plaintiff Douglas Groch (“Groch”) was injured on March 3, 2005 when the trim press he was operating came down on his right arm and wrist. At the time of his injury Plaintiff Douglas Groch was acting in the course and scope of his employment with Defendant General Motors Corporation. The trim press that he was using was manufactured by Defendants Kard Corporation and Racine Federated, Inc.

Groch bought an action in the Court of Common Pleas, Lucas County, Ohio seeking damages from Defendant General Motors Corporation (“GM”) based on a theory of employer intentional tort and from Defendants Kard Corporation and Racine Federated, Inc. (respectively, “Kard” and “Racine”) based on a theory of product liability. Plaintiff Chloe Groch (“Chloe”) sought damages for loss of consortium.

The action was removed to federal court by GM. Federal jurisdiction is based on 28 U.S.C. 1332 because there is diversity between the Plaintiffs and the Defendants, and the amount in controversy exceeds \$75,000.00.

GM has asserted a subrogation interest in Groch’s recovery for its payment to him of workers’ compensation benefits. Groch asserts that the Ohio statutes granting GM subrogation interests—R.C. 4123.93 and R.C. 4123.931—are unconstitutional. To fully adjudicate this matter and determine the rights and liabilities of each party, this Court needs a determination by the Ohio Supreme Court regarding the constitutionality of the statutes under the Ohio Constitution. The Supreme Court of Ohio has not yet had

opportunity to issue a decision on the constitutionality of R.C. 4123.93 and R.C. 4123.931, passed as Senate Bill 227 and made effective in April 2003. Therefore, this Court certifies questions 1 through 3 to the Supreme Court of Ohio.

Kard and Racine assert that they are immune from liability based on the statute of repose for products liability claims provided at R.C. 2305.10. To fully adjudicate this matter and fully determine the rights and liabilities of each party, this Court needs a determination by the Ohio Supreme Court regarding the constitutionality of the statutes under the Ohio Constitution. The Supreme Court of Ohio has not yet had opportunity to issue a decision on the constitutionality of R.C. 2305.10, passed as Senate Bill 80, and made effective in April, 2005. Therefore this Court certifies questions 10 through 14 to the Supreme Court of Ohio.

C. THE CERTIFIED QUESTIONS

1. Do the statutes allowing subrogation for workers' compensation benefits, R.C. 4123.93 and 4123.931, violate the takings clause, Article I, Section 19, of the Ohio constitution?
2. Do R.C. 4123.93 and 4123.931 violate the due process and remedies clause, Article I, Section 16, of the Ohio constitution?
3. Do R.C. 4123.93 and 4123.931 violate the equal protection clause, Article I, Section 2 of the Ohio constitution?
10. Do R.C. 2305.10(C) and (F) violate the open courts provision of the Ohio Constitution, Article I Section 16?
11. Do R.C. 2305.10(C) and (F) violate the takings clause, Article I, Section 19, of the Ohio constitution?
12. Do R.C. 2305.10(C) and (F) violate the due process and remedies clause, Article I, Section 16, of the Ohio constitution?
13. Do R.C. 2305.10(C) and (F) violate the equal protection clause, Article I, Section 2, of the Ohio constitution?

14. Do R.C. 2305.10 (C) and (F) violate the ban on retroactive laws, Article II, Section 28 of the Ohio constitution?

D. COUNSEL FOR THE PARTIES

Counsel for each party is provided below:

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*Counsel for Kard Corporation and
Racine Federated, Inc. National/Kard Division*

E. MOVING PARTY

The Plaintiff Douglas Groch is designated as the moving party.

s/ James G. Carr

Hon. James G. Carr

EXHIBIT B

COMMON PLEAS COURT
WASHINGTON COUNTY, OHIO

FILED
COURTS

2005 DEC 27 PM 4:17

WASHINGTON CO. OHIO

Jeff McKinley

Plaintiff

Case No. 05 OT 122

Judge Ed Lane

Ohio Workers Comp Bureau

Defendant

DECISION
(On Motion of Plaintiff for
Summary Judgment)

COPY

The above styled action was commenced in this Court by the filing of a Complaint for Declaratory Relief on April 11, 2005. The Plaintiff is participating in Ohio's Workers' Compensation Fund by virtue of a work related accident that occurred in East Liverpool, Ohio, on July 13, 2003. The Plaintiff has been determined to be eligible for Workers' Compensation benefits, and has been receiving benefits for medical expenses and loss of income. The Plaintiff also brought two civil suits as a result of the incident of July 13, 2003. He brought one suit against his employer for intentional tort, which was subsequently dismissed. He also brought a suit against the owner of the premises on which his injury occurred based on violations of the frequenter statutes. The Plaintiff settled his claim against the premises owner for a confidential amount.

The Defendant in this case, the Ohio Bureau of Workers' Compensation, claims a right of subrogation under Section 4123.931 O.R.C. from the Plaintiff's settlement proceeds. The

Plaintiff asserts that the aforesaid statute granting the Defendant the right of subrogation to his settlement claims is unconstitutional.

The Plaintiff filed his Motion for Summary Judgment on November 14, 2005. On November 17, 2005, the Assignment Commissioner gave notice of a Non-Oral Hearing for December 12, 2005. Thereafter, the Defendant timely filed a Response to the Plaintiff's Motion for Summary Judgment on November 28, 2005. The Plaintiff filed a Reply to the Defendant's Brief in Opposition on December 2, 2005. In an unrelated matter, the Defendant filed for leave to file a Motion for Summary Judgment on November 28, 2005. The Court, by Entry of November 29, 2005, granted the Defendant's leave to file a Motion for Summary Judgment. However, the Defendant has not filed for Summary Judgment to date. The parties have advised the Court that they desire the Court to consider first the issue of the constitutionality of the underlying statute. If the statute is found to be constitutional, then the Defendant will file for Summary Judgment. If the Court determines the statute to be unconstitutional, the matter will be appealed and will ultimately be decided by either the Washington County Court of Appeals or the Ohio Supreme Court.

The factual background of the Plaintiff's receipt of his injury does not appear to be in dispute by these parties. Both parties have stated the factual background in the Memorandums filed herein. It appears to the Court that it is uncontroverted that on July 13, 2003 the Plaintiff, Jeff McKinley, fell while he was working inside a furnace or boiler hopper at the Von Roll America, Inc./Waste Technologies facility in East Liverpool, Ohio. As a direct result of this fall, the Plaintiff was left hanging inside a cone shaped receptacle where he received severe burns to his legs and other parts of his body. At the time of the injury to the Plaintiff, he was employed by

Safway Services Inc. The Plaintiff is a carpenter who builds scaffolding for a living. At the time of his fall, he was engaged in erecting scaffolding in various applications at the aforesaid location.

As noted above, the Plaintiff initially sued his employer on an intentional tort. However, this suit was subsequently dismissed without payment of any monies to the Plaintiff. His employer was a state fund employer. Safway is not a self insured employer for the purposes of Workers' Compensation. The Plaintiff also sued Von Roll America, Inc. His claims against this company were settled out of court for an undisclosed amount of money. There was no jury trial. Therefore, no jury has determined what are the Plaintiff's economic and non-economic losses.

As of November 22, 2005, the Workers' Compensation Bureau had paid compensation in the amount of \$398,303.17. (\$57,788.43 on Plaintiff's Workman's Compensation claim; \$340,514.74 has been paid for the Plaintiff's medical benefits.) The Bureau estimates future benefits that it will pay to the Plaintiff to be \$487,505.39 and claims a statutory lien upon the settlement proceeds against the Plaintiff in the amount of \$885,808.56. The Plaintiff claims that by virtue of Section 4123.93 and 4123.931 O.R.C. it is subrogated to the rights of the Plaintiff with respect to past, present, and estimated future payments of compensation benefits. Under the present Ohio statute¹ the Bureau of Workers' Compensation (herein after referred to as BWC) has an automatic right of subrogation against a third party for the benefits of an injured worker who is receiving Workman's Compensation benefits. This statute has been written and rewritten

¹4123.931 O.R.C.

several times. Prior statutes have twice been held unconstitutional by the Ohio Supreme Court.² The BWC was first given a right of subrogation when the State of Ohio enacted Section 4123.93 (B) O.R.C. in 1993. This Section of law was amended in 1995, when the subrogation rights of the BWC were divided into Sections 4123.93 and 4123.931 O.R.C. The 1993 statute as amended in 1995 was declared unconstitutional by the Ohio Supreme Court in the Holeton decision (*supra*). The Court found that the 1995 amendments were not rationally related to their purpose, and they operated to reduce a Plaintiff's tort recovery irrespective of whether a double recovery had actually occurred. The Court went on to hold that due process permits deductions for collateral benefits only to the extent that the loss for which the collateral benefit compensates is actually included in the award.³ The Supreme Court also noted that a statute that requires a claimant to reimburse the Bureau for future benefits that the claimant may never receive is constitutionally flawed and violates the equal protection clause of the Ohio Constitution, Clause 16 requiring every person for an injury done to have remedy by due course of law and Section 19 the taking clause of Article I of the Ohio Constitution.⁴

Upon holding the 1995 amendments unconstitutional, the law of Ohio reverted to the statute as enacted in 1993. The Ohio Supreme Court considered this statute in 2004 and also held it unconstitutional. The Supreme Court held that under the rational relationship test, and for the reasons stated in Holeton, R. C. 4123.93 is unconstitutional because it precludes claimants

²Holeton v Crouse Cartage Co., (2001), 92 Ohio St.3d, 115, 2001-Ohio-109; and Modzelewski v Yellow Freight Sys., Inc., 102 Ohio St.3d 192, 2004-Ohio-2365

³Holeton v Crouse Cartage Co., (2001), 92 Ohio St.3d, 122, 2001-Ohio-109

⁴Holeton v Crouse Cartage Co., (2001), 92 Ohio St.3d, 123, 2001-Ohio-109

who are parties to actions against third party tort feasons from showing that their tort recovery or portions thereof, do not duplicate their Workers' Compensation recovery and, therefore, do not represent a double recovery.⁵

The present statute was enacted by the State of Ohio in 2003. The present statute modifies the previous statutes. The issue presented in the instant case is whether or not these modifications satisfy the requirements of the Holeton decision. In the instant case, both parties agree that the BWC's right of subrogation is now determined by mathematical formula. In fact, in its Reply Brief, the BWC sets forth a detailed example of how the mathematical formula will work. The present statute requires jurors to delineate by interrogatory economic from non-economic damages. This would clearly give some basis for determining what amount of an award was subject to subrogation by the BWC. However, the statute is entirely silent as to how or what are economic or non-economic damages when a case is settled without a jury. Public policy of Ohio has always strongly encouraged the settlement of law suits in the interest of judicial economy. The Plaintiff maintains that his settlement was not for the full amount of his damages, but was rather a compromised settlement. There is no provision in the present statute for the Plaintiff to show that there was no double recovery. Under the present statute and the mathematical formula, his settlement monies will essentially be tied up until he dies. Any remains will go to the benefit of his estate. This, in effect, is a complete taking of a Plaintiff's property without due process of law. The subrogation interest defined in the present statute includes past, present, and estimated future payments of compensation, including medical benefits and rehabilitation costs. It appears that the State of Ohio is taking property from this

⁵Modzelewski v Yellow Freight Sys., Inc., (2004) 102 Ohio St.3d 196, 2004-Ohio-2365

Plaintiff for damages which he may never ever incur. They are now estimating or guessing as to what future benefits will be. Courts have long held evidentiary matters to a standard of proof of a preponderance of the evidence in civil matters. There is no opportunity in this case to determine future benefits other than by mathematical formula.

The present statute assumes that there will be a double recovery in a settlement and provides no provisions whereby parties can actually go into a court of law and litigate the amount of the recovery and what is an actual fair award for all economic and non-economic losses, and what is a fair award for past and future injuries.

In this Court's view, perhaps Pogo was right when he stated that, "I have seen the enemy and they is us." Maybe we have now arrived at 1984, 21 years later than predicted. Prior to the State of Ohio taking any citizen's property, that citizen should be entitled to due process that involves a full and fair hearing, not a mathematical formula. The citizen's right to the enjoyment of their property should be protected by the State, not confiscated by the State and subject to the citizen going to the State every six months to beg for a partial payout of his or her money or actually dying before receiving compensation for injuries received. It appears to this Court that the present statute is unconstitutional for the reasons set forth in the Holeton case (*supra*). The present statute does violate article I, and Sections 216 and 19 of the Ohio Constitution.

Judge Ed Lane

DATE: _____

c: Attorney Beausay
Attorney McGee

file 0

FILED
CLERK OF COURTS

**COURT OF COMMON PLEAS
WASHINGTON COUNTY, OHIO**

2006 JAN 17 AM 9:46

WASHINGTON CO. OHIO

Jeff McKinley	:	
	:	Case No. 05 OT 122
Plaintiff	:	
vs.	:	Judge Lane
	:	
Ohio Bureau of Workers' Compensation	:	
	:	
Defendant	:	

JUDGMENT

This case is before the court on plaintiff's motion for summary judgment filed November 14, 2005. For the reasons set forth in the court's decision dated December 27, 2005 (attached), plaintiff's motion for summary judgment is hereby sustained. The decision renders moot all other issues before the court. Judgment for plaintiff. Costs to defendant. This is a final appealable order.


Ed Lane, Judge

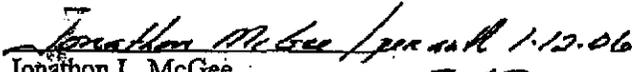
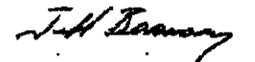
1-13-06
Date

NOTICE TO CLERK'S OFFICE:
FINAL APPEALABLE ORDER

Approved:

COPY


T. Jeffrey Beausay
Counsel for Plaintiff

 *per call 1-13-06*
Jonathon L. McGee
Special Counsel for Defendant 

J.M. 78

COPY

IN THE COMMON PLEAS COURT OF ERIE COUNTY, OHIO

Jody L. Forney, et al.,

CASE NO: 2003 CV 646

Plaintiff

Judge Tygh M. Tone

-vs-

Sandusky Limited a/k/a
Sandusky Athol International,
Defendant

OPINION AND
JUDGMENT ENTRY

FILED COURT
COMMON PLEAS, OHIO
2005 JUL 19 PM 1:05
CLERK OF COURT

On October 24, 2003, Forney filed complaint alleging wrongful death. Sandusky Limited answered the complaint on November 14, 2003. Defendant filed a motion for summary judgment on August 4, 2005, and it was denied on February 1, 2006. On April 13, 2006, Defendant Sandusky Limited filed Motion for Summary Judgment regarding the worker's compensation lien. Plaintiff filed a memorandum in support of the Motion on May 26, 2006. The defendant's Motion for Summary Judgment regarding the worker's compensation lien is granted.

I. FACTS

Plaintiff Judy Forney's husband Rolland was seriously injured and died as a result of workplace exposure to hazardous, toxic, carcinogenic substances which allegedly caused him to contract cancer. The Bureau of Workers' Compensation ("BWC") has denied all workers' compensation benefits to Mrs. Forney and her family. Defendant Sandusky is compliant and pays premiums to the BWC.

II. ARGUMENTS

Defendant moves the Court for Summary Judgment. The defendant argues that ORC §4123.931 is unconstitutional because it could mean that Sandusky Limited would pay twice for this particular claim, and the law generally bars an insurer from subrogating against its own insured. Specifically, defendant asserts that Section 35 of Article II of the Ohio Constitution has been violated. Defendant argues that the entire purpose of the benefits purchased from the BWC were to protect against liability for claims of this nature, and if the BWC recovered a double recovery as it attempts to do, it would result in an excessive fine, and would deprive Sandusky Limited of the benefit of its contract with the BWC. In the alternative, defendant argues if the statute is constitutional, Sandusky Limited is not a "third party" under the terms of the statute, and would be entitled to a complete setoff for any amounts already paid to the BWC.

Plaintiff replied to Defendant's Motion with a Memorandum in Support. Plaintiff reaches the same conclusion as Defendant reaches, however this is done through a different analysis. Plaintiff argues that the revision of R.C. §4123.931 constitutes an unlawful taking of property without due process of law. They assert that the legislation unreasonably burdens the injured worker. Plaintiff also argues that the statute favors those who try their cases to the detriment of those who settle; assuming a double recovery and subrogating against an injured employee. The plaintiffs make a distinction between two recoveries and a double recovery, as two separate recoveries can in many cases be insufficient to make a party whole. Plaintiffs further argue that the statute unconstitutionally extinguishes the recovery of a dead worker's family. Plaintiff further argues that the statute still violates Sections 2, 5, 16, and 19 of Article I of the Ohio Constitution, Sections 34 and 35 of Article II, as well as the Equal Protection Clause of

the Fourteenth Amendment. The Plaintiff further argues that the statute is unconstitutional because it unfairly groups together employer-intentional tort victims in with negligent tort victims under the guise of preventing double recovery.

III. LAW AND ANALYSIS

"A summary judgment motion is made on the grounds that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law as shown by the pleadings...served and filed therewith." 1 Civil Practice Section 3.65. The principle function of Ohio Rule of Civil Procedure 56 is to enable movement beyond allegations in the pleadings and to analyze the evidence so as to ascertain whether any actual need for a trial exists. Smith v. Mayfield (1989), Ohio App. LEXIS 4039. When a motion for summary judgment is made and supported as provided in the rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response must set forth specific facts showing that there is a genuine issue for trial. Id.

The appropriate rendering for a motion of summary judgment is determined by a tripartite demonstration:

- 1) There is no genuine issue as to any material fact;
- 2) The moving party is entitled to judgment as a matter of law; and
- 3) Reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor.

See, Harless, et al v. Willis Day Warehousing Company, Inc., et al (1978), 54 Ohio St. 2d

64.

O.R.C. §4123-931 violates Ohio Const. art. I, Sections 16 and 19 because, in some circumstances, it acts to reduce an individual's tort recovery irrespective of whether

a double recovery has actually occurred. Holeton v. Crouse Cartage, (2001) 92 O.S. 3d 115.

Under an equal protection analysis, the challenged statute will be upheld if the classification bears a rational relationship to a legitimate governmental interest or if reasonable grounds exist for drawing the distinction. Id.

Ohio Rev. Code Ann. § 4123.931(D) essentially creates a presumption that a double recovery occurs whenever a claimant is permitted to retain workers' compensation and tort recovery. Claimants who try their tort claims are permitted to rebut this presumption, while claimants who settle their tort claims are not. Such disparate treatment of claimants who settle their tort claims is irrational and arbitrary because there are situations where the claimants' tort recovery is necessarily limited to amounts that if retained along with workers' compensation cannot possibly result in a double recovery. Id.

Section 35 of Article II of the Ohio Constitution expressly provides: "For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease."

"The statutory subrogation right of recovery applies to, but is not limited to, all of the following:

1. ...
2. ...
3. Amounts recoverable from an intentional tort action."

O.R.C. Ann. § 4123.931 (I).

The amount of damages recoverable by civil action in the courts for death caused by the wrongful act, neglect, or default of another, shall not be limited by law. Oh. Const. Art. I, § 19 (a).

"Under the collateral source rule, benefits in the form of diminished wages, received by a plaintiff from his employer during the period he is not able to work because of a tort-feasor's negligent act, are collateral benefits and are not admissible on the issue of damages. However, if the tort-feasor claims that benefits received are not collateral but are direct benefits, the burden of establishing that such benefits are direct benefits, and therefore admissible on the issue of damages, is on the tort-feasor." Pryor v. Webber, (1970), 23 Ohio St. 2d 104, at Syllabus 3.

The government cannot take property in an arbitrary or unreasonable manner, such as withholding due process of law or providing just compensation. Grieb v. Dept. of Liquor Control (1950), 153 Ohio St. 77, 82.

Interest earnings are protected property rights, because interest follows principal. Phillips v. Washington Legal Foundation (1998), 524 U.S. 156.

The parameters of an intentional tort are as follows: 1. An intentional tort is an act committed with the intent to injure another, or committed with the belief that such injury

is substantially certain to occur. 2. The receipt of workers' compensation benefits does not preclude an employee or his representative from pursuing a common-law action for damages against his employer for an intentional tort. 3. An employer who has been held liable for an intentional tort is not entitled to a setoff of the award in the amount of workers' compensation benefits received by the employee or his representative. Brady v. Safety-Kleen Corp., 61 Ohio St. 3d 624.

O.R.C §4123.931 (D) "essentially creates a presumption that a double recovery occurs whenever a claimant is permitted to retain workers' compensation and tort recovery. Claimants who try their tort claims are permitted to rebut this presumption, while claimants who settle their claims are not. Such disparate treatment of claimants who settle their tort claims is irrational and arbitrary." Giles v. Schindler Elevator Corp., 146 Ohio App. 3d 388.

The statute in question makes a distinction between employers injured within the scope of employment and those injured outside of the scope, and punishes those injured in the course and scope of their employment. Under an Equal Protection analysis, this legislation is presumed valid and is subject to the rational relation test. The test asks: is this legislation rationally related to a legitimate interest? Here, the legislation's goal is to prevent true double recoveries, which would indeed qualify as a legitimate interest. However, the distinction drawn does not qualify as rationally related to the accomplishment of this interest and is therefore unconstitutional on those grounds. The interest appears to be accomplished for one class of plaintiffs but not another. The claimants who settle their case are not permitted to rebut the presumption of double recovery, while those who try their case are allowed the benefit of jury interrogatories

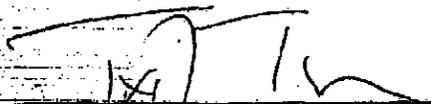
thereby delineating the different types of damages awarding and in essence rebutting the "assumed" double recovery. Based upon the foregoing, and for the reasons set forth in Holeton, supra, the Court finds that Ohio Revised Code §4123.931 as amended by Senate Bil 224, effective April 9, 2003, is unconstitutional.

IV. JUDGMENT ENTRY

It is therefore **ORDERED, ADJUDGED, AND DECREED** that the Motion of Defendant Sandusky Limited for Summary Judgment is granted pursuant to Ohio Civil Rule 56.

It is therefore **ORDERED** that the Erie County Clerk of Courts is to serve upon all parties not in default for failure to appear Notice of this Judgment Entry and its date of entry upon the journal. Within three (3) days entering the Judgment Entry on the journals, the Clerk shall serve the parties, all in accordance with Civil Rule 58 (B) and 5 (B).

7/1/07
DATE


JUDGE TYGH M TONE

FILED
LUCAS COUNTY

2006 APR -3 P 4: 37

COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

Erica E. Fry,

Plaintiff,

v.

Surf City, Inc., et al.,

Defendants.

*

*

*

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*

*

Case No. C105-2471

OPINION AND JUDGMENT ENTRY

Hon. Jack Zouhary

This matter is before the Court on the cross motions for summary judgment filed by Plaintiff Erica E. Fry and Defendant Ohio Bureau of Workers' Compensation ("Bureau").

Upon review of the parties' respective pleadings and briefs, the evidence presented, the arguments of counsel presented at a hearing on March 6, 2006, and the applicable law, the Court denies Plaintiff's Motion for Summary Judgment and grants the Bureau's Motion for Summary Judgment.

INTRODUCTION

The issue presented by both summary judgment motions is the constitutionality of R.C. 4123.93 and 4123.931 (the Ohio workers' compensation subrogation statute) as enacted by the 124th Ohio General Assembly in 2003 Sub.S.B. No. 227 (S.B. 227), effective April 9, 2003. This statute creates an independent right of recovery in favor of statutory

subrogees against third parties. The statutory subrogee is subrogated to a plaintiff's rights against third-party tortfeasors with respect to past, present, and estimated future payments of workers' compensation benefits.

The changes enacted to R.C. 4123.931 in S.B. 227 were in response to the Ohio Supreme Court's decision in *Holeton v. Crouse Cartage Co.*,¹ which held that former R.C. 4123.931 violated Sections 2, 16, and 19 of Article I of the Ohio Constitution. While the *Holeton* Court found the prior subrogation statute unconstitutional, it also opined that a subrogation statute does not violate Section 35, Article II of the Ohio Constitution (the Workers' Compensation provision) and, therefore, the legislature may constitutionally enact a subrogation statute.²

Fry alleges that the new statute violates Sections 2, 16, and 19 of Article I of the Ohio Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and asks the Court to grant summary judgment against the Bureau and find that the workers' compensation subrogation statute is unconstitutional.

The Bureau asks the Court to find that the workers' compensation subrogation statute is constitutional and therefore enforceable against any recovery made by Fry as a result of the instant lawsuit.

¹ (2001), 92 Ohio St.3d 115.

² *Id.* at 120.

FACTS

On December 21, 2004, Fry was injured while working for Defendant Surf City, Inc., an employer participating in the state insurance fund.³ The Complaint alleges that Fry's injury resulted from an employer intentional tort committed by Surf City. At the time of the accident, Fry was in the course and scope of her employment. As a result of her injuries, Fry filed a claim for workers' compensation benefits with the Bureau. The Bureau allowed the claim, has already paid medical bills and benefits on Fry's behalf, and may pay additional compensation and benefits in the future.

LAW AND ANALYSIS

1. Summary Judgment Standard

Civ.R. 56(C) provides that "before a summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, by viewing such evidence most strongly in favor of the non-moving party, that conclusion is adverse to the party against whom the motion for summary judgment is made."⁴

2. Constitutional Challenge Standard

The Court recognizes that all legislative enactments enjoy a strong presumption of constitutionality.⁵ Further, the Court "must apply all presumptions and pertinent rules of

³ Wentzel Affidavit, at ¶2.

⁴ *State ex rel. Zimmerman v. Tompkins* (1996), 75 Ohio St.3d 447, 448.

⁵ *State ex rel. Patterson v. Indus. Comm.* (1996), 77 Ohio St.3d 201.

construction so as to uphold, if at all possible, a statute * * * assailed as unconstitutional."⁶ Consequently, a challenging party must prove any assertions of unconstitutionality beyond a reasonable doubt.⁷

3. R.C. 4123.93 and 4123.931 (as enacted in S.B. 227) do not violate Sections 16 and 19 of Article I of the Ohio Constitution.

In analyzing the prior statute, the *Holeton* court cited to earlier opinions finding that the State of Ohio has a legitimate interest in preventing double recoveries and that "it is constitutionally permissible for the state to prevent a tort victim from recovering twice."⁸ The Ohio Supreme Court merged its analysis of Section 16 and Section 19 into one and stated:

"Whether expressed in terms of the right to private property, remedy or due process, the claimant-plaintiff has a constitutionally protected interest in his or her tort recovery to the extent that it does not duplicate the employer's or Bureau's compensation outlay."⁹

Holeton then called into question two provisions of the former statute, ultimately finding that they violated the Constitution. The first provision found unconstitutional in former R.C. 4123.931(A) gave the statutory subrogee a right of subrogation with respect to "estimated future values of compensation and medical benefits," and the second provision questioned was found in former division (D) regarding settlements.¹⁰

⁶ *State v. Dorso* (1983), 4 Ohio St.3d 60.

⁷ *In re Columbus Skyline Securities, Inc.* (1996), 74 Ohio St.3d 495.

⁸ *Holeton*, 92 Ohio St.3d at 121-122.

⁹ *Id.* at 122.

¹⁰ *Id.*

a. Fry's reliance on *Bartlet v. State of Ohio* is misplaced.

Fry argues in her motion that the General Assembly's attempt to remedy the constitutional defects identified in *Holeton* came up short and that the statute remains unconstitutional. Fry posits that under *Bartlet v. State of Ohio*,¹¹ the legislature cannot require a court to treat as valid laws that were previously rendered unconstitutional by simply re-enacting them.

Plaintiff's reliance on *Bartlet* is misplaced. If Fry's reading of *Bartlet* is correct, then the legislature could never go back to legislation and correct prior constitutional flaws. Further, *Bartlet* points out the "power of the legislature to validate any void or ineffectual act is limited to such acts as it might have originally performed or authorized,"¹² and *Holeton* recognizes that the legislature may constitutionally enact a subrogation statute.¹³ Thus, the legislature did not act unconstitutionally by enacting S. B. 227.

b. Reimbursements of estimated future values are not burdensome for claimants.

The *Holeton* court found that former R.C. 4123.931(A), by giving the statutory subrogee a current collectible interest in estimated future expenditures, created a situation in which a prohibited taking might occur when the statute operated not to prevent the claimant from keeping a double recovery, but to provide the statutory subrogee with a windfall at a claimant's expense. "In other words, R.C. 4123.931 requires [claimants] to

¹¹ (1905), 73 Ohio St. 54.

¹² Id. at 58.

¹³ *Holeton*, 92 Ohio St.3d at 120.

reimburse the Bureau or self-insuring employer for future benefits which the claimant may never receive."¹⁴ This would happen when compensation the statutory subrogee is obligated to pay is terminated earlier than what was estimated for purposes of determining future values. The former statute irrationally and arbitrarily placed the risk of over-estimating future benefits on the claimant.¹⁵

Fry argues that the new statute regarding estimated future expenditures also overburdens an injured worker by requiring the worker to immediately disgorge the portion of the recovery deemed to be estimated future expenses. Fry's counsel stated at oral argument that the statute also places an unreasonable burden on the worker to establish a trust account and bear any attendant administration costs. The Court finds these contentions inaccurate and meritless.

In S.B. 227, the legislature created a system that guarantees that any risk of estimating future values is not placed on a claimant. Under new R.C. 4123.931, the statutory subrogee does not have a current collectable interest in estimated future expenditures. The new statute does not require the claimant to reimburse the statutory subrogee for future benefits that the claimant may never receive. To accomplish this, new divisions (E) and (F) of R.C. 4123.931 permit the claimant to establish an interest-bearing trust account for the full amount of the subrogation interest that represents estimated future payments of compensation and benefits. If the claimant establishes a trust account, every six months the statutory subrogee must provide a payment notice to the claimant,

¹⁴ Id. at 123.

¹⁵ Id. at 125.

listing the amounts paid on the claimant's behalf. The claimant must then reimburse the subrogee from the trust account in accordance with the notice. If the statutory subrogee's duty to continue making payments is terminated, any amount that remains in the trust account, after final reimbursement is paid to the subrogee, must be paid to the claimant or the claimant's estate. If a claimant does not establish a trust account under division (E)(1), the claimant must, within 30 days after receipt of funds from the third-party tortfeasor, pay the statutory subrogee the full amount of the subrogation interest that represents future benefits.¹⁶

The *Holeton* court found that former R.C. 4123.931 was irrational and arbitrary because it imposed the risk of liability for overestimating future expenditures upon the claimant. The new statute removed this risk by providing for the creation of a trust account. There is now no risk that the amount of future benefits will be overestimated, as the subrogee is only reimbursed for amounts actually expended up to the amount placed in trust.

Further, the creation of a trust account does not pose an undue burden upon a claimant, for several reasons. First, it is the claimant's option to create the trust account; under division (F), the claimant may elect to pay the future benefits up front. Second, even if Fry is correct that the claimant would bear the cost of the trust account, she has not presented any evidence that obviates a finding that the cost would be minimal, if it exists at all, so as not to present an undue burden; and new R.C. 4123.931(E)(2) authorizes the claimant to use the interest that accrues on the trust account to pay the expenses associated

¹⁶ R.C. 4123.931(F).

with the account. Finally, once the trust account is established, the burden is on the subrogee to submit a payment notice to the claimant every six months,¹⁷ and the new statute makes no provision for reimbursement in the absence of a timely payment notice.

Fry also relies on *McKinley v. Ohio Workers' Comp. Bureau*,¹⁸ which held that R.C. 4123.931 effects a complete taking of property without due process because it requires a plaintiff to place *all* settlement monies into the trust account.¹⁹ *McKinley* misinterprets the statute, however, as division (E) requires only monies representing the future interest to be placed into the trust account. Thus, the Court finds *McKinley* unpersuasive.

Fry also argues that there may be less burdensome methods for eliminating the risk of overestimating future benefits, such as granting the statutory subrogee a credit or offset against future payments. While there may or may not be alternatives to the solutions selected by the General Assembly, the Court may not engage in legislative fact finding.²⁰ The legislature is not bound to pick the least burdensome alternative that can be devised. It is enough that the scheme proposed is reasonable and does not impose any irrational or arbitrary risk upon the claimant.²¹ The Court's power extends only to determining whether the method chosen by the legislature is clearly unconstitutional.²²

¹⁷ R.C. 4123.931(E)(3).

¹⁸ (Dec. 27, 2005), Washington C.P. No. 05-OT-122. *McKinley* is currently on appeal to the Fourth District Court of Appeals (Case No. 06 CA 7).

¹⁹ *Id.* at 5-6.

²⁰ See *FCC v. Beech Communications, Inc.* (1993), 508 U.S. 307, 315.

²¹ See *Direct Plumbing Supply Co. v. Dayton* (1941), 138 Ohio St. 540.

²² *Desenco Inc. v. Akron*, 84 Ohio St. 3d 535, 538. See, also, *Holeton*, 93 Ohio St.3d at 137 (C. J. Moyer, dissenting).

The trust fund created by the General Assembly in S.B. 227 corrects the constitutional infirmity cited by *Holeton*. There is now no risk to the plaintiff that future benefits may be estimated too high. The Court finds that the trust account provision in R.C. 4123.931 is a reasonable, rational, non-arbitrary response to the legitimate concern of preventing double recoveries and complies with the holding in *Holeton*. Thus, S.B. 227, as it addresses the estimated future value issue, is constitutional.

c. Settlements

The *Holeton* court found that former R.C. 4123.931(D) established a framework whereby an unconstitutional taking of the claimant's property or a denial of remedy by due process could occur by distinguishing between third-party claims that are tried and third-party claims that are settled.²³ Under the former statute, in the case of an award or judgment following trial, the claimant could obtain special jury interrogatories indicating that the award or judgment represented different types of damages. By obtaining this, the claimant could show that certain damages were not subject to reimbursement because they did not represent workers' compensation benefits. In contrast, in a settlement, the entire amount was subject to the statutory subrogee's subrogation right, regardless of the manner in which the settlement or compromise was characterized. The claimant was prevented from showing that portions of the settlement did not represent workers' compensation benefits. In other words, reimbursement could be from proceeds that did not constitute a double recovery.²⁴

²³ *Holeton*, 92 Ohio St.3d at 125-126.

²⁴ *Id.*

Fry argues that S.B. 227's settlement provisions remain unconstitutional. In support of her argument, Fry again submits the decision in *McKinley v. Ohio Workers' Comp. Bureau*,²⁵ which, in addition to holding that S.B. 227's version of R.C. 4123.931 effects a complete taking of property without due process as it requires a plaintiff to place all settlement monies into the trust account, held that in a settlement situation there is no provision for the plaintiff to show there was no double recovery.²⁶ The Court finds *McKinley* to be incorrect on the latter issue, too.

The constitutional defects found in *Holeton*, and as alleged by Fry, do not exist in the new workers' compensation subrogation statute. First, the new statute establishes a *pro rata* formula to determine the respective interests of the statutory subrogee and the claimant in any settlement amount.²⁷ This formula is applied equally to settlements and to awards following trial.²⁸ Thus, the new statute does not distinguish between cases going to trial and cases that settle.

Moreover, the formula ensures that the statutory subrogee is only reimbursed from amounts that would constitute an impermissible double recovery. The formula works to provide a *pro rata* distribution of the "net amount recovered" by the claimant through either settlement or trial award to the statutory subrogee and the claimant.²⁹ Never allowing the statutory subrogee to recoup more than its *pro rata* share of the "net amount

²⁵ (Dec. 27, 2005), Washington C.P. No. 05-OT-122.

²⁶ *Id.* at 5-6.

²⁷ R.C. 4123.931(B).

²⁸ R.C. 4123.931(B) and (D).

²⁹ *Id.*

recovered," the statute ensures that the subrogee does not unconstitutionally take more from the claimant than what would represent a double recovery.

Further, in a settlement situation, contrary to the holding in *McKinley*, the new statute allows ample opportunity for the plaintiff to demonstrate there was no double recovery. R.C. 4123.931(B) provides two methods to determine the statutory subrogee's interest in a settlement situation. The first method is the application of the mathematical formula. This seems to be the only method recognized by *McKinley*. But division (B) also provides a second, alternative method to the formula. Under the second method, the net amount recovered in a settlement may be divided and paid on a "more fair and reasonable basis that is agreed to by the claimant and the statutory subrogee." Division (D) further provides an alternative dispute resolution process that may be used to resolve the issue. The use of the alternative formula, coupled with the discretionary utilization of an alternative dispute resolution, either formal or informal, gives a claimant an opportunity to provide evidence as to what portions of a net amount recovered may or may not represent a double recovery. Finally, the plaintiff in *McKinley* used a third alternative to determine the Bureau's respective interest -- he brought a declaratory judgment action. In such an action, a claimant has the opportunity to demonstrate to the trial court what parts of the settlement are *not* a double recovery.

The new subrogation statute provides ample opportunity for a claimant to prove what amount of the settlement represents a double recovery. In a trial, evidence may be presented and jury interrogatories may be submitted, under Civ.R. 49, to determine what parts of the damages represents workers' compensation benefits and what parts represent the claimant's non-reimbursed interests. If the parties wish to settle, the statute provides

for the use of alternative dispute resolution processes, and the parties may use the statutory formula or distribute the settlement proceeds on any "fair and reasonable basis that is agreed to by the claimant and the statutory subrogee." Accordingly, the Court concludes R.C. 4123.93 and 4123.931 as enacted in S. B. 227 do not violate Sections 16 and 19, Article I of the Ohio Constitution, as the new statutes afford claimants a fair and reasonable opportunity to demonstrate what part of a settlement or judgment represents a double recovery.

4. **R.C. 4123.93 and 4123.931 (as enacted in S.B. 227) do not violate the Equal Protection and Benefits Clause of the Ohio Constitution or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.**

The equal protection analysis given by Ohio courts under the Ohio Constitution and the United States Constitution is "functionally equivalent."³⁰ Ohio courts have consistently applied the rational basis test when addressing constitutional challenges to workers' compensation statutes,³¹ and the *Holeton* court used this test in analyzing the equal protection arguments against former R.C. 4123.931. "Under an equal protection analysis, the challenged statute will be upheld if the classification bears a rational relationship to a legitimate governmental interest or if reasonable grounds exist for drawing the distinction."³² At the oral argument, the parties agreed that the Court must use the rational basis test in analyzing the subrogation statute.

³⁰ *Desenco Inc. v. Akron*, at 544.

³¹ See *State ex rel. Doersam v. Indus. Comm.* (1989), 45 Ohio St.3d 115,

³² *Holeton*, 92 Ohio St.3d at 131.

Under the rational basis test, a challenged statute must be upheld if there exists any conceivable set of facts under which the classification rationally furthers a legitimate legislative objective.³³ The party challenging the constitutionality of an enactment has the burden to negate "every conceivable basis which might support it."³⁴

R.C. 4123.931 is a rational response to the legitimate state concern of minimizing losses to the workers' compensation fund caused by the acts of third-party tortfeasors. The *Holeton* court agreed that this is a legitimate state concern, to the extent that it prevents a double recovery.³⁵ As analyzed above, under the amended version of 4123.931, the statutory subrogee only recoups to the extent that there is a double recovery. Further, the claimant is given substantial opportunity in either a trial or a settlement to prove amounts that would not represent a double recovery. Thus, R.C. 4123.931 is a rational response to a legitimate state concern.

Fry also argues that R.C. 4123.931 creates an unreasonable classification by singling out for special, less favorable treatment those individuals injured on the job due to an intentional tort by their employer. Fry asserts that in an intentional tort situation, the victim is required to indirectly contribute a portion of any amount recovered to the employer tortfeasor since any subrogation recovery will reduce the employer's contributions to the Bureau.

³³ *Schwan v. Riverside Methodist Hosp.* (1983), 6 Ohio St.3d 300, 301; *Heller v. Doe* (1993), 509 U.S. 313, 320.

³⁴ *Heller*, 509 U.S. at 320; *Am. Assn. of Universities. v. Central State Univ.* (1999), 87 Ohio St.3d 55, 60.

³⁵ *Holeton*, 92 Ohio St.3d at 121-122.

Fry premises her argument on the erroneous assumption that an employer's workers' compensation contributions are reduced when a subrogation recovery is made from an intentional tort claim. First, in this case, the employer has not yet been found to have committed an employer intentional tort. However, this is a facial challenge, and not one as applied, so the Court will look at other situations in its analysis. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid * * * ."36

A cursory read of R.C. 4123.931 reveals that it makes no distinction between claimants of an employer intentional tort and other workers' compensation claimants. Under *Jones v. VIP Development Co.*,³⁷ injured workers may pursue both an employer intentional tort action and statutory benefits. What Fry's argument misses is that injuries to her as an alleged intentional tort victim, and injuries caused by third-party tortfeasors through non-intentional torts in the workplace, both occur "on the job" and trigger the payment of workers' compensation benefits. There is no disparity in treatment between claimants alleging an intentional tort and claimants not alleging an intentional tort. Claimants in both situations receive statutory workers' compensation benefits, and both are treated equally under R.C. 4123.931. In each instance, the Bureau is subrogated for amounts paid on behalf of the workers' compensation claimant.

³⁶ *United States v. Salerno* (1987), 481 U.S. 739, 745. See, also, *Emerson Elec. Co. v. Tracy* (2000), 90 Ohio St.3d 157, 162 (Cook, J., dissenting).

³⁷ (1984), 15 Ohio St. 3d. 90, 98-99.

Further, the facts in this case do not support Fry's argument. Surf City, Inc. is a state fund employer.³⁸ In cases involving state fund employers, the statutory subrogee is the Administrator of Workers' Compensation. The Administrator, however, as a matter of policy, does not in any way credit an employer's account where there has been a judicial finding of liability in intentional tort, nor does the Administrator adjust that employer's actuarial experience if monies are collected through subrogation.³⁹ Thus, if a state fund employer is found to have committed an intentional tort, it will not be rewarded for its misconduct. Any amount recovered as a result of an intentional tort lawsuit will be deposited into the state insurance fund. The statutory scheme simply prevents the claimant from receiving a double recovery.

Fry concludes by arguing that equal protection requires that injured workers be treated similarly to tort plaintiffs in general and that the General Assembly may not enact a workers' compensation subrogation statute until it enacts a valid collateral-benefits-offset statute covering tort claims in general. This equal protection argument was raised in *Holeton*, protesting that the former statute created "arbitrary classifications of tort victims -- employees injured on the job and employees injured off the job."⁴⁰ The Court rejects Fry's argument for the same reasons that the *Holeton* court rejected it.⁴¹

³⁸ Wentzel Affidavit, at ¶2.

³⁹ Id. at ¶¶2 and 4.

⁴⁰ *Holeton*, 92 Ohio St.3d at 131 -132.

⁴¹ Id.

CONCLUSION

For the foregoing reasons, the Court finds that R.C. 4123.93 and 4123.931 as enacted in S.B. 227 (workers' compensation subrogation statute) do not violate Sections 2, 16, or 19 of Article I of the Ohio Constitution or the Equal Protection Clause of Fourteenth Amendment to the United States Constitution. Accordingly, no genuine issue as to any material fact remains to be litigated as between Fry and the Bureau; construing the evidence most strongly in Fry's favor, reasonable minds can only reach a conclusion that is adverse to Plaintiff; and the Bureau is entitled to judgment as a matter of law on its claims that the subrogation statute is constitutional and that the Bureau's statutory right to recover the amounts that it paid to or on behalf of Fry is enforceable against any recovery that Fry may make against Surf City in this action.⁴² Fry, however, is not entitled to judgment as a matter of law on her claim that the subrogation statute, specifically R.C. 4123.931, is unconstitutional.⁴³

JUDGMENT ENTRY

It is ORDERED that Plaintiff Erica E. Fry's Motion for Summary Judgment Against Defendant Ohio Bureau of Workers' Compensation (filed August 10, 2005) is DENIED.

It is further ORDERED that Defendant Ohio Bureau of Workers' Compensation's Motion for Summary Judgment (filed September 16, 2005) is GRANTED.

⁴² See the Bureau's Answer and Cross Claim (filed September 19, 2005), ¶1, and the Bureau's Response to Plaintiff's Motion for Summary Judgment and Motion for Summary Judgment (filed September 16, 2005), at unnumbered page 1.

⁴³ See First Amendment Complaint (filed July 18, 2005), Second Claim for Relief.

It is further ORDERED that the Second Claim for Relief set forth in Plaintiff's First Amended Complaint (filed July 18, 2005) is DISMISSED WITH PREJUDICE.

It is further ORDERED that the dates set forth in the Pretrial Order of February 23, 2006, are CONFIRMED.

March 31, 2006



Judge Jack Zouhary

cc: Steven P. Collier, Esq. and Anthony E. Turley, Esq.
Benjamin W. Crider, Esq. and Johnathan L. McGee, Esq.
Christopher F. Parker, Esq.

WARREN COUNTY COURT
WARREN COUNTY, OHIO

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JANET MATH
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
WARREN COUNTY, OHIO

JAMES A. RAKER, et al.
Plaintiffs,

CASE NO. 05CV64147

vs.

SCOTT PALMER, et al.
Defendants,

DECISION AND ENTRY

I. Facts and Procedural Posture

Mr. Raker was in the course of his employment with Aramark Industries when he was injured in an automobile. A third-party tortfeasor negligently caused the rear-end collision.

He filed for and received Worker's Compensation benefits from his state fund insured employer. The Bureau of Workers' Compensation ("BWC") has paid both compensation and medical payments on behalf of Mr. Raker and asserts that additional future payments are possible. Mr. Raker still suffers from residual symptoms as a result of the collision.

Plaintiff James Raker filed suit against the third-party tortfeasor Defendant Scott Palmer. Mr. Raker now moves the Court for summary judgment as to new party plaintiff, the Ohio Bureau of Workers' Compensation ("BCW"). The issue before the Court is the constitutionality

WARREN COUNTY
COMMON PLEAS COURT
JUDGE NEAL B. BRONSON
100 Justice Drive
Cabanon, Ohio 45036

of Ohio Revised Code §4123.931, which creates a statutory right of subrogation in favor of the BWC for benefits it paid to and on behalf of Plaintiff, which were caused by a third party.

Two prior versions of the statute were held unconstitutional by the Ohio Supreme Court. Plaintiff argues the revised provision, effective April 9, 2003, still violates Sections 16, 19, and 2, Article 1 of the Ohio Constitution, as well as the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and as a matter of law, are entitled to summary judgment.

The Court will concern itself with Plaintiff's motion for summary judgment.

II. Background

In its prior rulings, the Ohio Supreme Court has ruled twice that the workers' compensation subrogation statutes were unconstitutional. The Court however, has expressly stated these workers' subrogation compensation statutes are not *per se* unconstitutional and the Court, in overruling the statutes, only addressed specific provisions of former R.C. 4123.931.¹ The Supreme Court also acknowledged that "virtually every jurisdiction provides some statutory mechanism enabling the employer or fund to recover its workers' compensation outlay from a third-party tortfeasor."²

¹ *UAW v Ohio Bureau of Workers Compensation* (2006), 108 Ohio St. 3d 432, ¶ 11 citing *Holeton v. Crouse Cartage Co.*, (2001), 92 Ohio St. 3d 115

² *Id.* at ¶13, citing *Holeton* at 120, 748 N.E.2d 1111

The BWC was first given a right of subrogation when the State of Ohio enacted Section 4123.93(B) in 1993. This section of law was amended in 1995, when the subrogation rights of the BWC were divided into Sections 4123.93 and 4123.931, (H.B. 293). The 1993 statute as amended in 1995 was declared unconstitutional by the Ohio Supreme Court in *Holeton v. Crouse Cartage Co.*,³ which held that former R.C. 4123.931 violated Sections 2,16, and 19 of Article I of the Ohio Constitution. The Court found that the 1995 amendments were not rationally related to their purpose, and they operated to reduce a plaintiff's tort recovery irrespective of whether a double recovery had actually occurred. The Court held that due process permits deductions for collateral benefits only to the extent that the loss for which the collateral benefit compensates is actually included in the award.⁴ The Court further noted that a statute requiring a claimant to reimburse the Bureau for future benefits that the claimant may never receive is constitutionally flawed and violates the equal protection clause of the Ohio Constitution, Clause 16 requiring every person for an injury done to have remedy by due course of law and Section 19, the taking clause of Article I of the Ohio Constitution.⁵

The law of Ohio reverted to the 1993 statute (R.C. 4123.93) when the Court held the 1995 Amendments unconstitutional. In 2004, The Ohio Supreme Court held the 1993 statute unconstitutional.⁶ The Court, relying on its reasoning from *Holeton* and applying the rational relationship test to the statute, held R.C. 4123.93 unconstitutional because it precluded

³ (2001), 92 Ohio St.3d 115.

⁴ *Id.* at ____

⁵ *Id.* at ____

⁶ *Modezelewski v. Yellow Freight Sys. Inc.*, (2004) 102 Ohio St. 3d 192, 2004 Ohio 2365

claimants who were parties to actions against third-party tortfeasors from showing that their tort recovery or portions thereof did not duplicate their workers' compensation recovery and, therefore, did not represent a double recovery.⁷ The Court also held that the former statute, like the statute considered in the *Holeton* decision, treated claimants who litigate their claims against third-party tortfeasors differently from those who settle claims out of court.

III. R.C. 4123.931

The 124th Ohio General Assembly enacted 2003 Sub. S.B. No. 227 (S.B. 227), to specifically address the constitutional infirmities found by the Ohio Supreme Court in R.C. 4123.931 and R.C. 4123.93. S.B. 227 repealed the former provisions in R.C. 4123.931(A) and (D) that had been found unconstitutional. The revised statute became effective April 9, 2003.

The current statute creates an independent right of recovery in favor of statutory subrogees against third parties. The statutory subrogee is subrogated to a plaintiff's rights against third-party tortfeasors with respect to past, present, and estimated future payments of workers' compensation benefits. (Sec. 4123.931(A))

The act specifies a new settlement procedure in the form of a mathematical formula under which a claimant's and a statutory subrogee's interest in damages owed by a third-party tortfeasor is determined. If the parties are unable to agree to the net amount recovered, the act states the

⁷ *Id.* at ¶ 16

claimant or the statutory subrogee may file a request with the Administrator for a conference conducted by a designee appointed by the Administrator. The claimant and the statutory subrogee may also agree to any type of binding or non-binding alternative dispute resolution.

This formula is then applied to both settlements and awards following trial. Specifically, a claimant receives an amount equal to the "uncompensated damages"⁸ divided by the sum of the "subrogation interest"⁹ plus the uncompensated damages, multiplied by the "net amount recovered."¹⁰ A statutory subrogee receives its "subrogation interest" divided by the sum of the "subrogation interest" and the "uncompensated damages" multiplied by the "net amount recovered." In a nonjury action the court must make findings of fact, and the jury in a jury action must return a general verdict accompanied by answers to interrogatories that specify the total amount of the compensatory damages and the portion of those compensatory damages that represents economic loss and non-economic loss. (Sec. 4123.931 (D))

Once the net amount recovered (NAR) and its allocation have been determined the act allows a claimant to establish an interest-bearing trust account for the full amount of the subrogation interest that represents

⁸ "Uncompensated damages" - the claimant's demonstrated or proven damages minus the statutory subrogee's subrogation interest. R.C. 4123.93 (F)

⁹ "Subrogation interest" - past, present, and estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits, and any other costs or expenses paid to or on behalf of the claimant by the statutory subrogee pursuant to this chapter or chapter 4121, 4127., or 4131 of the Revised Code." R.C. 4123.93(D)

¹⁰ "Net amount recovered" - the amount of any award, settlement, compromise, or recovery by a claimant against a third party, minus the attorney fees, costs, or other expenses incurred by the claimant in securing the award, settlement, compromise, or recovery. 'Net amount recovered' does not include any punitive damages that may be awarded by a judge or jury. R.C. 4123.93(E)

future payments of compensation, medical benefits, rehabilitation costs, or death benefits, reduced to present value. If a claimant does not set up a trust account, the statute requires him to pay the statutory subrogee the full amount of the subrogation interest of the estimated future payments of compensation, medical benefits, rehabilitation costs or death benefits within 30 days of receipt.

The statutory subrogee is to provide the claimant twice a year with payment notices listing the amount paid during the half-year preceding the notice. The claimant must reimburse the statutory subrogee for the total amount on the notice out of the trust account. The interest that accrues on the trust account may pay for the expenses of establishing and maintaining the account. Any remaining interest must be credited to the account.

IV. Summary Judgment Standard

Summary judgment is a procedure for moving beyond the allegations in the pleadings and analyzing the evidentiary materials in the record to determine whether an actual need for a trial exists.¹¹ "Summary judgment is proper when 1) no genuine issue as to a material fact remains to be litigated; 2) the moving party is entitled to judgment as a matter of law; and 3) it establish that there is no genuine issue of material fact and that he is entitled to a judgment as a matter of law."¹² "After a proper summary judgment

¹¹ *Or met Primary Aluminum Corp. v. Employers' Ins. Of Wausau* (2000), 88 Ohio St. 3d 292, 300

¹² *AAA Enterprises, Inc. v. River Place Comm. Urban Redev. Corp.* (1900), 50 Ohio St. 3d 157, ¶ 2 of the syllabus

motion has been made, the nonmoving party must supply evidence that a material issue of fact exists, evidence of a possible inference is insufficient.”¹³

V. Constitutional Challenge Standard

The Supreme Court of Ohio recognizes the general rule that courts must presume lawfully enacted legislation is constitutional.¹⁴ A court is bound to give a constitutional rather than an unconstitutional construction if one is reasonably available due to the general presumption in favor of the validity of legislation found in the Ohio Revised Code § 1.47(A). Not only are “[A]ll statutes presumed constitutional, a party challenging the statutes bears the burden of proving otherwise. Further, the legislation being questioned is not invalidated unless the challenger establishes that it is unconstitutional beyond a reasonable doubt.”¹⁵

While legislative enactments are presumed constitutional under R.C. 1.47(A), this presumption is rebuttable. *Adamsky v. Buckeye Local Sch. Dist.* (1995), 73 Ohio St. 3d 360, 362. It is the duty of the court to reconcile legislative acts with constitutional provisions, if possible, but it is equally its duty to strike down any act which clearly conflicts with the provisions of the Constitution of the United States or the Constitution of this state. *Belden v. Union Cent. Life Ins. Co.* (Ohio 1944), 143 Ohio St. 329, 340

¹³ *Cox v. Commercial Parts & Serv.* (1994), 96 Ohio App.3d 417, 421

¹⁴ *Arnold v. City of Cleveland* (1993), 67 Ohio St. 3d 35

¹⁵ *State v. Thompkins*, (1996), 75 Ohio St. 3d 558

A legislative act may be unconstitutional upon its face or it may be valid on its face but unconstitutional because of its operative effect upon a particular set of facts. *Id* at 340.

The case at bar is a facial challenge to R.C 4123.931. There is no verdict or settlement to apply the statute in the case. Therefore, it does not present a set of facts upon which we can base an as-applied constitutional analysis.¹⁶

"Pursuing a facial challenge places a "heavy burden" on the challenger. A facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the act would be valid."¹⁷

V. General Principles

This Court, in its discussion, will set out general principles relying on the framework set forth in the Supreme Court's decision in *Holeton* and the constitutional tests used by the Court in workers compensation disputes.

Historically, the workers compensation law, Section 35, Article II, Ohio Constitution "represents a social bargain in which employers and employees exchange their respective common-law rights and duties for a more certain and uniform set of statutory benefits and obligations."¹⁸ "Further, R.C. 4123.931 does not disrupt any of the rights or obligations of the claimant and the employer with regard to the payment of statutory

¹⁶ *State v. Beckley* (1983), 5 Ohio St. 3d 4, 6-7

¹⁷ *State v. Bartis*, 1997 Ohio App. LEXIS 5602, citing *United States v. Salerno* (1987), 481 U.S. 739, [*8] 95 L. Ed. 2d 697, 107 S. Ct. 2095. "Id. at 745

¹⁸ *Id.* at 119

workers' compensation benefits, and the balance of compromise upon which the viability of the workers' compensation system depends remains in tact."¹⁹ Because the workers' compensation system is a mutual compromise between employers and employees, with the recognition that employees receive a lower level of benefits and employers receive protection from unlimited liability, both parties can and do pursue other remedies by law in order to be made whole.

In *State ex rel. United Automobile, etc. v OBWC* (2006), 108 Ohio St. 3d 432, "holding the former Ohio Rev. Code Ann § 4123.931(D) unconstitutional, the Supreme Court expressly noted that workers' compensation subrogation statutes are not *per se* unconstitutional and that the Court was addressing only the specific provisions in former § 4123.931." The Court also recognized that virtually every jurisdiction provides some statutory mechanism enabling the employer or fund to recover its workers' compensation outlay from a third-party tortfeasor.

Plaintiff moves the court for summary judgment asserting R.C. 4123.931 constitutes an unlawful taking of property without due process of law in violation of Section 19, Article I, Ohio Constitution. "It must be remembered that neither the state in the passage of general laws, nor the municipality in the passage of local laws, may make any regulations which are unreasonable. The means adopted must be suitable to the ends in view, they must be impartial in operation, and not unduly oppressive upon individuals, must have a real and substantial relation to their purpose, and

¹⁹ *Id.* at 121

must not interfere with private rights beyond the necessities of the situation.”

Plaintiff additionally moves this court for summary judgment contending R.C. 4123.931 violates Section 16, Article I, Ohio Constitution, which provides that “every person, for an injury done, shall have remedy by due course of law.”²⁰

The Supreme Court recognizes that the state has a legitimate interest in preventing tort victims from recovering twice when considering the constitutionality of collateral-benefits-offset statutes under Section 16, Article I.²¹ The State can regulate against a tort victim from receiving a double recovery, or an award from the collateral source and an award from the tortfeasor.²² However, the Court has consistently and repeatedly held that due process permits deductions for collateral benefits only to the extent that the loss for which the collateral benefit compensates is actually included in the award.²³

The subrogation statute, like the collateral-benefits-offset statutes, is designed to prevent the tort victim from keeping a double recovery with the statutory subrogee the intended beneficiary.²⁴ “Thus, R.C. 4123.931 must also satisfy the constitutional requirement that deductible or, in this case,

²⁰ *Froelich v. City of Cleveland* (1919) 99 Ohio St. 376 at 391, 124 N.E. 212, 216

²¹ *Holeton v. Crouse Cartage Company Et Al.* (2001), 92 Ohio St. 3d 115 at 121,122, 748 N.E. 2d 1111, 1118

²² *Id.*

²³ *Id.*, citing *McMullen v. Ohio State Univ. Hosp.* (2000), 88 Ohio St. 3d 332, 341-344

²⁴ *Id.*

subrogable or recoupable items be matched to those losses or types of damages that the claimant actually recovered from the tortfeasor."²⁵

Finally, Ohio courts consistently use the rational basis test when addressing constitutional challenges to workers' compensation statutes. See, *State ex rel. Doersam v. Indus. Comm.* (1989), 45 Ohio St.3d 115; *Rose v. Mayfield* (1984), 20 Ohio App.3d 300, 302. In the *Holeton* decision, the Supreme Court held that the former subrogation statute violated the Equal Protection Clause of Section 2, Article I of the Ohio Constitution.

Applying the rational basis test, the Court found that the statute created a presumption that a double recovery occurs whenever a claimant is permitted to retain workers' compensation and tort recovery, and that claimants who try their tort claims are permitted to rebut this presumption, while claimants who settle their tort claims are not.

The Court held that such disparate treatment of claimants is irrational and arbitrary because there are situations where claimants' tort recovery is necessarily limited to amounts that if retained along with workers' compensation cannot possibly result in double recovery.²⁶

The Court will in its determinations apply the appropriate standards of review.

VII. Future Estimated Benefits

Plaintiff moves for Summary Judgment arguing that the revised R.C. 4123.931 has not resolved the constitutional infirmities delineated in

²⁵ *Id.*

Holeton. Specifically that the revised statute still: 1) assumes claimant will enjoy a double recovery and ensures that the statutory subrogee will share in the proceeds of settlement or verdict regardless of claimant's damages and recovery, if any, from the third party tortfeasor; and 2) acts as a deterrent to settlement in opposition of public policy. Further, Plaintiff asserts that since previous versions of the statute have previously been held unconstitutional, the revised statute at issue does not deserve the deference as a long-standing statute being challenged for the first time.²⁷

To begin, this Court disagrees with Plaintiff in that R.C. 4123.931 does not deserve the same deference as a long-standing statute. This Court will follow the well-settled law and general rule that "courts must presume lawfully enacted legislation is constitutional." *Arnold v. City of Cleveland* (1993), 67 Ohio St.3d 35. As noted, this presumption of constitutionality is rebuttable.

In regards to estimated future benefits, Plaintiff argues that the trust account provisions of R.C. 4123.931 constitute an unlawful taking of property without due process of law. Plaintiff opines that first; the Bureau of Workers' Compensation's ("BWC") determination of future estimated benefits is arbitrary.

There being no amount of future damages before the court, Plaintiff uses the Defendant BWC's affidavit and subrogation interest worksheet regarding his own case to illustrate the proposition that Defendant BWC has "no valid

²⁶ *Id.*

²⁷ Plaintiff's Reply To New Party Plaintiff Ohio Bureau of Workers' Compensation Memorandum In Opposition To Motion For Summary Judgment, p. 2

or factual basis to formulate" Plaintiff's or any claimant's estimation of future benefits. ²⁸

Defendant BWC's worksheet indicates the Bureau, as of May 2006, has paid to or on behalf of Plaintiff \$35,359.34. Of these benefits, \$22,243.82 was for medical expenses, and \$13,115.52 was for compensation. Defendant BWC estimates that Plaintiff may receive an additional \$29,277.47 in benefits, attributing \$2,000 for medical costs. The remaining estimated future benefits are earmarked for temporary total compensation and living maintenance and/or wage loss compensation.

Plaintiff argues the estimated future benefits are arbitrary, inflated, and do not accurately represent the actual dollar amount Plaintiff may receive from the Bureau in the future. Plaintiff reasons that since the BWC has only paid Plaintiff in compensation \$13,000.00 in the three years since the accident it is unlikely the BWC will pay Plaintiff an additional \$27,277.47 for additional compensation in the future. This is compounded by Plaintiff's participation in a BWC rehabilitation / job training program designed to return injured workers back into the workforce.

The BWC provides the court with an affidavit and worksheet reflecting total compensation paid to Plaintiff to date, estimated future benefits, and the total value of its subrogation interest. The BWC asserts it has a lien in the amount of \$64,636.81 against any settlement or award that is received as a result of the civil lawsuit filed against negligent third parties. It does

²⁸ Defendant's Affidavit, Subrogation Interest Worksheet James Raker Exhibit D, Memorandum In Opposition To Plaintiff's Motion For Summary Judgment Of New Party Plaintiff Ohio Bureau Of Workers' Compensation

not offer any formula or evidence as to how the value of estimated future benefits was determined or how the probability percentage was assigned.

Plaintiff argues that estimated future benefits are nothing more than arbitrary numbers based on assumptions that become part of a lien against a claimant who sues a third party tortfeasor and it is because estimated future benefits are estimated or mere assumptions, the statute is unconstitutional.

Plaintiff next argues the revised statute still does not give the injured party an opportunity to show there was no double recovery or contain a provision addressing limited recovery. It is argued the result is scenarios where the statutory subrogee is reimbursed and an injured plaintiff is statutorily prevented from being made whole.

Plaintiff again uses his situation to illustrate what happens. Plaintiff was injured by a third-party tortfeasor who was uninsured. As a result, Plaintiff can only seek recovery from his own uninsured motorist carrier and will be limited by the terms of the policy. Plaintiff points out that the recovery is only possible due to insurance premiums paid by him, not the tortfeasor or the BWC, yet, based on the amount of uninsured motorist coverage, it is feasible that the BWC, as statutory subrogee is reimbursed completely and Plaintiff would get nothing.

Plaintiff uses the scenario where he is successful at trial and receives a jury award of \$250,000.00 however recovery is limited to \$100,000.00, the amount of uninsured motorist.²⁹ Here, the NAR by Plaintiff, as defined by R.C. 4123.931, is significantly more than the actual amount recovered. Since the NAR is greater than the gross amount recoverable for Plaintiff, he

²⁹ BWC's affidavit, exhibit D

asserts that once again the statutory scheme allows for an injured plaintiff to receive nothing while assuring the statutory subrogee receive reimbursement. Further, the source of funds is arguably from Plaintiff's own pocket, in the form of the payments Plaintiff made on his insurance premiums.

VIII. Tried Cases vs. Settled Cases

Plaintiff argues the revised statute again favors those claimants who take their cases to trial versus claimants who settle or attempt to settle their case. The core of Plaintiffs' argument rests in the proposition that claimants who go to trial have the opportunity to prove the verdict does not represent double recovery.

Plaintiff further asserts that the new statute deviates from subrogation law in that it requires the injured Plaintiff and not the party claiming a subrogation interest to prove that a double recovery does not exist and this burden is unduly harsh.

The Plaintiff finally alleges the revised statute deters settlements since it does not define demonstrated or uncompensated damages adequately.

Discussion

The Court, presuming R.C. 4123.931 is constitutional, must see if Plaintiff, under the requirements of Civ.R. 56(C), has established that the

statute can not operate constitutionally under any set of circumstances. Plaintiff has failed to meet this burden.

In enacting the revised statute, the General Assembly created a mechanism whereby an injured claimant could recover from a third party tortfeasor and a statutory subrogee could exercise its subrogation rights. Concurrently, it safeguards the public policy encouraging settlement, the estimated future benefits that claimant may or may not receive, and finally against double recovery by injured plaintiffs.

The statutory formulae may not be easy in their application or provide injured Plaintiff or statutory subrogee the entire amount of either uncompensated damages or the subrogation interest. This does not, however, make the statute unconstitutional. The General Assembly, in direct response to the Supreme Court's decision in *Holeton*, has crafted a statutory scheme that applies a *pro rata* formula to the NAR by a claimant, regardless of whether the injured plaintiff chooses to settle or try his case against the third party tortfeasor. The formula provides a safeguard against double recovery while ensuring the interest the parties receive is equitable.

While Plaintiff is correct in stating the statute does not account for situations where recovery is limited by an insurance policy, this does not operate to make the statute irrational or unreasonable. Many plaintiffs are forced to accept recoveries that are often limited by insurance policies or other factors.

Revised 4123.931 no longer gives the statutory subrogee a current collectible interest in estimated future payments. Instead, the statutory subrogee's interest, based on the NAR by Plaintiff and calculated *vis a vis*

the formula, is first applied to benefits claimant has received from the BWC. If the dollar amount of statutory subrogee's recovery interest exceeds the dollar amount of benefits the BWC has already paid out to a claimant, the remaining recovery interest is placed in a trust set-up by Plaintiff. Plaintiff then reimburses the BWC twice a year if he is in receipt of benefits. Once the statutory subrogee's lien is paid in full, benefits are discontinued, or claimant dies, claimant or claimant's estate has access to the remaining funds in the trust.

Plaintiff opines this portion of the statute amounts to an unlawful taking of property without due process of law. Plaintiff believes the BWC arbitrarily determines the amount of future payments, and thus places an unreasonable burden on injured workers who are third party tort victims.

Plaintiff's argument must once again fail. The settlement provisions allow and encourage dialogue between a plaintiff and the statutory subrogee as to how funds are to be allocated. If an agreement can not be reached there is provision for resolution by administrative process.

The Court has examined the record closely and finds the affidavit and subrogation worksheet provided by the BWC demonstrating the estimation of future benefits is in fact calculated based on both quantitative and qualitative data. Far from an arbitrary guess. Further, if the BWC is wrong, Plaintiff has a right to the money in trust. Finally, Plaintiff does not reimburse the BWC until they actually receive a benefit this can hardly constitute a taking.

While setting up a trust may be cumbersome, it does not rise to the level of unconstitutional. Plaintiff's motion for summary judgment is denied.

IT IS SO ORDERED.

Neal B. Bronson

Neal B. Bronson, Judge
Common Pleas Court

Julie Schimpf Kehres
Benjamin Crider
Matthew T. Jewson
Carrie I. Budinger
Chris Baton
Steven J. Forbes

McGu



HANCOCK COUNTY, OH
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CATHY PROSSER WILCOX
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS OF
HANCOCK COUNTY, OHIO

APRIL J. SMITH,

Plaintiff,

Case No. 2005-CV-00152

v.

JUDGMENT ENTRY

August 29, 2006

CAROLYN S. JONES, et al.,

Defendants.

_____ ^

This matter is before the Court for decision and ruling upon Plaintiff April J. Smith's Motion for Partial Summary Judgment, filed on December 23, 2005, requesting the Court to declare Ohio Revised Code Section 4123.931 unconstitutional. Attached in support thereof was a memorandum of law, the deposition of Plaintiff, April J. Smith (hereinafter Smith), taken on May 27, 2005, and filed on December 23, 2005, Answers to Plaintiff's first set of interrogatories, and supplemental legal authority.

New Party Plaintiff, Ohio Bureau of Workers' Compensation (hereinafter BWC), filed its Memorandum in Response to Plaintiff's motion, on January 13, 2006, which included both supplemental legal authority and the Affidavit of Ellen Wentzel, Supervisor of the Subrogation Unit of the Ohio Bureau of Workers' Compensation. New Party Plaintiff's Memorandum also requested an oral hearing on the Motion for Partial Summary Judgment. On January 20, 2006, Plaintiff filed a Reply in Support of her Motion for Summary Judgment. Counsel for New Party Plaintiff, BWC, filed a Notice of Supplemental Authority, on April 14, 2006.

This action is proceeding on Plaintiff's Third Individual Claim for Relief, requesting declaratory judgment under Ohio Revised Code Section 2721.03, of her rights and the constitutionality of Ohio Revised Code Section 4123.931 as to the subrogation rights of the New Party Plaintiff. The Court ordered the re-alignment of the parties on October 14, 2005, permitting the BWC to be named as a New Party Plaintiff. Thereafter, the BWC filed a Complaint on October 31, 2005, asserting its subrogation rights under Ohio Revised Code Section 4123.931.

STATEMENT OF THE CASE

On April 29, 2003, Plaintiff Smith, an employee of Hancock County, was injured in an automobile accident. According to Smith, the injuries that resulted from the accident include a laceration of her hand, pain in her left elbow, hip, neck, and back. Smith has engaged substantial treatment of her injuries, and claims ongoing pain from the injuries in her back. At the time of the accident, Smith was engaged in activities pursuant to her position with Hancock County. As a result of being injured while working, Smith filed a claim for benefits with the BWC on May 5, 2003, and has received workers' compensation benefits for medical bills and prescriptions, totaling \$10,854.90, as of January 10, 2006. The BWC further estimated on January 10, 2006 that future benefit payments to Smith will total \$4,434.72.

In addition to seeking and receiving workers' compensation benefits, Smith also filed suit against Defendant Carolyn S. Jones, as a third-party tortfeasor in connection with the accident. Proceeding under Ohio Revised Code Sections 4123.93 and 4123.931, the BWC has asserted an independent right of recovery in the net amount recovered from this third-party

claim, with respect to past, present, and estimated future payments of compensation and benefits.

CLAIMS OF THE PLAINTIFF

Plaintiff asserts in her motion that Ohio Revised Code Section 4123.931 is unconstitutional, facially and as applied, based primarily on the Ohio Supreme Court decision in *Holeton v. Crouse Cartage Co.*, 92 Ohio St. 3d 115, 2001-Ohio-109, 748 N.E.2d 1111, which invalidated the predecessor to the currently challenged statute under the Ohio Constitution. Plaintiff challenges the current statutory enactment of a subrogation right for the BWC under the Ohio Constitution, specifically under the following constitutional provisions: Section 16, Article I; Section 19, Article I; Section 2, Article I; and Section 5, Article I.

As to her first two arguments, those premised on the Ohio Constitution's guarantees of Due Course of Law and Private Property, Smith argues that the most recent revisions to the statute have failed to satisfy the constitutional requirements expressed in *Holeton*. Smith first asserts that the current version of the statute is not limited to reimbursing the BWC only for damages that are considered a double recovery- those which are paid both by the BWC and the third-party tortfeasor. Smith also argues that the estimated future benefits provision of the current statute operates as a taking, allowing the BWC to either achieve a windfall at the expense of claimants, or to relieve claimants of dominion and control over their tort judgments, through its option of allowing estimated future benefits awards to be paid either immediately, or into a trust fund, pursuant to Ohio Revised Code Sections 4123.931(E) and (F).

Smith also raises an Equal Protection claim under the Ohio Constitution, asserting that the current statute imposes an arbitrary classification scheme distinguishing between those

claimants who settle their third-party tort claims, and those who take their claims to trial. Smith contends that allowing a claimant who settles his or her claim before trial to take advantage of alternative dispute resolution proceedings to achieve an allocation of the net amount received in the settlement, while limiting a claimant who goes to trial to the operation of the statutory formula, constitutes such an arbitrary classification.

Lastly, Smith argues that the current statutory scheme violates her Right to Jury Trial under Section 5, Article I of the Ohio Constitution. Smith maintains that the statute at issue allows the Court to enter judgment on a subrogation claim, based on the algebraic formula of the statute, and in disregard of whether the jury actually awarded damages based on the future workers' compensation benefits in its verdict. Based on this argument, Smith asserts that the statute allows courts to disregard the jury verdict, thereby violating her right to a trial by jury.

CLAIMS OF THE NEW PARTY PLAINTIFF

Responding to Smith's claims, the BWC asserts that the statute is constitutional, both facially and as applied to Smith's particular case. As a general matter, the BWC argues that the revisions to the statute invalidated in *Holeton* addressed the constitutional infirmities of the prior statute, and thus, the new statutory scheme should be upheld.

The BWC asserts that Ohio Revised Code Section 4123.931 does not operate to deprive Smith of either her rights to Private Property or Due Course of Law under the Ohio Constitution. As to the estimated future benefits provisions of the statute, the BWC points out that the new statute does not grant the BWC a current collectible interest in a third-party tort judgment; instead, it provides claimants with the option of creating an interest bearing trust account, and requires the BWC to file claims every six months in order to receive payment for

the funds. As to the constitutionally mandated matching requirement in a subrogation statute, the BWC argues that the *pro-rata* nature of the statutory formula precludes an award of a subrogation interest that does not constitute a double recovery. Additionally, the BWC asserts that the Court is bound to consider the jury interrogatories when calculating the subrogation interest when it applies the formula. In the case of the third-party claims that are settled before a court judgment is rendered, the BWC points out that the General Assembly provided for two avenues for the settling party to allocate the "net amount recovered" to those benefits that were or are to be paid through the Workers' Compensation system, and those that represent other recoveries. The BWC maintains that the statute allows the claimant to make this allocation through an agreement with the BWC, or through an alternative dispute resolution process.

Next, the BWC argues that the current statutory scheme does not violate Smith's Equal Protection rights under the Ohio Constitution. Focusing on the different options available to settling parties for allocating the "net amount recovered," the BWC contends that the classification is rational and is not arbitrary. Based on the inherent difference between taking a case to trial and settling the same case, the BWC asserts that providing an alternative dispute resolution option in the former case, but not the latter, is a rational response to the requirement that in both instances a claimant should have an opportunity to show that their recovery is not duplicative of their Workers' Compensation benefits.

Lastly, the BWC asserts that Ohio Revised Code Section 4123.931 does not violate Smith's right to a Jury Trial under the Ohio Constitution. The BWC argues that the right being claimed here is one of statutory creation, through the Workers' Compensation statute, and thus, is not one that the jury trial right extended to at common law. In the alternative, however, the BWC maintains that the statutory provisions providing for jury interrogatories do not require

the Court to apply the statutory formula in blank. Additionally, the BWC contends that the statute allows the jury to apply the formula, thereby preventing an award contrary to the jury verdict. Because the formula is *pro-rata* in its application, the BWC asserts that the formula precludes an award that does not constitute a double recovery. Based on this argument, the BWC asserts that there is no impairment of the jury trial right from the operation of the statute.

STANDARD FOR REVIEW

Civil Rule 56 dictates the requirements for and parameters of summary judgment in the state of Ohio. Civil Rules 56(A) and (B) determine that parties seeking affirmative action and defending parties may move for summary judgment, and the Ohio Supreme Court has held, "Civ.R. 56(B) makes summary judgment available to '[a] party *against whom* a claim . . . is asserted,' while Civ.R. 56(A) makes summary judgment available to '[a] party seeking to recover upon a claim.'" *Robinson v. B.O.C. Group* (1998), 81 Ohio St. 3d 361, 367, 1998-Ohio-432, 691 N.E.2d 667; quoting Ohio Civ. R. 56(A), (B) (emphasis in original).

Civil Rule 56(C) sets forth the evidence a party may use to support its motion for summary judgment and how that evidence must be construed when the Court determines whether summary judgment is appropriate. The rule states, "[s]ummary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can

come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." Ohio Civ. R. 56(C). Furthermore, Civil Rule 56(E) stipulates that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." Ohio Civ. R. 56(E).

In interpreting Rule 56(C), the Ohio Supreme Court has established, "[b]efore summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *Mootispaw v. Eckstein* (1996), 76 Ohio St. 3d 383, 385, 1996-Ohio-389, 667 N.E.2d 1197; citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 317, 327, 364 N.E. 2d 267. The party moving for summary judgment has the burden of proving that no genuine issue of material fact exists. The Ohio Supreme Court has established that the moving party must use some type of evidence specified in Civil Rule 56(C) to show that the "nonmoving party has no evidence to support [its] claims." *Kulch v. Structural Fibers Inc.* (1997), 78 Ohio St. 3d 134, 145, 1997-Ohio-219, 677 N.E.2d 308; quoting *Dresher v. Burt* (1996), 75 Ohio St. 3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264 (emphasis deleted). Although a moving party is not required to "support its motion for summary judgment with any affirmative evidence, i.e., affidavits or similar materials produced by the movant . . . even *Celotex [Corp. v. Catrett]* makes clear that the moving party

bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher* at 292 (citations omitted) (emphasis in original).

If a moving party can satisfy its initial burden, the burden then shifts to the nonmoving party to fulfill its burden, as outlined in Civil Rule 56(E), which requires the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial[.]" by using the type of evidence outlined in Rule 56(C). See Ohio Civ. R. 56(E); *Dresher* at 293. Therefore, the nonmoving party has a reciprocal burden to set forth specific facts showing the existence of a genuine issue of material fact. *A. Doe v. First Presbyterian Church (USA)* (1998), 126 Ohio App. 3d 358, 364, 710 N.E.2d 367; Civ. R. 56(E). The nonmoving party may not rest on the mere allegations of its pleading. *State ex rel. Burns v. Athens County Clerk of Courts* (1998), 83 Ohio St. 3d 523, 524, 1998-Ohio-3, 700 N.E.2d 1260, 1261; citing *Moonispaaw* at 385; Ohio Civ. R. 56(E).

Because Smith is arguing that the current version of Ohio Revised Code Section 4123.931 is unconstitutional, specialized standards of review are applicable to her claims when determining whether she is entitled to judgment as a matter of law under Rule 56(C). The specific standard of review for each claim is addressed and applied within each discussion of the issue, as the standard of review is dependant both on the claim being raised as well as the specific allegations within the claim.

CONCLUSIONS OF LAW

Plaintiff in this matter is requesting the Court to grant declaratory judgment that Ohio Revised Code Section 4123.931 is unconstitutional, both on its face and as applied to her situation. The Court "may declare rights, status, and other legal relations whether or not further relief is or could be claimed...The declaration may be either affirmative or negative in form and effect...[and] has the effect of a final judgment or decree." R.C. 2721.02(A). Specifically, "any person...affected by...a statute...may have determined any question of construction or validity arising under the...statute...and obtain a declaration of rights, status, or other legal relations under it." R.C. 2721.03. In resolving a declaratory action by summary judgment, the trial court must specify a construction of the law under consideration. See *Grange Mut. Cas. Co. v. Jordan* (3rd Dist. 1991), No. 5-90-46, 1991 Ohio App. LEXIS 5331. Therefore, the logical starting point for analysis is the current version of Ohio Revised Code Section 4123.931.

The current version of Ohio Revised Code Section 4123.931 "creates a right of recovery in favor of a statutory subrogee against a third party, and the statutory subrogee is subrogated to the rights of a claimant [of workers' compensation benefits]" R.C. 4123.931(A). In allocating the rights of the parties, the statute makes a preliminary classification dependant on whether the claimant settles his or her claim against the third-party, or takes that claim to judgment in a court of law. Cf. R.C. 4123.931(B) and (D). However, in either instance, the same formula will apply to determine the amounts of the judgment or settlement that are allocated to the respective parties. *Id.*

That formula can best be expressed as: $\text{Claimant} = \frac{\text{Uncompensated Damages}}{(\text{Subrogation Interest} + \text{Uncompensated Damages}) \times \text{Net Amount Recovered}}$; Statutory

Subrogee = Subrogation Interest / (Subrogation Interest + Uncompensated Damages) x Net Amount Recovered. Id. In the formula, the uncompensated damages are "the claimant's demonstrated or proven damages minus the statutory subrogee's subrogation interest." R.C. 4123.93(F). The subrogation interest is the "past, present, and estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits...paid to or on behalf of the claimant by the statutory subrogee." R.C. 4123.93(D). The net amount recovered is "the amount of any award, settlement, compromise, or recovery by a claimant against a third party, minus the attorney's fees, costs, or other expenses incurred...in securing the award, settlement, compromise or recovery" and does not include punitive damages. R.C. 4123.93(E). Thus, the formula operates to provide each party with the percentage of the net amount recovered that represents the percentage of the sum of the subrogation interest and the uncompensated damages.

The distinction between settlement and judgment appears to come into play in the allocation of actual amounts to the formula. A settling party has the option of coming to an agreement with the statutory subrogee to allocate the net amount recovered "on a more fair and reasonable basis" than the formula, and if this fails, to utilize a conference with a designee of the administrator of workers' compensation, or through an alternative dispute resolution process to achieve the same goal. R.C. 4123.931(B). A party taking his or her claim to judgment, on the other hand, is entitled to, in a non-jury proceeding, findings of fact as to the total amount of compensatory damages, further broken down into economic and non-economic loss, and in a jury proceeding, interrogatories as to the same findings. R.C. 4123.931(D).

After the amounts are allocated through the above process, the claimant is presented with an option by the statute: either establish an interest bearing trust account for the portion of

the subrogation interest that represents estimated future benefits, or to pay the entire estimated amount to the statutory subrogee within 30 days. R.C. 4123.931(B) and (F). If a claimant chooses the trust account option, any balance in the account after the right to receive benefits has terminated belongs to the claimant. R.C. 4123.931(E). However, if the claimant chooses the immediate payment option, there is no comparable refund provision in the statute.

Smith challenges the above statutory scheme on a number of constitutional grounds. The first argument she makes is that the Ohio Constitution's guarantees of Due Course of Law and Private Property are violated by the statute. Smith contends that the most recent revisions to the statute have failed to satisfy the constitutional requirements expressed by the Ohio Supreme Court. The Supreme Court of Ohio invalidated the previous version of this statute in 2001. *Holeton v. Crouse Cartage Co.*, 92 Ohio St. 3d 115, 135, 2001-Ohio-109, 748 N.E.2d 1111. In determining the validity of the previous statute on both Due Course of Law and Private Property grounds, the Supreme Court determined that the appropriate standard of review was that of rational basis, which requires that the statute be reasonably related to a legitimate government purpose. *Id.* at 122. In the context of subrogation statutes, like the parallel context of collateral source deduction statutes, this means that "deductible, or in this case, subrogable or recoupable items be matched to those losses or types of damages that the claimant actually recovered from the tortfeasor." *Id.* The central element of this inquiry is whether the amount awarded to the subrogee is actually included in the settlement or judgment.

The Court in *Holeton* invalidated the prior statute under this standard, focusing on two elements of the previous statute: (1) the estimated future values of compensation and medical benefits, and (2) the subjection of the entire settlement award to the subrogation interest. *Id.* As to the estimated future benefits, the Court found that the prior version of the statute violated

both section 16 and 19 of Article I of the Ohio Constitution, because it operated to provide a windfall for the statutory subrogee, by requiring "the claimant to reimburse the bureau or self-insuring employer for future benefits that the claimant may never receive," creating an immediate recovery in the statutory subrogee, and imposing the risk of overestimation of future payments on the claimant. *Id.* at 123-25. The Court held that such a statute was "irrational and arbitrary." *Id.*

In assessing the current statute, the Court must indulge in a strong presumption in favor of the constitutionality of the statute, and the challenger of the statute must prove its unconstitutionality beyond a reasonable doubt. *Johns v. Univ. of Cincinnati Med. Assocs.*, 101 Ohio St. 3d 234, 240, 2004-Ohio-824, 804 N.E.2d 19; See also *In re Columbus Skyline Securities, Inc.*, 74 Ohio St. 3d 495, 498, 1996-Ohio-151, 660 N.E.2d 427. At the outset, it is important to note that the Ohio Supreme Court stated in *Holeton* that the holding did "not accept the proposition that a workers' compensation subrogation statute is *per se* unconstitutional, and nothing in this opinion shall be construed to prevent the General Assembly from ever enacting such a statute." *Holeton*, 92 Ohio St. 3d at 135. Accepting the invitation of the Court, the General Assembly substantially revised the invalidated statute in 2003.

One of the major revisions presented in S.B. 227 was the addition of the trust fund option for the payment of estimated future benefits. R.C. 4123.931(B); See Legislative Service Commission, Final Analysis of S.B. 227 (124th General Assembly). This trust fund operates to preclude the creation of an immediate right of recovery in the statutory subrogee by requiring the subrogee to file reimbursement claims with the claimant every six months. *Id.* Additionally, the trust fund remains the property of the claimant, both in principal and interest,

and should there be an overestimation, the claimant is entitled to keep that portion of the trust fund that was not actually expended by the subrogee. *Id.* This Court is aware that there has been conflicting judicial authority, as to the decisions issued by the Courts of Common Pleas in the State of Ohio, regarding the effect of this revision. See *McKinley v. Ohio Bureau of Workers' Comp.*, Case No. 05-OT-122, (Washington Cty. C.P., Dec. 27, 2005) (currently on appeal to the 4th District Court of Appeals, as case number 06 CA 7); *Fry v. Surf City*, 137 Ohio Misc.2d 6, 2006-Ohio-3092, 581 N.E.2d 573.

In *McKinley*, the Washington County Court of Common Pleas determined that the trust fund provisions of the statute did not cure the unconstitutionality of the predecessor to R.C. 4123.931, specifically finding that the current statute operated as a complete taking, subjecting funds that may or may not be a double recovery to the trust until the injured Plaintiff dies. *McKinley* at 5-6. In *Fry*, the Lucas County Court of Common Pleas disagreed with this assessment of the statute, where it construed the trust fund provisions as precluding the potential windfall to the State that provided the grounds for the *Holeton* Court to invalidate the statute's predecessor. *Fry* at ¶¶13-19. The *Fry* court focused on the fact that the trust fund provisions of the revised statute operate to ensure that the statutory "subrogee is only reimbursed for amounts actually expended up to the amount placed in trust." *Id.* at ¶16. The court found that this revision "corrected the constitutional infirmity" and was a "reasonable, rational, non-arbitrary response to the legitimate concern of preventing double recoveries." *Id.* at ¶19.

This Court is persuaded by both the construction of the statute and the reasoning provided by the Lucas County Court of Common Pleas, and follows that analysis here. The addition of the trust fund option by the General Assembly prevents any risk to the Plaintiff that

future benefits may be overestimated or that double recoveries will occur. The State no longer has a present collectable interest in the recovery of a Plaintiff; instead, the State is required to submit payment notices to the Plaintiff in order to receive funds from the trust. The Court finds that because this option in the statute would preclude a windfall to the state and the statute is presumed to be constitutional, the legislature has remedied this specific shortcoming of the previous statute.

Additionally, the trust fund also operates in a manner similar to the "future credits" provision for overpayment by the BWC, approved by the Ohio Supreme Court in *State, ex rel. Weimer v. Industrial Comm'n* (1980), 62 Ohio St. 2d 159, 404 N.E.2d 149. In that case, the court upheld the provisions of Ohio Revised Code Section 4123.52 against Due Process and Equal Protection challenges. *Id.* That provision allowed recoupment of overpayment through deducting the overpayment from future amounts payable to the claimant. *Id.*

As to the second shortcoming of the previous statute, the *Holeton* Court held that the provisions of the prior subrogation statute, which precluded settling claimants from showing that the entire amount of the settlement did not constitute a double recovery, violated both the Due Course of Law and Takings provisions of the Ohio Constitution. *Holeton* at 125-26. The Court seemingly approved of the portions of the statute that allowed a claimant who went to trial to obtain jury interrogatories dividing the damages award between economic and non-economic loss, and focused on the lack of such provisions in the case of a settling claimant. *Id.* Since settling claimants were unable to prove that the settlement did not constitute a double recovery, the statute in *Holeton* went too far, and reached amounts that were not double recoveries. The new statute retains the jury interrogatory provisions of the prior statute, and

added a mechanism by which settling claimants could show that their settlement did not constitute a double recovery.

The statute now provides that a settling claimant can apportion damages through an agreement with the BWC, and if this fails, can request a conference with a designee of the administrator of workers' compensation, or can utilize an alternative dispute resolution process to allocate damages. R.C. 4123.931(B). Additionally, the statute also now applies the same *pro-rata* formula to both claims that go to trial, and claims that are settled without a trial. R.C. 4123.931(B). More importantly, however, the statute now provides a mechanism by which a settling Plaintiff can demonstrate that there was no double recovery, by providing mechanisms similar to the jury interrogatories, but tailored to the unique factual scenario of a settled case. As the Lucas County Court of Common Pleas has also noted, a Plaintiff who remains unsatisfied with the results of the conference and alternative dispute resolution process retains the ability to bring a declaratory judgment action to determine the appropriate interest vested in the statutory subrogee. *Fry v. Surf City*, Case No. CI05-2471, at 11 (Lucas Cty. C.P. April 3, 2006). Applying both the rational basis standard, as well as the presumption of constitutionality required when reviewing a statute of the General Assembly, as stated in *Johns*, the Court finds that the statute complies with the mandates of *Holeton*, by providing a fair and reasonable mechanism by which a settling claimant can prevent the subrogation claim from exceeding the amount that the settlement duplicates expenditures of the BWC.

Plaintiff also argues that the statute violates the Due Course of Law and Private Property rights of claimants who go to trial, based on the jury interrogatories being non-binding on the court when the court applies the statutory formula. This argument is based on the provisions of the statute that apply the formula, and then provide for the jury interrogatories

discussed above, without stating that the interrogatories should affect the operation of the formula. R.C. 4123.931(D). Such a construction of the statute would also implicate the right to a jury trial, discussed below. However, this argument appears to be specious at best since a court is bound to construe a statute to avoid constitutional infirmities if possible, and because of the presumption of constitutionality that attaches to all statutes. *State v. Keenan*, 81 Ohio St. 3d 133, 150, 1998-Ohio-459, 689 N.E.2d 929; See also *Johns v. Univ. of Cincinnati Med. Assocs.*, 101 Ohio St. 3d 234, 240, 2004-Ohio-824, 804 N.E.2d 19. The appropriate constitutional construction would be that the legislature intended the court to use the jury verdict as a guide to determining the amounts to be used in applying the statute, and not that the legislature intended the formula to apply irrespective of the jury verdicts. If the Court were to construe the statute as requested by the Plaintiff, subsection D of the statute would be rendered completely irrelevant. Given that "[i]t is a cardinal rule of statutory construction that a statute should not be interpreted so as to make the statute ineffective" and "[a] court must construe the statute so as to render it compatible with other related enactments and construe it so as to avoid unreasonable consequences," the Court declines to utilize Plaintiff's construction of the statute, and instead, will construe the statute as preventing a court from disregarding the jury interrogatories. *Christman v. Washington Court House School Dist.* (12th Dist. 1986), 30 Ohio App. 3d 228, 231, 507 N.E.2d 384; citing *Gulf Oil Corp. v. Kosydar* (1975), 44 Ohio St. 2d 208, 339 N.E.2d 820.

Plaintiff also raises an Equal Protection claim under the new statute, asserting that the statute makes an arbitrary classification by allowing settling claimants to take advantage of the alternative dispute resolution mechanism, while requiring claimants who take their case to a jury verdict to be limited to the application of the statutory formula. Such a challenge,

according to *Holeton*, is reviewed under the same rational basis review as the claims above, which requires a rational relationship to a legitimate government interest, or reasonable grounds for the distinction. *Holeton* at 131 (applying *State ex rel. Patterson v. Industrial Comm'n* (1996), 77 Ohio St. 3d 201, 205, 672 N.E.2d 1008). In *Holeton*, the classification that allowed claimants taking their case to verdict to allocate their damages through the use of interrogatories, but prevented settling claimants from making a similar showing, was "irrational and arbitrary." *Id* at 132.

However, the Court's construction of the statute, discussed above, indicates that the claimant who takes his/her case to trial is not limited to the application of the statutory formula, but instead obtains the benefits of the jury interrogatories that are required under the statute. This is the same type of interrogatory that was favorably discussed in *Holeton*. Thus, the claimant who takes a case to trial receives the opportunity to apportion damages through jury interrogatories, while the settling claimant has the opportunity to allocate informally with the BWC or to utilize alternative dispute resolution. The distinction in remedies appears to be rationally related to the legitimate governmental purpose of encouraging settlements, as well as the legitimate purpose in preventing double recoveries. *AAAA Enterp., Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St. 3d 157, 533 N.E.2d 597; *Holeton* at 132. Additionally, the remedy reflects the difference between a settled and a tried case, and therefore, under rational basis review, survives constitutional scrutiny. Accordingly, the Court finds that this statute does not offend the Equal Protection Clause of the Ohio Constitution, as its classifications are rationally related to a legitimate government purpose.

Lastly, Plaintiff raises an argument not presented in *Holeton*, maintaining that the provisions of Ohio Revised Code Section 4123.931 operate to deprive a claimant of his/her

right to a jury trial. The standard for reviewing such claims is one of the strict scrutiny, since the right to jury trial, in actions where the right existed at common law at the time that the Ohio Constitution was adopted, is a fundamental right. *Sorrell v. Thevenir*, 69 Ohio St. 3d 415, 421-23, 1994-Ohio-38, 633 N.E.2d 504. Thus, the statute must be shown to be necessary to promote a compelling state interest, should the fundamental right to a jury trial be shown to be implicated. *Id.* However, the threshold matter here is the construction of the statute, as discussed above. Since the Court has already construed the statute to prevent a court from disregarding the jury findings, expressed through the interrogatories, the statute does not violate the right to a jury trial. The present statute is distinct from the scenario in *Sorrell v. Thevenir*, where the Ohio Supreme Court invalidated a collateral source deduction statute that allowed the court to make the deduction, regardless of whether they were duplicated in the jury verdict, and in disregard of that verdict. *Id.* at 421.

Here, the statute requires that a court use the jury interrogatory numbers in applying the formula to the verdict. The statute provides a mechanism by which the jury's economic damages award supplies the value for the "subrogation interest" and the non-economic damages award to supply the value for the "uncompensated damages." Under such a construction, the right to a jury trial is not implicated, and thus, the strict scrutiny review is not necessary. The statute does not impinge on the right to a jury trial under the Ohio Constitution, and the Court upholds the statute on this basis as well.

CONCLUSION

For the forgoing reasons, the Court finds that Ohio Revised Code Section 4123.931 as enacted in S.B. 227, does not violate Sections 2, 5, 16, and 19 of Article I of the Ohio

Constitution. Accordingly, no genuine issue as to any material fact remains to be litigated as between Smith and the BWC. Construing the evidence most strongly in the BWC's favor, reasonable minds can only reach a conclusion that is adverse to Plaintiff. Thus, Smith is not entitled to judgment as a matter of law on her claim that Ohio Revised Code Section 4123.931 is unconstitutional.

It is therefore **ORDERED** that Plaintiff April J. Smith's Motion for Summary Judgment is found not well taken, and accordingly denied.

As a result of the Court's determination that the statute is constitutional, both facially and as applied to this case, the Court dismisses with prejudice Plaintiff's Third Individual Claim for Relief, requesting declaratory judgment that the statute is unconstitutional. Given that the pending claims against Defendant Jones have been settled by the parties, the only matter pending before the Court is the amount, if any, of the subrogation lien applied to the settlement. Given that Ohio Revised Code Section 4123.931 specifically provides methods for the allocation of this amount, the Court dismisses the remainder of the cause of action in this case.

The Court finds that this is a final appealable order, pursuant to Civil Rule 54(B), and that there is no just cause for delay.

All until further order of the Court.


JOSEPH H. NIEMEYER, JUDGE

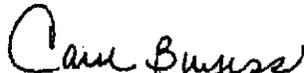
CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this 29th day of August 2006, a time-stamped copy of the foregoing Judgment Entry was delivered by ordinary U.S. Mail to:

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2006 SEP 18 AM 11:23

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CLERK OF COURTS
MONTGOMERY CO., OHIO

**IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
GENERAL DIVISION**

KIM D. LASLEY ,

Plaintiff,

-vs-

HUONG T. NGUYEN, et al.,

Defendant.

CASE NO.: 05 CV 8507

**JUDGE MARY
KATHERINE HUFFMAN**

**DECISION, ORDER AND ENTRY
OVERRULING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND SUSTAINING
DEFENDANT'S MOTION FOR
JUDGMENT ON THE PLEADINGS**

This matter is before the court on the Motion for Summary Judgment filed herein on May 30, 2006 by Plaintiff Kim D. Lasley ("Lasley"). On June 14, 2006, Defendant Ohio Bureau of Workers Compensation ("BWC") filed a Response and 12(C) Motion for Judgment on the Pleadings. Plaintiff filed a Reply Memorandum in Support of her Motion on June 23, 2006. Defendant filed its Reply Memorandum on June 29, 2006. This matter is now ripe for decision.

I. FACTS

The parties do not dispute that on December 31, 2004, Plaintiff Lasley was injured in an automobile accident while she was in the course and scope of her employment with Choices in Community Living. As a result of her injuries, Lasley filed a claim with Defendant BWC. As of the date of filing of the Motions before this court, BWC has paid to Lasley approximately \$1212.12 in benefits and/or medical bills and BWC estimates no further benefits as a result of Lasley's claim.

As a result of the automobile accident and the injuries sustained therein, Lasley filed a Complaint on November 7, 2005. In her First Claim for Relief, Lasley alleges, among other things, that she suffered severe and permanent injuries when co-Defendant Huong T. Nguyen ("Nguyen") negligently operated his motor vehicle and/or failed to yield the right of way from private property and collided with her vehicle at a high rate of speed. Lasley demands judgment against Nguyen in excess of \$25,000.00. In her Second Claim for Relief, Lasley alleges that BWC may have paid medical expenses on her behalf in connection with the automobile accident and that BWC has claimed or may claim a subrogation right under O.R.C. Sections 4123.93 and 4123.931. Lasley further claims that the aforementioned code sections are unconstitutional on their face as applied to her and that such statutes violate her rights under the Ohio Constitution. Lasley contends that under O.R.C. Section 2721.03, Plaintiff's rights and obligations may be declared by this court and requests declaratory judgment declaring the following: (1) her rights under O.R.C. 4123.93 and 4123.931; and (2) O.R.C. 4123.93 and 4123.931 unconstitutional as applied to her.

BWC contends, by and through the sworn affidavit of Ellen Wentzel, supervisor of the BWC's subrogation unit, that it has "an independent right of recovery and is subrogated to the rights of the plaintiff against the defendant with respect to past, present, and estimated future payment of compensation and benefits" (Defendants Response, p. 4, citing Wentzel Afd., paragraph 6). While Lasley admits in her Motion that "BWC is a 'statutory subrogee' within the meaning of R.C. [section] 4123.931" and that "[a]s a statutory subrogee with respect to workers' compensation benefits previously or hereafter paid to Kim Lasley, BWC has asserted a subrogation claim in its 'new party complaint' against any settlement made or judgment paid by or on behalf of the other defendants for not only benefits the BWC has paid, but benefits they may never pay in the future" (Plaintiff's Motion for Summary Judgment, p. 2). However, Lasley disputes the validity of BWC's subrogation claim and contends that O.R.C. 4123.931, otherwise known as Ohio's subrogation statute, violates Sections 2, 5, 16 and 19 the Ohio Constitution.

In its Response, BWC argues that the subrogation statute is constitutional, and moves this court for judgment on the pleadings under Ohio Rule of Civil Procedure 12(C) in relation to Lasley's Second Claim for Relief for declaratory judgment on the issue that O.R.C. Sections 4123.93 and 4123.931 do not violate the Ohio Constitution and that its statutory right to recover is enforceable against recovery made by Lasley as a result of this case. BWC further moves this court to dismiss Lasley's Second Claim for Relief as contained in her Complaint.

II. STANDARDS OF REVIEW

A. Summary Judgment Standard

Summary judgment is appropriate pursuant to Rule 56(C) of the Ohio Rules of Civil Procedure when (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) construing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to only one conclusion, that being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St 2d 64, 66 (1978). The burden of showing that no genuine issue exists as to any material fact falls upon the moving party. *Mitseff v. Wheeler*, 38 Ohio St. 3d 112, 115, 526 N.E.2d 798 (1988). Additionally, a motion for summary judgment forces the nonmoving party to produce evidence on any issue (1) for which that party bears the burden of production at trial, and (2) for which the moving party has met its initial burden. *See Dresher, v. Burt*, 75 Ohio 3d 280, 662 N.E.2d 264 (1996). A non-moving party "may not rest upon the mere allegations or denial of his pleadings, but must set forth specific facts showing there is a genuine issue for trial." *Chaney v. Clark Cty. Agricultural Soc.* (1993), 90 Ohio App. 3d 421, 424, 629 N.E.2d 513.

The key to a summary judgment is that there must be no genuine issue as to any material fact. Whether a fact is "material" depends on the substantive law of the claim being litigated. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986); *Turner v. Turner*, 67 Ohio St. 3d 337 (1993). An issue of fact exists when the relevant factual allegations in the pleadings, affidavits, depositions or interrogatories are in conflict. *Link v.*

Leadworks Corp., 79 Ohio App. 3d 735, 741 (1992).

B. Constitutional Challenge Standard

All legislative enactments enjoy a strong presumption of constitutionality. *Fry v. Surf City, Inc.*, 2006 Ohio Misc. LEXIS 123 (citing *State ex rel. Patterson v. Indus. Comm.* (1996), 77 Ohio St.3d 201). Further, the court "must apply all presumptions and pertinent rules of construction so as to uphold, if at all possible, a statute * * * assailed as unconstitutional." *Fry, supra* (citing *State v. Dorso* (1983), 4 Ohio St.3d 60). Consequently, a challenging party must prove any assertions of unconstitutionality beyond a reasonable doubt. *Fry, supra* (citing *In re Columbus Skyline Secs., Inc.* (1996), 74 Ohio St.3d 495).

C. Judgment on the Pleadings Standard

Upon a motion for judgment on the pleadings under Ohio Civ. R. 12(C), the party against whom the motion is made is entitled to have all the material allegations in his complaint, with all reasonable inferences to be drawn therefrom, construed in his favor. *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 166. A determination of the motion for judgment on the pleadings is restricted solely to the allegations in the pleadings. *Id.* A motion for judgment on the pleadings is to be granted when after viewing allegations and reasonable inferences therefrom in a light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law. *Brown v. Wood City Board of Elections* (1992), 79 Ohio App.3d 474, 477.

III. LAW AND ANALYSIS

In her Motion, Lasley disputes the validity of BWC's subrogation claim and submits that O.R.C. 4123.931 violates the Ohio Constitution. Ohio Revised Code Section 4123.93 defines the following:

"Statutory subrogee" means the administrator of workers' compensation, a self-insuring employer, or an employer that contracts for the direct payment of medical services pursuant to division (L) of section 4121.44 of the Revised Code. (O.R.C. 4123.93(B))

"Third party" means an individual, private insurer, public or private entity, or public or private program that is or may be liable to make payments to a person without regard to any statutory duty contained in this chapter or Chapter 4121., 4127., or 4131. of the Revised Code. (O.R.C. 4123.93(C))

"Subrogation interest" includes past, present, and estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits, and any other costs or expenses paid to or on behalf of the claimant by the statutory subrogee pursuant to this chapter or Chapter 4121., 4127., or 4131. of the Revised Code. (O.R.C. 4123.93(D)).

Ohio Revised Code Section 4123.931 governs the subrogation rights of a statutory subrogee against a third party and reads:

(A) The payment of compensation or benefits pursuant to this chapter or Chapter 4121., 4127., or 4131., of the Revised Code creates a right of recovery in favor of a statutory subrogee against a third party, and the statutory subrogee is subrogated to the rights of a claimant against that third party. The net amount recovered is subject to a statutory subrogee's right of recovery.

(B) If a claimant, statutory subrogee, and third party settle or attempt to settle a claimant's claim against a third party, the claimant shall receive an amount equal to the uncompensated damages divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered, and the statutory subrogee shall receive an amount equal to the subrogation interest divided by the sum

of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered, except that the net amount recovered may instead be divided and paid on a more fair and reasonable basis that is agreed to by the claimant and statutory subrogee. If while attempting to settle, the claimant and statutory subrogee cannot agree to the allocation of the net amount recovered, the claimant and statutory subrogee may file a request with the administrator of workers' compensation for a conference to be conducted by a designee appointed by the administrator, or the claimant and statutory subrogee may agree to utilize any other binding or non-binding alternative dispute resolution process.

The claimant and statutory subrogee shall pay equal shares of the fees and expenses of utilizing an alternative dispute resolution process, unless they agree to pay those fees and expenses in another manner. The administrator shall not assess any fees to a claimant or statutory subrogee for a conference conducted by the administrator's designee.

(C) If a claimant and statutory subrogee request that a conference be conducted by the administrator's designee pursuant to division (B) of this section, both of the following apply:

(1) The administrator's designee shall schedule a conference on or before sixty days after the date that the claimant and statutory subrogee filed a request for the conference.

(2) The determination made by the administrator's designee is not subject to Chapter 119. of the Revised Code.

(D) When a claimant's action against a third party proceeds to trial and damages are awarded, both of the following apply:

(1) The claimant shall receive an amount equal to the uncompensated damages divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered, and the statutory subrogee shall receive an amount equal to the subrogation interest divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered.

(2) The court in a non-jury action shall make findings of fact, and the jury in a jury action shall return a general verdict accompanied by answers to interrogatories that specify the following:

(a) The total amount of the compensatory damages;

(b) The portion of the compensatory damages specified pursuant to division (D)(2)(a)

of this section that represents economic loss;

(c) The portion of the compensatory damages specified pursuant to division (D)(2)(a) of this section that represents non-economic loss.

(E) (1) After a claimant and statutory subrogee know the net amount recovered, and after the means for dividing it has been determined under division (B) or (D) of this section, a claimant may establish an interest-bearing trust account for the full amount of the subrogation interest that represents estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits, reduced to present value, from which the claimant shall make reimbursement payments to the statutory subrogee for the future payments of compensation, medical benefits, rehabilitation costs, or death benefits. If the workers' compensation claim associated with the subrogation interest is settled, or if the claimant dies, or if any other circumstance occurs that would preclude any future payments of compensation, medical benefits, rehabilitation costs, and death benefits by the statutory subrogee, any amount remaining in the trust account after final reimbursement is paid to the statutory subrogee for all payments made by the statutory subrogee before the ending of future payments shall be paid to the claimant or the claimant's estate.

(2) A claimant may use interest that accrues on the trust account to pay the expenses of establishing and maintaining the trust account, and all remaining interest shall be credited to the trust account.

(3) If a claimant establishes a trust account, the statutory subrogee shall provide payment notices to the claimant on or before the thirtieth day of June and the thirty-first day of December every year listing the total amount that the statutory subrogee has paid for compensation, medical benefits, rehabilitation costs, or death benefits during the half of the year preceding the notice. The claimant shall make reimbursement payments to the statutory subrogee from the trust account on or before the thirty-first day of July every year for a notice provided by the thirtieth day of June, and on or before the thirty-first day of January every year for a notice provided by the thirty-first day of December. The claimant's reimbursement payment shall be in an amount that equals the total amount listed on the notice the claimant receives from the statutory subrogee.

(F) If a claimant does not establish a trust account as described in division (E)(1) of this section, the claimant shall pay to the statutory subrogee, on or before thirty days after receipt of funds from the third party, the full amount of the subrogation interest that represents estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits.

(G) A claimant shall notify a statutory subrogee and the attorney general of the identity of all third parties against whom the claimant has or may have a right of recovery, except that when the statutory subrogee is a self-insuring employer, the claimant need not notify the attorney general. No settlement, compromise, judgment, award, or other recovery in any action or claim by a claimant shall be final unless the claimant provides the statutory subrogee and, when required, the attorney general, with prior notice and a reasonable opportunity to assert its subrogation rights. If a statutory subrogee and, when required, the attorney general are not given that notice, or if a settlement or compromise excludes any amount paid by the statutory subrogee, the third party and the claimant shall be jointly and severally liable to pay the statutory subrogee the full amount of the subrogation interest.

(H) The right of subrogation under this chapter is automatic, regardless of whether a statutory subrogee is joined as a party in an action by a claimant against a third party. A statutory subrogee may assert its subrogation rights through correspondence with the claimant and the third party or their legal representatives. A statutory subrogee may institute and pursue legal proceedings against a third party either by itself or in conjunction with a claimant. If a statutory subrogee institutes legal proceedings against a third party, the statutory subrogee shall provide notice of that fact to the claimant. If the statutory subrogee joins the claimant as a necessary party, or if the claimant elects to participate in the proceedings as a party, the claimant may present the claimant's case first if the matter proceeds to trial. If a claimant disputes the validity or amount of an asserted subrogation interest, the claimant shall join the statutory subrogee as a necessary party to the action against the third party.

(I) The statutory subrogation right of recovery applies to, but is not limited to, all of the following:

(1) Amounts recoverable from a claimant's insurer in connection with underinsured or uninsured motorist coverage, notwithstanding any limitation contained in Chapter 3937. of the Revised Code;

(2) Amounts that a claimant would be entitled to recover from a political subdivision, notwithstanding any limitations contained in Chapter 2744. of the Revised Code;

(3) Amounts recoverable from an intentional tort action.

(J) If a claimant's claim against a third party is for wrongful death or the claim involves any minor beneficiaries, amounts allocated under this section are subject to the approval of probate court.

(K) The administrator shall deposit any money collected under this section into the public fund or the private fund of the state insurance fund, as appropriate. If a self-insuring employer collects money under this section of the Revised Code, the self-insuring employer shall deduct the amount collected, in the year collected, from the amount of paid compensation the self-insured employer is required to report under section 4123.35 of the Revised Code.

“These statutes create an independent right of recovery in favor of statutory subrogees against third parties. The statutory subrogee is subrogated to a plaintiff's rights against third-party tortfeasors with respect to past, present, and estimated future payments of workers' compensation benefits. The changes made to R.C. 4123.931 in S.B. 227 were in response to the Ohio Supreme Court's decision in *Holeton v. Crouse Cartage Co.*, which held that former R.C. 4123.931 violated Sections 2, 16, and 19 of Article I of the Ohio Constitution. While the *Holeton* court found the prior subrogation statute unconstitutional, it also opined that a subrogation statute would not necessarily violate Section 35, Article II of the Ohio Constitution (the workers' compensation provision) and, therefore, the legislature may constitutionally enact a subrogation statute.” *Fry v. Surf City, Inc.*, 137 Ohio Misc. 2d 6, 9 (Ohio Misc. 2006) (citing *Holeton v. Crouse Cartage Co.*, (2001) Ohio St.3d 115).

In her Motion, Lasley argues that ORC 4123.93 and ORC 4123.931 violate her rights under the Ohio Constitution, specifically: (1) the formulas used by ORC 4123.931 violate the Ohio Constitution; (2) the portion of ORC 4123.931 allowing the state to take “estimated future payments” from the injured worker violates the Ohio Constitution; (3) the statutory scheme of ORC 4123.931 violates the equal protection clause of the Ohio Constitution; (4) ORC 4123.931 violates the right to trial by jury.

Defendant BWC argues that ORC 4123.93 and 4123.931 do not violate the Ohio Constitution and moves this court for judgment on the pleadings under Ohio R. Civ. P. 12(C) in relation to Lasley's Second Claim for Relief for declaratory judgment on the issue that ORC 4123.93 and 4123.931 do not violate the Ohio Constitution, that the BWC's subrogation right is enforceable and as such, moves this court to dismiss Lasley's Second Claim for Relief stated in her Complaint.

The court has reviewed the record, including all memoranda filed herein, and makes the following findings:

A. ORC 4123.93 and 4123.931 do not violate the Ohio Constitution.

This court finds the *Fry* court's decision persuasive and adopts its reasoning in pertinent part:

In analyzing the prior statute, the *Holeton* court cited earlier decisions holding that the State of Ohio has a legitimate interest in preventing double recoveries and that "it is constitutionally permissible for the state to prevent a tort victim from recovering twice." *Holeton*, at 121-122. The Ohio Supreme Court merged its analysis of Section 16 and Section 19 into one and stated:

Whether expressed in terms of the right to private property, remedy, or due process, the claimant-plaintiff has a constitutionally protected interest in his or her tort recovery to the extent that it does not duplicate the employer's or bureau's compensation outlay. *Id* at 120.

Holeton then called into question two provisions of the former statute, ultimately finding that they violated the Constitution. The first provision found unconstitutional in former R.C. 4123.931(A) gave the statutory subrogee a right of subrogation with respect to "estimated future values of compensation and medical benefits," and the

second provision questioned was found in former division (D) regarding settlements.
Id.

Fry at 10.

1. The formulas used by ORC 4123.931 to determine the amount paid to the statutory subrogee in a settlement or a trial situation do not violate the Ohio Constitution.

Lasley argues that: "The statutory scheme for determining the award to the statutory subrogee, by the application of the pro rata formula, violates the Ohio Constitution because the subrogee is still allowed... to participate in part of a settlement that does not result in a true 'double recovery.' To comply with *Holeton* and the Ohio Constitution, the statutory subrogee cannot participate in any part of the settlement that does not result in a 'double recovery.'" Lasley further argues that the pro rata formula of ORC 4123.931 has two "fatal flaws," those being: (1) the formula "assumes that all workers compensation benefits were duplicated in the tort recovery, thereby assuring the subrogee makes some recovery regardless of whether its damages were proven or a double recovery occurred;" and (2) "the statute mandates that the statutory subrogee participate and take its subrogation claim from not only items which could conceivably match benefits paid..., but also all other 'uncompensated damages'... which do not and could not, match benefits paid."

Defendant BWC argues that: "Lasley is confused as to the application of the formula and how it applies to future benefits. Lasley is laboring under the impression that the statutory formula determines the amount of future benefits. It does not. The formula works

to divide the "net amount recovered" between the claimant and the subrogee. The amount of future benefits is left to be agreed to by the parties in a settlement, or to be determined by the trier of fact.*** What the new law does is allow the trier of fact to determine based upon the evidence presented the amounts that represent future costs - this is something that juries in Ohio are asked to do every day, and through interrogatories presented pursuant to Ohio R. Civ. P. 49(B) juries can do the same under this statute."

This court finds the *Fry* court's decision persuasive and adopts its reasoning in pertinent part:

The constitutional defects found in *Holeton*, and as alleged by *Fry*, do not exist in the new workers' compensation subrogation statute. First, the new statute establishes a pro rata formula to determine the interests of the statutory subrogee and the claimant in any settlement amount. This formula is applied equally to settlements and to awards following trial. Thus, the new statute does not distinguish between cases going to trial and cases that are settled.

Moreover, the formula ensures that the statutory subrogee is reimbursed only from amounts that would constitute an impermissible double recovery. The formula works to provide a pro rata distribution of the "net amount recovered" by the claimant through either settlement or trial award to the statutory subrogee and the claimant. Never allowing the statutory subrogee to recoup more than its pro rata share of the "net amount recovered," the statute ensures that the subrogee does not unconstitutionally take more from the claimant than what would represent a double recovery.

Further, in a settlement situation, contrary to the holding in *McKinley*, the new statute allows ample opportunity for the plaintiff to demonstrate there was no double recovery. R.C. 4123.931(B) provides two methods to determine the statutory subrogee's interest in a settlement situation. The first method is the application of the mathematical formula.... But division (B) also provides a second, alternative method to the formula. Under the second method, the net amount recovered in a settlement

may be divided and paid on a "more fair and reasonable basis that is agreed to by the claimant and the statutory subrogee." Division (D) further provides an alternative dispute resolution process that may be used to resolve the issue. The use of the alternative formula, coupled with the discretionary use of an alternative dispute-resolution, either formal or informal, gives a claimant an opportunity to provide evidence as to what portions of a net amount recovered may or may not represent a double recovery.

The new subrogation statute provides ample opportunity for a claimant to prove what amount of the settlement represents a double recovery. In a trial, evidence may be presented and jury interrogatories may be submitted, under Civ.R.49, to determine what parts of the damages represents workers' compensation benefits and what parts represent the claimant's unreimbursed interests. If the parties wish to settle, the statute provides for the use of alternative dispute-resolution processes, and the parties may use the statutory formula or distribute the settlement proceeds on any "fair and reasonable basis that is agreed to by the claimant and the statutory subrogee." Accordingly, the court concludes R.C. 4123.93 and 4123.931 as enacted in S. B. 227 do not violate Sections 16 and 19, Article I of the Ohio Constitution, as the new statutes afford claimants a fair and reasonable opportunity to demonstrate what part of a settlement or judgment represents a double recovery.

Fry at 14-15 (citations omitted).

Upon reviewing the statutory language of ORC 4123.931 and the *Fry* court's reasoning, this court finds Lasley's argument to be not well taken and, just as the Plaintiff-Claimant in *Fry*, Lasley's reliance on *McKinley* is misplaced. Lasley has not demonstrated to the court beyond a reasonable doubt that the formulas used by ORC 4123.931 to determine the amount paid to the statutory subrogee in a settlement or trial situation violate the Ohio Constitution. In viewing the evidence in a light most favorable to the non-moving party, Defendant BWC herein, the court finds that there is no genuine issue of material fact and Lasley is not entitled to judgment as a matter of law.

2. The mandate of ORC 4123.931 allowing the state to "take money from an injured party" for estimated future payments of compensation does not violate the Ohio Constitution.

Lasley argues that:

ORC 4123.931 does not meet constitutional muster under due course of law/right to a remedy analysis due to the statutory mandate to award the state a windfall for 'estimated future payments of compensation' that the state has not paid, and may never pay, and which cannot meet the matching requirement, Furthermore the provisions of [ORC] 4123.931 violate the takings clause because they are clearly arbitrary. The provisions allow (1) the state to arbitrarily calculate these estimated future benefits however they want, which formula may be changed at any time, and (2) they mandate the collection or confiscation of money for benefits that have not been paid and may never be paid.

... the statute here provides that a claimant either immediately pay the state for benefits it may never receive (a windfall for which the state does not offer a refund), or the claimant must give up all rights to the money claimed by the state in its mysterious formulation, place it in an account, and get back control of that money only by settlement or death. In either event, the claimant arbitrarily loses dominion over their property due to events which have never occurred and may never occur, under formulas that have no statutory guidelines or controls and gives a windfall to the subrogee.

As the *McKinley* court held:

Prior to the State of Ohio taking any citizen's property, that citizen should be entitled to due process that involves a full and fair hearing, not a mathematical formula. The citizen's right to the enjoyment of their property should be protected by the State, not confiscated by the State and subject to the citizen going to the State every six months to beg for a partial payout of his or her money or actually dying before receiving compensation for injuries received. *McKinley* at 6.

Conversely, Defendant BWC argues:

Under new ORC 4123.931, the statutory subrogee does not have a current collectible interest in estimated future expenditures which would create a prohibited situation wherein the estimated future values would be greater than the subrogee's eventual

compensation outlay. New ORC 4123.931 'does not require the claimant to reimburse the statutory subrogee for future benefits that the claimant may never receive.' *Fry* at 6. Contrary to Lasley's assertions, the statute does not 'mandate the collection or confiscation of money for benefits that have not been paid and may never be paid.' To accomplish this, new divisions (E) and (F) of ORC 4123.931 permit the claimant to establish an interest-bearing trust account in to which may be deposited the full amount of the subrogation interest that represents estimated future payments of compensation or benefits. From this trust account, the claimant is to make reimbursement payments to the statutory subrogee for future payment of benefits. If a trust account is established, under paragraph (E)(3), the statutory subrogee shall provide payment notices every six months listing the amount the statutory subrogee has paid for the six months preceding the notice. The claimant is then to make reimbursement payments to the statutory subrogee from the trust account. If the statutory subrogee's duty to continue making payments is terminated, any remainder in the trust account, after final reimbursement is made, shall be paid to the claimant or claimant's estate. If the claimant does not establish a trust account under (E)(1), the claimant is to pay the statutory subrogee within thirty days after receipt of funds from the third party tortfeasor the full amount of the subrogation interest that represents future payments. ORC 4123.931(F). Since reimbursements are made as benefits are paid, contrary to Lasley's claim, a double recovery is rendered impossible and the subrogee is only reimbursed for benefits actually paid out.

Just like the Plaintiff-Claimant in *Fry*, Lasley, to support her Motion, relies on *McKinley*, "which, in addition to holding that S.B. 227's version of R.C. 4123.931 effects a complete taking of property without due process because it requires a plaintiff to place all settlement money into the trust account, held that in a settlement situation there is no provision for the plaintiff to show that there was no double recovery. The court finds *McKinley* to be incorrect on the latter issue, too." *Fry* at 14. The *Fry* court further articulated:

In S.B. 227, the legislature created a system that guarantees that any risk of estimating future values is not placed on a claimant. Under new R.C. 4123.931, the statutory subrogee does not have a current collectible interest in estimated future expenditures.

The new statute does not require the claimant to reimburse the statutory subrogee for future benefits that the claimant may never receive. To accomplish this, new divisions (E) and (F) of R.C. 4123.931 permit the claimant to establish an interest-bearing trust account for the full amount of the subrogation interest that represents estimated future payments of compensation and benefits.

If the claimant establishes a trust account, every six months the statutory subrogee must provide a payment notice to the claimant, listing the amounts paid on the claimant's behalf. The claimant must then reimburse the subrogee from the trust account in accordance with the notice. If the statutory subrogee's duty to continue making payments is terminated, any amount that remains in the trust account, after final reimbursement is paid to the subrogee, must be paid to the claimant or the claimant's estate. If a claimant does not establish a trust account under division (E)(1), the claimant must, within 30 days after receipt of funds from the third-party tortfeasor, pay the statutory subrogee the full amount of the subrogation interest that represents future benefits.

Fry at 12 (citations omitted).

Further, the creation of a trust account does not pose an undue burden upon a claimant, for several reasons. First, it is the claimant's option to create the trust account; under division (F), the claimant may elect to pay the future benefits up front. Second, even if *Fry* is correct that the claimant would bear the cost of the trust account, she has not presented any evidence that precludes a finding that the cost would be minimal, if it exists at all, so as not to present an undue burden; and new R.C. 4123.931(E)(2) authorizes the claimant to use the interest that accrues on the trust account to pay the expenses associated with the account. Finally, once the trust account is established, the burden is on the subrogee to submit a payment notice to the claimant every six months, and the new statute makes no provision for reimbursement in the absence of a timely payment notice. *Fry* also relies on *McKinley v. Ohio Bur. of Workers' Comp.*, which held that R.C. 4123.931 effects a complete taking of property without due process because it requires a plaintiff to place all settlement monies into the trust account. *McKinley* misinterprets the statute, however, as division (E) requires only monies representing the future interest to be placed into the trust account. Thus, the court finds *McKinley* unpersuasive

Fry at 12-13 (citations omitted).

The trust fund created by the General Assembly in S.B. 227 corrects the constitutional infirmity cited by *Holeton*. There is now no risk to the plaintiff that future benefits

may be estimated too high. The court finds that the trust account provision in R.C. 4123.931 is a reasonable, rational, nonarbitrary response to the legitimate concern of preventing double recoveries and complies with the holding in *Holeton*. Thus, S.B. 227, as it addresses the estimated future value issue, is constitutional.

Fry at 13 (citations omitted).

The *Holeton* court found that former R.C. 4123.931(D) established a framework whereby an unconstitutional taking of the claimant's property or a denial of remedy by due process could occur by distinguishing between third-party claims that are tried and third-party claims that are settled. Under the former statute, in the case of an award or judgment following trial, the claimant could obtain special jury interrogatories indicating that the award or judgment represented different types of damages. By obtaining this, the claimant could show that certain damages were not subject to reimbursement because they did not represent workers' compensation benefits. In contrast, in a settlement, the entire amount was subject to the statutory subrogee's subrogation right, regardless of the manner in which the settlement or compromise was characterized. The claimant was prevented from showing that portions of the settlement did not represent workers' compensation benefits. In other words, reimbursement could be from proceeds that did not constitute a double recovery.

Fry at 13-14 (citations omitted).

Upon reviewing the statutory language of ORC 4123.931 and the *Fry* court's reasoning, this court finds Lasley's argument to be not well taken and, just as the Plaintiff-Claimant in *Fry*, Lasley's reliance on *McKinley* is again misplaced. Lasley has not demonstrated to the court beyond a reasonable doubt that the State's subrogation interest in estimated future payments of compensation contained in ORC 4123.931 violate the Ohio Constitution. In viewing the evidence in a light most favorable to the non-moving party, Defendant BWC herein, the court finds that there is no genuine issue of material fact and Lasley is not entitled to judgment as a matter of law.

3. The statutory scheme of ORC 4123.931 does not violate the equal protection clause of the Ohio Constitution.

Lasley argues that: "The statute permits a claimant who wants to settle his case to undergo the additional expense of utilizing alternative dispute resolution for determining the allocation of the 'net amount recovered' on a 'more fair and reasonable basis.' This alternative dispute option for a 'more fair and reasonable basis' is not even given to claimants who must take their third party claims to trial. Instead, parties who take their cases to trial are forced into the rigid statutory formulations."

Defendant BWC contends that "the new statutory scheme and its pro rata formula ensures that the statute does not unconstitutionally take more from the claimant than what would represent a double recovery (*Fry* at 10). It operates in both settlement situations and in cases that go to trial to provide the claimant an opportunity to demonstrate the existence of a double recovery. By establishing an optional alternative dispute resolution process in cases where the claimant wishes to settle, the statute is not irrational or arbitrary. Claimants who try their cases may always take advantage of court appointed mediation or other settlement options—this statute in no way prohibits this."

The *Fry* court articulated:

The equal protection analysis given by Ohio courts under the Ohio Constitution and the United States Constitution is "functionally equivalent." Ohio courts have consistently applied the rational-basis test when addressing constitutional challenges to workers' compensation statutes, and the *Holeton* court used this test in analyzing the equal protection arguments against former R.C. 4123.931. "Under an equal protection analysis, the challenged statute will be upheld if the classification bears a

rational relationship to a legitimate governmental interest or if reasonable grounds exist for drawing the distinction." At the oral argument, the parties agreed that the court must use the rational-basis test in analyzing the subrogation statute. *Fry* at 15-16 (citations omitted).

Under the rational-basis test, a challenged statute must be upheld if there exists any conceivable set of facts under which the classification rationally furthers a legitimate legislative objective. The party challenging the constitutionality of an enactment has the burden to negate "every conceivable basis which might support it." *Fry* at 16 (citations omitted).

ORC 4123.931 is a rational response to the legitimate state concern of minimizing losses to the workers' compensation fund caused by the acts of third-party tortfeasors. The *Holeton* court agreed that this is a legitimate state concern, to the extent that it prevents a double recovery. n35 As analyzed above, under the amended version of R.C. 4123.931, the statutory subrogee recoups only to the extent that there is a double recovery. Further, the claimant is given substantial opportunity in either a trial or a settlement to prove amounts that would not represent a double recovery. Thus, R.C. 4123.931 is a rational response to a legitimate state concern. *Fry* at 16 (citations omitted).

Upon reviewing the statutory language of ORC 4123.931 and the *Fry* court's reasoning, this court finds Lasley's argument to be not well taken. Lasley has not demonstrated to the court beyond a reasonable doubt that the statutory scheme of ORC 4123.931 violates the equal protection clause contained in the Ohio Constitution. In viewing the evidence in a light most favorable to the non-moving party, Defendant BWC herein, the court finds that there is no genuine issue of material fact and Plaintiff is not entitled to judgment as a matter of law.

4. ORC 4123.931 does not violate Lasley's right to a jury trial under the Ohio Constitution.

Section 5, Article I of the Ohio Constitution provides the right to trial by jury and reads: "the right to trial by jury shall be inviolate, except that, in civil cases, laws may be

passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."

Lasley claims that ORC 4123.931 "is unconstitutional because it requires trial courts to take from a plaintiff's jury award and give to a statutory subrogee money allegedly representing benefits which have been or will be received by the plaintiff, regardless of whether those benefits are actually duplicated in the jury's verdict. Thus, courts may, consistent with ORC 4123.931, enter judgments in disregard of the jury's verdict and thus violate the plaintiff's right to have all facts determined by the jury, including damages." Lasley further claims that ORC 4123 "allows courts to enter judgments in disregard of the jury's verdict and thus violate the plaintiff's right to have all facts determined by the jury, including damages, regardless of whether the benefits paid and now allegedly recovered actually were contained in the jury verdict."

Defendant BWC argues that the right to a trial by jury involving workers compensation matters is statutory, not constitutional, and that the right to a jury trial applies only to those causes of action based on rights that existed at common law when the Ohio Constitution was adopted. BWC argues in the alternative that even if the right to a jury trial in workers compensation matters was guaranteed by the Ohio Constitution, ORC 4123.931 does not divest the claimant of this right. BWC further argues:

ORC 4123.931 does not require a trial court to take away from a jury award the statutory subrogee's interests. ORC 4123.931(D) provides what happens when a claimant's action against a third party proceeds to a trial and damages are awarded. Subsection (D)(1) repeats the formula that is used in cases involving settlements, and Subsection (D)(2) provides that the jury is to return a "general verdict" along with

answers to certain interrogatories. Nowhere in Subsection (D), or the rest of Section 4123.931 is a court instructed to apply the formula. The General Assembly's drafting of Subsection (D), while it lists three interrogatories to be given, does not preclude other interrogatories from being given under Ohio Rule Civil Procedure 49(B). In fact, it would most likely be contrary to Rule 49(B) if the General Assembly had limited the court to only the interrogatories specified in the statute.

ORC 4123.931(D) reads:

When a claimant's action against a third party proceeds to trial and damages are awarded, both of the following apply:

(1) The claimant shall receive an amount equal to the uncompensated damages divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered, and the statutory subrogee shall receive an amount equal to the subrogation interest divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered.

(2) The court in a non-jury action shall make findings of fact, and the jury in a jury action shall return a general verdict accompanied by answers to interrogatories that specify the following:

- (a) The total amount of the compensatory damages;
- (b) The portion of the compensatory damages specified pursuant to division (D)(2)(a) of this section that represents economic loss;
- (c) The portion of the compensatory damages specified pursuant to division (D)(2)(a) of this section that represents non-economic loss.

Upon review of the subsection (D) of the statute, this court finds that ORC 4123.931 does not violate the Ohio Constitution or Lasley's right to a trial by jury. The pro rata formula eliminates the possibility that a statutory subrogee's interest can be satisfied from amounts that do not represent a double recovery and does not require the court to deduct anything from a jury verdict. The court finds Lasley's argument to be not well taken. Further, Lasley's reliance on the Ohio Supreme Court's holding in *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415 is misplaced. The *Sorrell* court found that ORC 2317.45 required a trial

court to deduct certain disclosed collateral benefits from a plaintiff's jury award, thus violating a plaintiff's right to trial by jury. In contrast, ORC 4123.931 does not require the court to deduct anything from a plaintiff's jury award and therefore ORC 4123.931 does not violate Lasley's right to a jury trial. As such, Lasley can not demonstrate to the court beyond a reasonable doubt that ORC 4123.931 violates her right to a trial by jury. In viewing the evidence in a light most favorable to the non-moving party, Defendant BWC herein, this court finds that there is no genuine issue of material fact and Lasley is not entitled to judgment as a matter of law.

B. Defendant's Motion for Judgment on the Pleadings.

In its Response, Defendant BWC moves this court for judgment on the pleadings in accordance with Ohio R. Civ. P. 12(C) in relation to Lasley's Second Claim for Relief for declaratory judgment on the issue that ORC 4123.93 and 4123.931 do not violate the Ohio Constitution and that BWC's statutory right to recover is enforceable against recovery made by Lasley as a result of this action. BWC further asks the court to dismiss Lasley's Second Claim for relief contained in her Complaint.

Ohio R. Civ. P. 12 (C) states in pertinent part: "After the pleadings are closed but within such times as not to delay the trial, any party may move for judgment on the pleadings." The Ohio Supreme Court held in *Bennett v. Ohio Dep't of Rehabilitation & Correction*, 60 Ohio St. 3d 107, 108-109 that:

For purposes of a Civ. R. 12(C) motion for judgment on the pleadings, the material allegations of plaintiff's complaint and all reasonable inferences arising therefrom must be accepted as true (citing *Peterson v. Teodosio* (1973), 34 Ohio St. 2d 161,

165-166).

In her Reply Memorandum, Lasley claims that judgment on the pleadings is inappropriate here because Defendant BWC "has attached an affidavit [of Ellen Wentzel, a supervisor in the subrogation unit of the BWC] to its motion and refers to that affidavit in support of the motion. Therefore, the Defendant has not truly sought judgment on the pleadings." Lasley further contends that BWC's 12(C) motion is a belated 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted.

Conversely, BWC contends that the affidavit was filed in response to Lasley's Motion for Summary Judgment, *not* in support of its motion for judgment on the pleadings and argues:

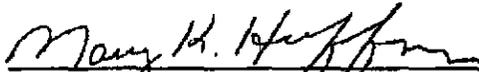
Further, as with a motion to dismiss filed under Rule 12(B)(6), the court, in its discretion, may convert it to a motion for summary judgment. However, Rule 12(C) motions are specifically for resolving questions of law." *State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996) 75 Ohio St.3d 565,570. As the question presented is whether the workers compensation statute is constitutional on its face, a motion for judgment on the pleadings is appropriate.

Since this court has determined above that BWC's statutory right to recover is enforceable against recovery made by Lasley as a result of this action and when viewing the allegations and all reasonable inferences therefrom in a light most favorable to the nonmoving party, Plaintiff Lasley herein, this court finds that Defendant BWC is entitled to judgment on the pleadings as a matter of law and Lasley's Second Claim for Relief is hereby dismissed.

IV. CONCLUSION

Based on the foregoing, Plaintiff's Motion for Summary Judgment is hereby
OVERRULED. Defendant's Motion for Judgment on the Pleadings is hereby SUSTAINED
and as such, Plaintiff's Second Claim for Relief contained in her complaint is hereby
DISMISSED.

SO ORDERED:



HONORABLE MARY KATHERINE HUFFMAN

Copies of the above were sent to all parties listed below by ordinary mail on this date
of filing.

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**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

DIEGO DAMBOLENA ETAL
Plaintiff

OHIO BUREAU OF WORKERS COMPENSATION
Defendant

Case No: CV-06-584623

Judge: TIMOTHY J MCGINTY

JOURNAL ENTRY

96 DISP.OTHER - FINAL

PURSUANT TO COURT ORDER DATED 06/22/2006, BOOK 3594 PAGE 0257, DEFENDANT'S MOTION TO DISMISS, FILED 03/28/2006, IS TREATED AS A MOTION FOR SUMMARY JUDGMENT. MOTION OF DEFENDANT FOR SUMMARY JUDGMENT IS GRANTED. THE COURT, HAVING CONSIDERED ALL THE EVIDENCE AND HAVING CONSTRUED THE EVIDENCE MOST STRONGLY IN FAVOR OF THE NON-MOVING PARTY, DETERMINES THAT REASONABLE MINDS CAN COME TO BUT ONE CONCLUSION, THAT THERE ARE NO GENUINE ISSUES OF MATERIAL FACT, AND THAT DEFENDANT OHIO BUREAU OF WORKERS' COMPENSATION, WILLIAM MABE ADMINISTRATOR, IS ENTITLED TO JUDGMENT AS A MATTER OF LAW. FINAL.
COURT COST ASSESSED TO THE PLAINTIFF(S).

Judge Signature

10/06/2006

- 96
10/05/2006

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