

IN THE SUPREME COURT OF OHIO

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

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STATEMENT OF THE FACTS

Petitioner Douglas Groch is a GM employee who was injured in an accident at work involving the operation of a trim press. Petitioner and his wife, Chloe Groch, have sued Respondents General Motors Corporation ("GM"), Kard Corporation ("Kard") and Racine Federated, Inc. ("Racine"), in the Lucas County, Ohio Court of Common Pleas for the injuries sustained by Douglas Groch. (Complaint; attached to Petitioners' Merit Brief as Appendix 4, ¶¶ 3, 9). Against Kard and Racine, Petitioners assert product liability claims. Against GM, Petitioners allege the employer intentional tort exception to the exclusive remedy established by Ohio's amended workers' compensation statute. (Complaint, Count I) Through this Petition, Petitioners seek, among other things, to have declared unconstitutional recently amended portions of the workers' compensation statute that grant to GM, as an employer that has paid to Groch workers' compensation benefits, a subrogation interest in any tort recovery he obtains from third-parties.

GM removed Petitioners' lawsuit to the United States District Court for the Northern District of Ohio, Western Division. (October 11, 2006 Order at p. 2). On October 11 and November 27, 2006, the district court issued two orders certifying nine questions for consideration by this Court, including, among others, the constitutionality of the subrogation provisions of the Ohio workers' compensation statute, R.C. 4123.93 and R.C. 4123.931. (October 11, 2006 Order and November 27, 2006 Order of the United States District Court for the Northern District of Ohio; attached to Petitioners' Merit Brief at Appendix 2) On December 27, 2006, this Court accepted the nine certified questions. (December 27, 2006 Order of the Ohio Supreme Court; attached to Petitioners' Merit Brief at Appendix 3). Because Petitioners' product liability claims are

not asserted against GM, GM will limit its Merit Brief to addressing Petitioners' arguments concerning the constitutionality of the workers' compensation subrogation statutes (Petitioners' Proposition of Law Nos. 7-9).¹

ARGUMENT

Proposition of Law No. 1

R.C. 4123.93 and R.C. 4123.931 do not violate Section 19, Article I of the Ohio Constitution because the statutes do not take away an injured party's right to pursue a third party tort claim.

A. Petitioners have failed to meet their burden in challenging the constitutionality of the subrogation statutes.

Petitioners purport to challenge R.C. 4123.93 and R.C. 4123.931 on the basis that it is unconstitutional as written. To succeed with such a challenge, however, Petitioners must overcome the "strong presumption of constitutionality" afforded to all legislative enactments. *Johnson v. BP Chemicals, Inc.* (1999), 85 Ohio St.3d 298, 303. But, this "strong presumption" cannot be overcome unless it is demonstrated "beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *Austintown Township Board of Trustees v. Tracy* (1996), 76 Ohio St.3d 353, 356 (citation omitted). To find the subrogation statutes facially unconstitutional, Petitioners must show and this Court must find that "there exists no set of circumstances under which the statute would be valid." *Harrold v. Collier* (2005), 107 Ohio St.3d 44, 50, citing *United States v. Salerno* (1987), 481 U.S. 739, 107 S.Ct. 2095. Moreover, "[t]he fact that a statute might operate unconstitutionally under some plausible set of circumstances is insufficient to render it wholly invalid." *Id.*

¹ GM's decision to only address the issues which are germane to Petitioners' lawsuit against GM should not be construed as an endorsement of Petitioners' claims concerning the Ohio product liability statute of repose.

Petitioners have not nearly satisfied this burden. Essentially, Petitioners merely parrot deficiencies identified by this Court in *Holeton v. Crouse Cartage Co.* (2001), 92 Ohio St.3d 115, regarding the former version of the statutes. However, as this Court recently acknowledged, "[t]he manifest objective of the General Assembly in enacting [the current version of R.C. 4123.93 and R.C. 4123.931] was to comply with [the court's] holding in *Holeton*." *State ex rel. United Automobile, Aerospace & Agricultural Implement Workers of America v. Ohio Bureau of Workers' Compensation* (2006), 108 Ohio St.3d 432, 435 at ¶ 17, citing Legislative Service Commission, Bill Analysis of 2002 S.B. 227 (attached to GM's Merit Brief at Appendix 1). *See also McKinley v. Ohio Bureau of Workers' Compensation*, --- N.E.2d ---, 2006 – Ohio – 5271, 2006 WL 2846343 at *1 (Ohio Ct. App. 2006) (holding that the subrogation statutes "were drafted to comply with the holding in *Holeton*.") 2006 WL 2846343 at *1 (attached to GM's Merit Brief at Appendix 2). Moreover, a critical analysis of the amended subrogation statutes reveals that the new laws have indeed corrected the deficiencies outlined in *Holeton*.

The amended versions of the subrogation provisions are substantially different from its predecessor. Unlike the Court in *Holeton*, however, this Court lacks the benefit of any real-world examples of supposed unconstitutional application of these new provisions that elevate the Court's consideration of this issue from the realm of the purely hypothetical. *See Holeton v. Crouse Cartage Co.* (2001), 92 Ohio St.3d at 1119-23. As noted, *infra*, Petitioners' arguments themselves are riddled with appearances buttressed by unsupported presumptions founded upon gratuitous speculation. Indeed, in commenting on the new statutory language, Petitioners implicitly acknowledge their

inability to substantiate an unconstitutional taking as an irrefutable application of these provisions when they state, “[a]s the statute reads, *it appears* that any such money *could be* kept by the statutory subrogee.” (Petitioners’ Br. at 38) (emphasis added). Not only is Petitioners’ reading of the statute contrary to its express language, as will be demonstrated below, the mere possibility of an interpretation, not yet articulated, accepted, or applied by the courts is a grossly insufficient basis upon which to find facial unconstitutionality of the statute

B. Under R.C. 4123.931(E), injured parties are no longer required to disgorge estimated future compensation expenditures.

Petitioners contend that – just like the statute found unconstitutional in *Holeton* – R.C. 4123.931 authorizes a statutory subrogee (the bureau of worker’s compensation or a self-insured employer) to engage in an unconstitutional taking of a claimant’s right to retain estimated future benefits. Petitioners’ argument is, however, directly contradicted by the express language of R.C. 4123.931(E).

The subrogation statute reviewed by this Court in *Holeton* contained a “current collectible interest in estimated future expenditures” which “require[d] the claimant to reimburse the bureau or self-insuring employer for future benefits that the claimant may never receive.” *Holeton*, 92 Ohio St.3d at 123. This Court concluded that because the prior statute required the claimant to disgorge future benefits that had not yet been accumulated, the former subrogation statute was both “irrational and arbitrary” because it placed the risk of an overestimate of future benefits on the injured claimant.

In 2003 and in direct response to the constitutional infirmities identified in *Holeton*, however, the General Assembly corrected the “future payment” deficiencies by

adopting R.C. 4123.931(E)(1). Now, in lieu of paying estimated future benefits to the subrogee, 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.

State ex rel. United Automobile, 108 Ohio St.3d 435, ¶ 16; *see also* R.C. 4123.931(E)(1).

Under the new law, the subrogee must provide bi-annual payment notices to the claimant identifying the total amount incurred on behalf of the claimant for benefits during the preceding six months. R.C. 4123.931(E)(3) After the claimant receives the payment notices, he or she reimburses the subrogee from the proceeds of the trust account. *Id.* And if any circumstance occurs which terminates the subrogee's obligation to make future payments (*e.g.*, claimant's death, settlement of the claims), "any amount remaining in the trust account after final reimbursement is paid to the statutory subrogee * * *" is paid to the claimant or the claimant's estate. R.C. 4123.931(E)(1).

Thus, under R.C. 4123.931, the claimant no longer bears any risk of an overestimate of future benefits. The claimant retains ownership and control of all funds which have been allocated for estimated future benefits. The claimant is only obligated to reimburse the subrogee after the subrogee has paid benefits. The claimant (or the claimant's estate) receives all funds remaining in the trust account after the subrogee's obligation to pay compensation benefits is terminated. There is no longer a possibility of an employer windfall "because the claimant is no longer required to reimburse the statutory subrogee for future benefits that are not received." *McKinley*, 2006 WL 2846343 at *8. Because R.C. 4123.931(E) "legitimately guard[s] against a windfall for

the statutory subrogee and simultaneously [does] away with the claimant's former burden regarding the risk of overestimating liability for future values," the statute does not authorize an unconstitutional taking of a claimant's property. *Id.*

C. Contrary to Petitioners' speculative interpretation, R.C. 4123.931(E) does not require a claimant to create a fully managed trust to oversee the disposition of estimated future benefit payments.

Petitioners incorrectly contend that claimants will suffer unnecessary hardship if they are required to establish a trust, suggesting that only a fully managed trust satisfies the requirement to hold monies associated with estimated future benefits in a "trust account" and that bank maintenance and management fees may consume the principal.²

Petitioners have mistakenly interpreted the phrase "trust account" to require a claimant to set up an actively managed trust by ignoring the plain meaning of the term "trust account" as it is commonly used in Ohio statutes. The phrase "interest-bearing trust account" appears several times in the Ohio Revised Code without bearing the expensive interpretation Petitioners have suggested. For example, R.C. 4705.09 provides that attorneys practicing in the State of Ohio must "establish and maintain an interest-bearing trust account" to hold client funds. Similarly, R.C. 3953.231 requires that each title insurance agent or company "establish and maintain an interest-bearing trust account for the deposit of all non-directed escrow funds * * * ." But neither of these statutes has been interpreted or applied to require appointment of a managing trustee or complicated maintenance agreements. They require nothing more than establishment of a simple

² Petitioners provide the court with a letter from a trust officer at Fifth Third Bank in Toledo, Ohio. In his letter, the trust officer declares that Fifth Third Bank charges *trusts* an annual maintenance fee of \$5,000 plus an additional fee representing 0.83% of principal contained within the trust (up to \$1,000,000). Reliance upon this outside-the-record evidence merely serves to highlight the impropriety of assessing the facial constitutionality of the revised subrogation provisions. Even if Petitioners were not obviously incorrect regarding the nature of the "trust account" required by the statute, a letter from one bank regarding its fee structure is hardly sufficient evidence upon which to conclude that

interest-bearing account to hold funds for the possible benefit of third parties. There is no basis upon which to suggest that R.C. 4123 931(E)(1)'s identical language should be interpreted to require more and Petitioner's speculative interpretation to the contrary is a patently insufficient basis upon which to facially challenge the constitutionality of a statute.

D. Application of the subrogation formula contained in R.C. 4123.931(B) and (D) does not amount to an improper taking.

Petitioners have not cited any authority to support their theory that application of the subrogation formula outlined in R.C. 4123 931 constitutes an improper taking. Instead, Petitioners just assume (without supporting case law or statutory language) that the subrogation statutes always contain a presumption of double recovery. The notion that workers' compensation subrogation provisions are *per se* unconstitutional, however, was explicitly rejected by this Court in *Holeton*, which emphasized that "nothing in [its] opinion shall be construed to prevent the General Assembly from ever enacting" a subrogation statute. . 92 Ohio St.3d at 134.;

Nevertheless, review of the actual language contained in R.C. 4123 93 and R.C. 4123 931 demonstrates that there is no double recovery. The *Holeton* also court held that a claimant's constitutionally protected right to tort recovery is not without its limits. In fact, the claimant's right is protected "*to the extent that it does not duplicate the employer's or bureau's compensation outlay.*" 92 Ohio St 3d at 122 (emphasis added)

Consistent with the guidance provided in *Holeton*, the General Assembly adopted a subrogation formula which protects the claimant's constitutional right to recover on his or her third-party tort claim. R.C. 4123 931(B) and (D). At the same time, the formula

in all circumstances application of the requirement imposes an unconstitutional taking *State v Beckley*

provides a logical mechanism for a subrogee to recoup at least a pro-rata portion of its prior compensation outlays.

In particular, R.C. 4123.931(B) and (D) contain a mathematical formula for allocating proceeds from a tort settlement and a final judgment, respectively. Under the formula (which applies equally to settlements and judgments), a self-insured employer or the bureau may only collect "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." (2007 edition). Conversely, the claimant collects "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 " (2007 edition)

R.C. 4123.93 defines "subrogation interest" as "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 * * * " R.C. 4123.93(B). "Uncompensated damages" are defined as "the claimant's demonstrated or proven damages minus the statutory subrogee's subrogation interest." R.C. 4123.93(F).

As indicated above, the Legislative Service Commission analyzed the subrogation law shortly after the statutes were adopted by the General Assembly. *See* Legislative Service Commission, Bill Analysis of 2002 S.B. 227 (Appendix 1). In its analysis, the Commission provided the following hypothetical application of R.C. 4123.931(B) and (D)'s statutory formula:

If the net amount recovered = \$70k; the subrogation interest = \$60k; and the uncompensated damages = \$50k, the claimant would receive

(1983), 5 Ohio St 3d 4, 7.

\$31,818.18 This is calculated as follows: $50k / (60k + 50k) \times 70k$. The statutory subrogee would receive \$38,181.82, which is calculated as follows: $60k / (60k + 50k) \times 70k$. The claimant's and statutory subrogee's amounts total \$70k, which is the net amount recovered.

Id. at p. 4

The *pro rata* formula for allocating proceeds between the subrogee and claimant fulfills the *Holeton* court's mandate that "subrogable or recoupable items be matched to those losses or types of damages that the claimant actually recovered from the tortfeasor." The subrogee's recovery of its compensation payments is tied (or "matched") directly to the percentage of the claimant's overall damages attributable to the subrogee's subrogation interest; consequently, there is no possible scenario which would enable the employer or the bureau to collect more than it previously paid out in worker's compensation benefits.

Similarly, under a hypothetical scenario where the claimant's tort recovery is insufficient to fully satisfy the claimant's damages or the subrogee's interest (like the scenario outlined in *Holeton*), both parties will bear their respective share of the burden of any shortfall and the claimant will not be denied his or her *pro rata* share of the total tort recovery. Beyond that, as noted, *infra*, where the claimant is not satisfied with a division according to the formula, he or she "is provided with a substantial opportunity and may choose the means by which he or she may prove amounts that do not represent a double recovery." *McKinley v Ohio Bureau of Workers' Compensation*, 2006 Ohio 5271, 2006 WL 2846343 at *11

For example, the claimant "may bring a declaratory judgment action, and may present evidence regarding what portions of the amount recovered constitute a double recovery" *McKinley v Ohio Bureau of Workers' Compensation*, 2006 Ohio 5271, 2006

WL 2846343 at *11. Thus, not only does the statute eliminate any presumption of a double recovery by apportionment, but it expressly grants the employee an opportunity to seek judicial oversight where he or she believes the formula as applied to his or her particular circumstances results in an unfair distribution. Other than concluding that all subrogation provisions are *per se* unconstitutional, which this Court refused to do in *Holeton*, it is difficult to imagine a process that could better address this concern

Petitioners have not met their heavy burden of establishing that the statutory formula contained in R.C. 4123.931(B) and (D) is facially unconstitutional under the Takings Clause of Section 19, Article I of the Ohio Constitution. Because Petitioners have not proven that a claimant's constitutionally protected interest would be impugned by the statutory formula, their constitutional challenge must fail.

Proposition of Law No. 2

The Worker's Compensation subrogation statutes do not violate Section 16, Article I of the Ohio Constitution because the statutes provide claimants with due process in seeking to allocate benefits previously paid by the employer.

Petitioners' due process argument is similarly unavailing. Notwithstanding Petitioners' superficial representation, there is no "presumption" of double recovery in the subrogation statutes. Nevertheless, even if there was such a presumption, a claimant has several options under the statute if he or she concludes that the subrogation formula outlined in R.C. 4123.931(B) and (D) is unsatisfactory to protect his or her interest in the tort recovery. *See* R.C. 4123.931(B) and (H)

In their Brief, Petitioners suggest that R.C. 4123.931 bars a claimant from submitting an interrogatory to the jury asking the jury to determine whether there has been a double recovery. As a practical matter, it is unclear why it would ever be

necessary for a claimant to submit that particular issue to the jury. At trial, the jury would presumably determine a claimant's total damages. Under R.C. 4123.931(D)(2), the jury would also segregate its damages verdict between economic and non-economic damages. Accordingly, from the verdict the parties and the court could rather easily derive an understanding as to the jury's conclusions as to damages. Then, the damages award could be apportioned consistent with the statutory formula outlined in R.C. 4123.931(D).

Even though there does not appear to be any practical need for a party to submit the "double recovery" issue to the jury, it should be emphasized that – contrary to Petitioners' representations – R.C. 4123.931 does not prohibit either the parties or the court from submitting additional interrogatories to the jury. If indeed a claimant concludes it is necessary to submit the "double recovery" issue to the jury, then Ohio Civ. R. 49(B) allows the parties to utilize jury interrogatories to determine the amount of the subrogation interest. *See McKinley*, 2006 WL 2846343 at *9

Rule 49(B) (entitled "General verdict accompanied by answer to interrogatories") states:

The court shall submit written interrogatories to the jury, together with appropriate forms for a general verdict, *upon request of any party prior to the commencement of argument*. Counsel shall submit the proposed interrogatories to the court and to opposing counsel at such time. The court shall inform counsel of its action upon their requests prior to their arguments to the jury, but the interrogatories shall be submitted to the jury in the form that the court approves. The interrogatories may be directed to one or more determinative issues whether issues of fact or mixed issues of fact and law.

(2007 edition) (emphasis added).

Building on their argument that the jury is not permitted to determine whether there has been a double recovery, Petitioners suggest that this creates a *de facto*

irrebutable presumption of double recovery. Interestingly, Petitioners' argument is directly rebutted in *Holeton*.

In its equal protection analysis, the *Holeton* court lamented the disparate treatment afforded to those who settled their tort claims under the previous subrogation statute. In its discussion, the court stated:

R.C. 4123.931(D) [prior statute] 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. * * **

92 Ohio St 3d at 132 (emphasis added).

Petitioners have not identified any provision in R.C. 4123.93 or R.C. 4123.931 which bars or otherwise prevents a claimant from submitting the double recovery issue to the jury. Because Petitioners have not demonstrated that the subrogation statutes deny a claimant's right to due process, this Court should reject Petitioners' challenge to the subrogation statutes under Section 16, Art. I of the Ohio Constitution.

Proposition of Law No. 3

The Worker's Compensation subrogation statutes do not violate Section 2, Article I of the Ohio Constitution because the statutes' subrogation provisions apply equally to individuals who settle their third-party tort claim and individuals who pursue their third-party claims to trial.

Claimants who settle their tort cases are governed by the exact same statutory formula as claimants who take their cases to trial. *See* R.C. 4123.931(B) (settlement allocation) and R.C. 4123.931(D) (trial allocation). Petitioners have therefore failed to establish that the subrogation statutes violate the equal protection clause contained in Section 2, Article I of the Ohio Constitution.

A. The court applies a rational-basis test in addressing Petitioners' challenge to the equal protection clause.

Ohio courts consistently apply a rational-basis test when dealing with constitutional challenges to worker's compensation statutes. *See e.g. State ex rel. Doersam v. Indus. Comm.* (1989), 45 Ohio St.3d 115. Applying the rational-basis test, a statute must be upheld if there exists any conceivable set of facts under which the classification rationally furthers a legitimate legislative objective. *Schwan v. Riverside Methodist Hosp.* (1983), 6 Ohio St.3d 300, 301. Moreover, the state is not obligated to produce evidence to support the rationality of the statutory classification; as a result, the party challenging the constitutionality of the enactment has the burden to "negative every conceivable basis that might support it." *See Heller v. Doe*, 113 S.Ct. 2637 (1993).

B. Petitioners have not met their burden of establishing that the subrogation statutes violate the equal protection clause.

Under the prior subrogation statute, claimants who settled their tort claims were treated differently from claimants who took their claims to trial. In particular, claimants who went to trial could shield some portion of the award from the subrogee's right of reimbursement; on the other hand, claimants who settled their cases did not have similar protection. As a result, the *Holeton* court concluded that the prior subrogation statute violated Section 2, Article I's equal protection clause.

As indicated above, the current subrogation statute abolished the distinction between the two classes. Under the current version of R.C. 4123.931(B) and (D), claimants who settle their cases are treated exactly the same way as those who take their disputes to trial. Consequently, the equal protection concerns identified in *Holeton* have been eliminated. *See McKinley*, 2206 WL 2846343 at *11 ("The pro rata formula employed by R.C. 4123.931 in the case of settlements and trial ensures that the statutory

subrogee does not recoup more from the claimant than the amount representing a double recovery.")

Because the distinction between claimants who settle their claims and claimants who try their claims has been abolished, there is no apparent equal protection issue with the subrogation statutes. This Court should therefore reject Petitioners' attempt to attack the subrogation statutes on the basis of equal protection.

CONCLUSION

In *Holeton*, this Court identified the flaws in Ohio's workers' compensation subrogation statutes. The General Assembly repaired those flaws when it enacted the current versions of R.C. 4123 93 and R.C. 4123 931. The General Assembly protected the claimant's constitutional right to tort recovery and outlined a statutory formula for apportioning the subrogation interest asserted by the self-insured employer or the worker's compensation bureau.

Petitioners have not met their onerous burden of successfully challenging the facial constitutionality of the subrogation statutes. Petitioners have not satisfactorily demonstrated that there are "no reasonable set of circumstances" under which the statutes would be constitutional. In fact, Petitioners have not even shown a single set of circumstances under which a claimant's constitutional rights would be impaired under the subrogation statutes.

Even if Petitioners could demonstrate a hypothetical set of facts which would place a claimant's constitutional rights in jeopardy, Petitioners' showing would be insufficient to warrant a determination that the subrogation statutes are facially unconstitutional. See *Desenco, Inc v. Akron* (1999), 84 Ohio St 3d 535, 538 ("Courts

have a duty to liberally construe statutes in order to save them from constitutional infirmities.”)

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I hereby certify that a copy of the foregoing Merit Brief of Respondent General Motors Corporation was served by U.S. Mail, postage pre-paid this 14th day of May, 2007, upon the following counsel:

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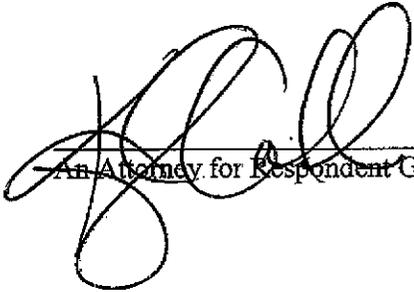
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APPENDIX

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McKinley v. Ohio Bur. of Workers' Comp.
Ohio App. 4 Dist., 2006.

Court of Appeals of Ohio, Fourth District,
Washington County.
McKINLEY, Appellee,

v

OHIO BUREAU OF WORKERS'
COMPENSATION, Appellant.
No. 06CA7.

No. 06CA7.

Decided Sept. 26, 2006.

Background: Workers' compensation claimant brought action against Bureau of Workers' Compensation, seeking a declaration that workers' compensation subrogation statutes were unconstitutional. The Court of Common Pleas, Washington County, granted claimant summary judgment. Bureau appealed.

Holdings: The Court of Appeals, McFarland, J., held that:

(1) subrogation statute did not violate Ohio Constitution's due process clause or takings clause, and

(2) subrogation statute did not violate the Ohio Constitution's equal protection clause

Reversed and remanded.

Harsha, P.J., filed dissenting opinion.

[1] Constitutional Law 92 ↪ 38

92 Constitutional Law

92II Construction, Operation, and Enforcement of Constitutional Provisions

92k37 Validity of Statutory Provisions

92k38 k. In General. Most Cited Cases

A party may challenge a statute as unconstitutional either on its face or as applied to a particular set of

facts.

[2] Statutes 361 ↪ 63

361 Statutes

361I Enactment, Requisites, and Validity in General

361k63 k. Effect of Total Invalidity. Most Cited Cases

Statutes 361 ↪ 64(1)

361 Statutes

361I Enactment, Requisites, and Validity in General

361k64 Effect of Partial Invalidity

361k64(1) k. In General. Most Cited Cases

If a statute is unconstitutional as applied, the state may continue to enforce the statute in circumstances when it is not unconstitutional, but if a statute is unconstitutional on its face, the state may not enforce the statute under any circumstances.

[3] Constitutional Law 92 ↪ 48(1)

92 Constitutional Law

92II Construction, Operation, and Enforcement of Constitutional Provisions

92k44 Determination of Constitutional Questions

92k48 Presumptions and Construction in Favor of Constitutionality

92k48(1) k. In General. Most Cited Cases

Constitutional Law 92 ↪ 48(3)

92 Constitutional Law

92II Construction, Operation, and Enforcement of Constitutional Provisions

92k44 Determination of Constitutional Questions

92k48 Presumptions and Construction in Favor of Constitutionality

92k48(3) k. Doubtful Cases;

Construction to Avoid Doubt. Most Cited Cases

All legislative enactments enjoy a presumption of validity and constitutionality; unless it is shown beyond a reasonable doubt that a statute violates a constitutional provision, that statute will be presumed to be constitutional.

[4] Constitutional Law 92 ↻38

92 Constitutional Law

92II Construction, Operation, and Enforcement of Constitutional Provisions

92k37 Validity of Statutory Provisions

92k38 k. In General Most Cited Cases

When challenging the constitutionality of a statute on its face, a plaintiff must establish that no set of circumstances exists under which the statute would be valid; the fact that a statute might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.

[5] Constitutional Law 92 ↻301(4)

92 Constitutional Law

92XII Due Process of Law

92k299 Creation or Discharge of Liability in General

92k301 Personal Injuries

92k301(4) k. Workers' Compensation and Employers' Liability. Most Cited Cases

Eminent Domain 148 ↻2.21

148 Eminent Domain

148I Nature, Extent, and Delegation of Power

148k2 What Constitutes a Taking; Police and Other Powers Distinguished

148k2.21 k. Labor and Employment in General. Most Cited Cases

Workers' Compensation 413 ↻907

413 Workers' Compensation

413IX Amount and Period of Compensation

413IX(B) Compensation for Disability

413IX(B)6 Deductions and Offsets

413k907 k. Payments from Other Sources. Most Cited Cases

Workers' Compensation 413 ↻2189

413 Workers' Compensation

413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses

413XX(C) Action Against Third Persons in General for Employee's Injury or Death

413XX(C)3 Right of Employer or Insurer to Remedy of Employee or Employee's Representative

413k2189 k. Subrogation or Assignment

in General. Most Cited Cases

Workers' Compensation 413 ↻2251

413 Workers' Compensation

413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses

413XX(C) Action Against Third Persons in General for Employee's Injury or Death

413XX(C)7 Right to Proceeds of Action or Settlement

413k2250 Rights of Employer or Insurer

413k2251 k. In General Most Cited Cases

Workers' compensation subrogation statute did not violate Ohio Constitution's due process clause or takings clause; the statute did not require the claimant to reimburse the statutory subrogee for future benefits that the claimant might never receive, it allowed claimant to keep proceeds remaining after the statutory subrogee's duty to continue making payments ended, it set forth a formula under which both the claimant's and subrogee's interests in damages owed by third-party tortfeasor were determined that applied to both settlements and awards following trial, and it did not assume that there would be a double recovery in a settlement with third-party tortfeasor, but rather provided a procedure to determine the respective amounts to be recovered by claimant and subrogee in the event that claimant objected to the recovery calculation rendered by the formula. Const. Art. 1, § § 16, 19; R.C. § § 4123.931, 4123.93.

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[6] Constitutional Law 92 ↻245(4)

92 Constitutional Law

92XI Equal Protection of Laws

92k243 Creation or Discharge of Liability

92k245 Personal Injuries

92k245(4) k. Workers' Compensation and Employers' Liability. Most Cited Cases

Workers' Compensation 413 ↻907

413 Workers' Compensation

413IX Amount and Period of Compensation

413IX(B) Compensation for Disability

413IX(B)6 Deductions and Offsets

413k907 k. Payments from Other Sources. Most Cited Cases

Workers' Compensation 413 ↻2189

413 Workers' Compensation

413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses

413XX(C) Action Against Third Persons in General for Employee's Injury or Death

413XX(C)3 Right of Employer or Insurer to Remedy of Employee or Employee's Representative

413k2189 k. Subrogation or Assignment in General. Most Cited Cases

Workers' Compensation 413 ↻2251

413 Workers' Compensation

413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses

413XX(C) Action Against Third Persons in General for Employee's Injury or Death

413XX(C)7 Right to Proceeds of Action or Settlement

413k2250 Rights of Employer or Insurer

413k2251 k. In General. Most Cited

Cases

Workers' compensation subrogation statute did not violate the Ohio Constitution's equal protection clause; the statute eliminated the distinction between claimants that settled with third-party tortfeasors and those that received an award after trial, and the statute ensured that the subrogee did not recoup more from the claimant than the amount representing a double recovery and represented a rational response to a legitimate state concern. Const. Art. 1, § 2; R.C. § § 4123.93, 4123.931

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[7] Constitutional Law 92 ↻209

92 Constitutional Law

92XI Equal Protection of Laws

92k209 k. Constitutional Guaranties in General. Most Cited Cases

The equal protection analysis given by Ohio courts under the Ohio Constitution and the United States Constitution is functionally equivalent. U.S.C.A. Const. Amend. 14; Const. Art. 1, § 2.

[8] Constitutional Law 92 ↻213.1(2)

92 Constitutional Law

92XI Equal Protection of Laws

92k213.1 Bases for Discrimination Affected in General

92k213.1(2) k. Rational or Reasonable Basis; Relation to Object or Compelling Interest. Most Cited Cases

Under the rational-basis test for reviewing equal protection challenges, a challenged statute must be upheld if there exists any conceivable set of facts under which the classification rationally furthers a legitimate legislative objective. U.S.C.A.

Const.Amend. 14; Const. Art. 1, § 2.

[9] Constitutional Law 92 ↪ 213.1(2)

92 Constitutional Law

92XI Equal Protection of Laws

92k213.1 Bases for Discrimination Affected in General

92k213.1(2) k. Rational or Reasonable Basis; Relation to Object or Compelling Interest
Most Cited Cases

Under the rational-basis test for reviewing equal protection challenges, a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 2.

[10] Constitutional Law 92 ↪ 213.1(2)

92 Constitutional Law

92XI Equal Protection of Laws

92k213.1 Bases for Discrimination Affected in General

92k213.1(2) k. Rational or Reasonable Basis; Relation to Object or Compelling Interest.
Most Cited Cases

Under the rational-basis test for reviewing equal protection challenges, the state is under no obligation to produce evidence to sustain the rationality of a statutory classification, and the party challenging the constitutionality of the enactment has the burden to negative every conceivable basis that might support it U.S.C.A. Const.Amend. 14; Const. Art. 1, § 2.

[11] Appeal and Error 30 ↪ 169

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(A) Issues and Questions in Lower Court
30k169 k. Necessity of Presentation in General. Most Cited Cases

Appeal and Error 30 ↪ 171(1)

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(A) Issues and Questions in Lower Court
30k171 Nature and Theory of Cause
30k171(1) k. In General; Adhering to Theory Pursued Below. Most Cited Cases
A party cannot assert new legal theories for the first

time on appeal; a reviewing court will not consider an issue that a party failed to raise initially in the trial court.

[12] Workers' Compensation 413 ↪ 2242

413 Workers' Compensation

413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses

413XX(C) Action Against Third Persons in General for Employee's Injury or Death

413XX(C)5 Actions and Proceedings
413k2242 k. Appeal and Error. Most Cited Cases

Workers' compensation claimant waived on appeal his claim that subrogation statute was void for vagueness, where he raised the issue for the first time on appeal R.C. § 4123.931.

Jim Petro, Attorney General, and Jonathon L. McGee, Benjamin W. Crider, and Lee M. Smith, Special Counsel, for appellant.

T. Jeffrey Beausay, Columbus, Ohio, for appellee Jim Petro, Attorney General, and Jonathon L. McGee, Benjamin W. Crider, and Lee M. Smith, Special Counsel, for appellant. J. Jeffrey Beausay, Columbus, Ohio, for appellee McFARLAND, Judge.

*1 {¶ 1} The Ohio Bureau of Workers' Compensation appeals the decision of the Washington County Court of Common Pleas holding R.C. 4123.93 and 4123.931 unconstitutional. The appellant contends that the statutes do not violate appellee Jeff McKinley's interest in his tort recovery, effect an impermissible taking, deprive the appellee of his due process rights, or violate the equal protection clause. Because we determine that the current versions of R.C. 4123.93 and 4123.931 were drafted to comply with the holding in Holeton v. Crouse Cartage (2001), 92 Ohio St.3d 115, 748 N.E.2d 1111, and do not violate Sections 2, 16, or 19, Article I of the Ohio Constitution, we reverse the judgment of the trial court.

I. Facts

{¶ 2} On July 13, 2003, the appellee fell while working inside a furnace or boiler hopper at the Von Roll America, Inc., Waste Technologies facility in East Liverpool, Ohio. The appellee was acting in the course and scope of his employment at the time of his fall. As a direct result of his fall, the appellee 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 he sustained the injury, the appellee was employed by Safway Services, Inc. Safway is not a self-insured employer for the purposes of workers' compensation.

{¶ 3} The appellee sued Von Roll America, Inc. His claims against Von Roll America were settled out of court for an undisclosed amount of money. No jury trial took place. The appellee also filed a claim for benefits with the appellant, which the appellant allowed. As of November 22, 2005, the appellant had paid the appellee compensation in the amount of \$398,303.17. Of this amount, the appellant paid \$57,788.43 on the workers' compensation claim and \$340,514.74 for the appellee's medical benefits. The appellant claims a statutory lien upon the settlement proceeds in the amount of \$385,808.56. The appellant asserts that through R.C. 4123.93 and 4123.931, it has an independent right of recovery in the net amount recovered by the appellee and is subrogated to the appellee's rights against the tortfeasor with respect to the past, present, and estimated future payments of compensation and benefits.

{¶ 4} The appellee brought an action in the Washington County Court of Common Pleas, challenging the constitutionality of R.C. 4123.93 and 4123.931, the Ohio workers' compensation subrogation statute. He asked the court of common pleas to declare that R.C. 4123.931 violated Sections 16 and 19, Article I of the Ohio Constitution. He also requested that in the event that the court of common pleas did not find that the subrogation statute violated the Ohio Constitution, the court would declare the amount owed to the appellant under the subrogation statute

{¶ 5} The appellee filed a motion for summary judgment, seeking the Washington County Court of Common Pleas to declare R.C. 4123.93 and 4123.931 unconstitutional. The court issued a decision, finding that R.C. 4123.93 and 4123.931 violate Sections 2, 16, and 19, Article I of the Ohio Constitution for the reasons set forth in Holeton, 92 Ohio St.3d 115, 748 N.E.2d 1111.

II. Assignments of Error

*2 {¶ 6} "I. Ohio Revised Code Sections 4123.93 and 4123.931 as enacted by the 124th Ohio General Assembly in Substitute Senate Bill No. 227 do not violate Article I, Section 2 of the Ohio Constitution

{¶ 7} "II. Ohio Revised Code Sections 4123.93 and 4123.931 as enacted by the 124th Ohio General Assembly in Substitute Senate Bill No. 227 do not violate Article I, Section 16 of the Ohio Constitution

{¶ 8} "III. Ohio Revised Code Sections 4123.93 and 4123.931 as enacted by the 124th Ohio General Assembly in Substitute Senate Bill No. 227 do not violate Article I, Section 19 of the Ohio Constitution."

III. Standard of Review

[1][2] {¶ 9} Initially, we note that a party may challenge a statute as unconstitutional either on its face or as applied to a particular set of facts. Belden v. Union Cent. Life Ins. Co. (1944), 143 Ohio St. 329, 55 N.E.2d 629, paragraph 4 of the syllabus. If a statute is unconstitutional as applied, the state may continue to enforce the statute in circumstances when it is not unconstitutional, but if a statute is unconstitutional on its face, the state may not enforce the statute under any circumstances. Women's Med. Professional Corp. v. Voinovich (C.A.6, 1997), 130 F.3d 187, 193, 1997 Fed.App. 0336P.

[3] {¶ 10} Moreover, all legislative enactments enjoy a presumption of validity and constitutionality. Adamsky v. Buckeye Local School Dist. (1995), 73 Ohio St.3d 360, 361, 653 N.E.2d 212; Sedar v. Knowlton Constr. Co. (1990), 49 Ohio St.3d 193, 199, 551 N.E.2d 938. Unless it is shown beyond a reasonable doubt that a statute violates a constitutional provision, that statute will be presumed to be constitutional. State ex rel. Herman v. Klopfeisch (1995), 72 Ohio St.3d 581, 585, 651 N.E.2d 995, citing Fabrey v. McDonald Police Dept. (1994), 70 Ohio St.3d 351, 352, 639 N.E.2d 31.

[4] {¶ 11} The appellee has challenged R.C. 4123.931 on its face. In so doing, he must establish that no set of circumstances exists under which the statute would be valid. The fact that a statute might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid. See United States v. Salerno (1987), 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697; Emerson Elec. Co. v. Tracy (2000), 90 Ohio St.3d 157, 162, 735 N.E.2d 445.

{¶ 12} When reviewing a trial court's summary judgment decision, an appellate court conducts a de novo review. See, e.g., Grafton v. Ohio Edison Co.

(1996). 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Accordingly, an appellate court must independently review the record to determine whether summary judgment is appropriate. We need not defer to the trial court's decision. See Brown v. Scioto Cty. Bd. of Commrs. (1993), 87 Ohio App.3d 704, 711, 622 N.E.2d 1153; Morehead v. Conley (1991), 75 Ohio App.3d 409, 411-412, 599 N.E.2d 786. Thus, in determining whether a trial court properly granted a motion for summary judgment, an appellate court must review the standard for granting a motion for summary judgment as set forth in Civ.R. 56, as well as the applicable law. Civ.R. 56(C) provides:

*3 Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, 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.

{¶ 13} Thus, a trial court may not grant summary judgment unless the evidence demonstrates 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. See, e.g., Vahila v. Hall (1997), 77 Ohio St.3d 421, 429-430, 674 N.E.2d 1164.

IV. Due Process and Uncompensated Takings

{¶ 14} For ease of analysis, we will first address the appellant's second and third assignments of error. The appellant contends that R.C. 4123.93 and 4123.931 do not violate Sections 16 and 19, Article I of the Ohio Constitution. Section 16, Article I provides: All courts shall be open, and every person for an injury done him in his land, goods, person, or

reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

{¶ 15} The focus of Section 16, Article I is the promise of due process rights. The appellee contends that R.C. 4123.93 and 4123.931 deny him the due process of law by assuming that there will be a double recovery in a settlement with a third party and by providing no vehicle for parties to litigate the amount of the recovery. Section 19, Article I concerns the inviolability of private property. It provides:

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases where private property shall be taken for public use, a compensation therefore shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

*4 {¶ 16} The appellee claims that the subrogation process set forth in R.C. 4123.93 and 4123.931 results in an uncompensated taking, in that it takes from claimants settlement money that they may never receive for future benefits.

{¶ 17} We now turn to the statutory sections at issue in the case sub judice. R.C. 4123.93 is merely a definitional section lending meaning to the terms used in R.C. 4123.931. R.C. 4123.931 provides: ^{ENI}

(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.

*5 (2) The court in a nonjury 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 noneconomic 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.

*6 (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.

*7 [5] ¶ 18] We will jointly address the appellant's arguments that R.C. 4123.93 and 4123.931 do not offend due process or constitute an uncompensated taking under Sections 16 and 19, Article I of the Ohio Constitution, as did the *Holeton* court when reviewing the predecessors to current R.C. 4123.93 and 4123.931. The *Holeton* court held that under Section 19, Article I, "any legislation must be reasonable, not arbitrary, and must confer upon the public a benefit commensurate with its burdens upon private property." *Holeton*, 92 Ohio St.3d at 121, 748 N.E.2d 1111, quoting *Direct Plumbing Supply Co. v. Dayton* (1941), 138 Ohio St. 540, 546, 38 N.E.2d 70. The *Holeton* court applied its earlier holdings regarding Section 16, Article I, as related to collateral-benefits-offset statutes, to R.C. 4123.93 and 4123.931, noting that the state has a legitimate interest in preventing double recoveries: "[I]t is constitutionally permissible for the state to prevent a tort victim from recovering twice for the same item of loss or type of damage, once from the collateral source and again from the tortfeasor." *Holeton*, at 121-122, 748 N.E.2d 1111. The court noted, however, that statutes designed to prevent double recoveries "are not rationally related to their purpose where they operate to reduce a plaintiff's tort recovery irrespective of whether double recovery has actually occurred." *Holeton*, at 122, 748 N.E.2d 1111, citing *McMullen v. Ohio State Univ. Hosp.* (2000), 88 Ohio St.3d 332, 725 N.E.2d 1117; *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 715 N.E.2d 1062; *Buchman v. Wayne Trace Local School Dist. Bd. of Edn.* (1995), 73 Ohio St.3d 260, 652 N.E.2d 952; *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 633 N.E.2d 504. Taking these considerations into account, the court stated,

[A claimant] 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. Thus, if [former] R.C. 4123.931 operates to take more of the claimant's tort recovery than is duplicative of the statutory subrogee's workers' compensation expenditures, then it is at once unreasonable, oppressive upon the claimant, partial, and unrelated to its own purpose.

Holeton, 92 Ohio St.3d at 122, 748 N.E.2d 1111.

{¶ 19} Under this analysis, the *Holeton* court determined that former R.C. 4123.931(A), which gave the statutory subrogee a right of subrogation with respect to “estimated future values of compensation and medical benefits,” and former R.C. 4123.931(D), which provided that “[t]he entire amount of any settlement or compromise of an action or claim is subject to the subrogation right of a statutory subrogee, regardless of the manner in which the settlement or compromise is characterized,” violated Sections 16 and 19, Article I, of the Ohio Constitution. We find that the issues that rendered these provisions unconstitutional in *Holeton*, however, have been eliminated and/or reformed under the current versions of R.C. 4123.93 and 4123.931.

A. Future Benefits

*8 {¶ 20} Former R.C. 4123.931(A) required a claimant to disgorge the entire amount of the estimated value of future benefits to the statutory subrogee. In some cases, the claimant never received the future benefits. This situation resulted in a windfall for the statutory subrogee. The current version of R.C. 4123.931, however, eliminates the possibility of such a windfall, because the claimant is no longer required to reimburse the statutory subrogee for future benefits that are not received.

{¶ 21} The present version of R.C. 4123.931(E) allows a claimant to establish an interest-bearing trust account into which he or she may deposit the full amount of the subrogation interest that represents estimated future payments of compensation or benefits. The claimant makes reimbursement payments from this trust account to the statutory subrogee for compensation, medical benefits, rehabilitation costs, or death benefits that the statutory subrogee has paid during the half of the year preceding the notice. If the claimant establishes such a trust account, the statutory subrogee provides him or her with payment notices every six months, and the claimant reimburses the statutory subrogee the amount listed on the payment notice. If the statutory subrogee's duty to continue making payments ends, any remainder in the trust account, after final reimbursement is made, is paid to the claimant or the claimant's estate. If the claimant does not elect to establish a trust account under R.C. 4123.931(E)(1), R.C. 4123.931(F) provides that the claimant must pay the statutory subrogee the full amount of the subrogation interest that represents future payments.

{¶ 22} The trust fund concept that is enacted in the present versions of R.C. 4123.931(E) and (F) is modeled after Minn.Stat. 176.061(6), which the *Holeton* court cited with approval. *Holeton*, 92 Ohio St.3d at 124, 748 N.E.2d 1111. Minn.Stat. 176.061 provides a formula under which the employer can obtain reimbursement for compensation paid, and it provides that remaining tort proceeds should be paid to the claimant and constitute a credit to the subrogee against future compensation payments. Like the Minnesota statute, the current version of R.C. 4123.931 does not require the claimant to reimburse the statutory subrogee for future benefits that the claimant may never receive. Additionally, under the present version of R.C. 4123.931, the claimant may keep proceeds remaining after the statutory subrogee's duty to continue making payments ends. Therefore, we conclude that the current versions of the statutes at issue legitimately guard against a windfall for the statutory subrogee and simultaneously do away with the claimant's former burden regarding the risk of overestimating liability for future values.

B. Distinguishing Settlements from Trials

{¶ 23} The *Holeton* court also determined that subsection (D) of former R.C. 4123.931 was unconstitutional because it distinguished between third-party claims that are tried and third-party claims that are settled. *Holeton*, 92 Ohio St.3d 15, 748 N.E.2d 1111. Under the former statute, if the claim was tried, the claimant could obtain a special jury interrogatory indicating that the award or judgment represented different types of damages. These interrogatories allowed the claimant to show that certain damages did not represent workers' compensation benefits; those damages, therefore, were not subject to subrogation. In the case of a settlement, however, the entire settlement amount was subject to subrogation, regardless of the manner in which the settlement was characterized. This practice prevented the claimant from showing that portions of the settlement did not represent workers' compensation benefits and, thus, were not subject to subrogation.

*9 {¶ 24} Under the current version of R.C. 4123.931, however, sections (B) and (D) set forth a formula under which both the claimant's and statutory subrogee's interests in the damages owed by the third-party tortfeasor are determined. The formula applies to both settlements (R.C. 4123.931(B)) and

awards following trial (R.C. 4123.931(D)) This equal application avoids the disparate result of the former statute and provides a clear definition of the claimant's and statutory subrogee's interests in the damages.

C. Double Recovery

{¶ 25} The appellee contends that the present versions of R.C. 4123.93 and 4123.931 assume that there will be a double recovery in a settlement and provide no process by which parties can determine what is a fair award for all economic and noneconomic losses, as well as for past and future injuries. He argues that the formula employed by R.C. 4123.93 and 4123.931(B) and (D) to determine how a recovery by the claimant against a third-party tortfeasor will be distributed deprives the claimant of the opportunity to show that there was no double recovery. The appellee overlooks, however, the procedures outlined in R.C. 4123.931 to determine the respective amounts to be recovered by the claimant and the subrogee in the event that the claimant objects to the recovery calculation rendered by the formula.

{¶ 26} R.C. 4123.931 provides several methods for determining how a recovery by the worker's compensation claimant against a third-party tortfeasor is to be distributed. First, the claimant has the option of joining the Bureau or a self-insured employer as a party to the underlying tort action. Once the subrogee is a party, if the parties are unable to agree on a settlement amount under R.C. 4123.931(B), the matter may proceed to trial, where all issues can be heard. The statutory subrogee presents evidence at trial regarding its expenditures on behalf of the claimant and other evidence regarding its entitlement for future damages. The subrogation amount can be determined as part of the damages proven through use of jury interrogatories submitted by the court pursuant to Civ.R. 49(B).

{¶ 27} Second, if the claimant does not join the Bureau or a self-insured employer as a party to the underlying tort action, and has settled with the tortfeasor without the participation of the Bureau or the self-insured employer, the Bureau and the claimant may choose to use the aforementioned formula or some other mutually agreed-to allocation, or may seek a declaratory judgment to determine the respective amounts to be recovered by the claimant and the subrogee. If the case proceeds to trial, the claimant may present evidence as to what portions of

the amount recovered represent a double recovery. Both of these options ensure that the claimant will obtain a full and fair hearing.

{¶ 28} Third, the parties may lawfully settle at any time. R.C. 4123.931(B) provides the parties with the option to use the formula or any other agreed-upon allocation of the net amount recovered. The parties are free to agree to any allocation they deem proper. If the parties cannot agree, the issue can be resolved at trial. This option also provides a claimant with the opportunity for a full, fair hearing. Therefore, each of the procedures set forth in R.C. 4123.931 provides a claimant with due process when determining how a recovery by the workers' compensation claimant against a third-party tortfeasor is to be distributed.

*10 {¶ 29} We take the opportunity to note that the constitutionality of R.C. 4123.93 and 4123.931 was recently upheld by the Lucas County Court of Common Pleas in Fry v. Surf City, Inc., 137 Ohio Misc.2d 6, 2006-Ohio-3092, 851 N.E.2d 573. In Fry, the appellant challenged the statutes under Sections 2, 16, and 19, Article I of the Ohio Constitution, the same challenge that the appellee in the case sub judice undertakes. In a well-reasoned decision, the Lucas County Court of Common Pleas held that R.C. 4123.93 and 4123.931 violated neither the due process or takings clauses, under Article I, Sections 16 and 19, nor the equal protection clause under Section 2, Article I of the Ohio Constitution.

{¶ 30} Further, we note that the manifest objective of the General Assembly in enacting the current versions of R.C. 4123.93 and 4123.931 was to comply with the Supreme Court of Ohio's holding in Holeton, 92 Ohio St.3d 15, 748 N.E.2d 1111. See State ex rel. United Auto., Aerospace & Agricultural Implement Workers of Am. v. Bur. of Workers' Comp., 108 Ohio St.3d 432, 844 N.E.2d 335, 2006-Ohio-1327, at ¶ 17, citing Legislative Service Commission, Bill Analysis of 2002 S.B. 227. Because the current versions of R.C. 4123.93 and 4123.931 avoid the constitutional pitfalls of the former statutes with regard to due process and takings under Sections 16 and 19, Article I of the Ohio Constitution, and because the statutes were specifically drafted by the General Assembly to comply with the Holeton holding, we find that the statutes are constitutional. Therefore, the appellant's second and third assignments of error are well taken.

V. Equal Protection

[6] [¶ 31] In its first assignment of error, the appellant argues that R.C. 4123.93 and 4123.931 do not violate Section 2, Article I of the Ohio Constitution. Section 2 provides:

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly

[7] [¶ 32] Section 2, Article I is generally referred to as Ohio's equal protection clause. The equal protection analysis given by Ohio courts under the Ohio Constitution and the United States Constitution is "functionally equivalent." Desenco, Inc. v. Akron (1999), 84 Ohio St.3d 535, 544, 706 N.E.2d 323.

[8][9][10] [¶ 33] Ohio courts have consistently used the rational-basis test when addressing constitutional challenges to workers' compensation statutes. See, generally, State ex rel. Doersam v. Indus. Comm. (1989), 45 Ohio St.3d 115, 543 N.E.2d 1169; Rose v. Mayfield (1984), 20 Ohio App.3d 300, 302, 486 N.E.2d 197; Holeton, 92 Ohio St.3d 15, 748 N.E.2d 1111. 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. Schwan v. Riverside Methodist Hosp. (1983), 6 Ohio St.3d 300, 301, 452 N.E.2d 1337; Heller v. Doe (1993), 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257. Further, a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. FCC v. Beach Communications, Inc. (1993), 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211. The state is under no obligation to produce evidence to sustain the rationality of a statutory classification, and the party challenging the constitutionality of the enactment has the burden to "negative every conceivable basis that might support it." Heller, 509 U.S. at 320, 113 S.Ct. 2637, 125 L.Ed.2d 257.

*11 [¶ 34] In Holeton, the Supreme Court of Ohio held that the state's concern for minimizing losses to the workers' compensation fund and self-insuring employers caused by the acts of third-party tortfeasors is a legitimate concern to the extent that it prevents a double recovery. Holeton, 92 Ohio St.3d at 121-122, 748 N.E.2d 1111. As discussed previously, under the current version of R.C. 4123.931, the statutory subrogee recoups only to the

extent that there is a double recovery. The claimant is provided with a substantial opportunity and may choose the means by which he or she may prove amounts that do not represent a double recovery.

[¶ 35] The appellee argues that R.C. 4123.931 creates an arbitrary classification, distinguishing between claimants who settle their third-party tort claims and those who try their claims. As discussed previously, the Holeton court determined that the prior version of R.C. 4123.931 violated Section 2, Article I of the Ohio Constitution because claimants who settled their third-party tort claims were precluded from showing that their tort recovery did not duplicate workers' compensation benefits, whereas claimants who tried their tort claims were able to demonstrate that fact via special jury interrogatories. Claimants who went to trial were able to have some portion of their award shielded from the statutory subrogee's right of reimbursement, but claimants who settled had no such method available to them. The statute operated regardless of whether there had actually been a double recovery.

[¶ 36] The current version of R.C. 4123.931 eliminates this distinction. The pro rata formula employed by R.C. 4123.931 in the case of settlements and trial ensures that the statutory subrogee does not recoup more from the claimant than the amount representing a double recovery. Moreover, the statute provides alternative means for determining the amount representing a double recovery if the claimant does not want to use the statutory formula. R.C. 4123.931(B) provides that the net amount recovered may be divided and paid "on a more fair and reasonable basis that is agreed to by the claimant and the statutory subrogee," rather than determined by the statutory formula. R.C. 4123.931(B) also provides that nonbinding alternative dispute resolution may be used to determine the net amount recovered. Additionally, if the parties cannot resolve the recovery issue through any of the aforementioned means, the claimant may bring a declaratory-judgment action and may present evidence regarding what portions of the amount recovered constitute a double recovery. Due process is ensured under each of the means for determining the net amount recovered under R.C. 4123.931, as discussed previously.

[¶ 37] R.C. 4123.931 establishes a rational method under which a claimant can demonstrate whether there was a double recovery. Whereas jury interrogatories may be used to establish a double recovery if a case goes to trial, there are several other

methods available under R.C. 4123.931 for the claimant to establish a double recovery in a settlement situation. Because we find that the current version of R.C. 4123.931 is a rational response to a legitimate state concern, the appellant's first assignment of error is sustained

VI. Vagueness

*12 [11][12] {¶ 38} In his brief, the appellee also raises the argument that R.C. 4123.931 is unconstitutionally vague. This was the first time the appellee raised the void-for-vagueness doctrine in support of his position. It is a cardinal rule of appellate review, however, that a party cannot assert new legal theories for the first time on appeal. Stores Realty Co. v. Cleveland (1975), 41 Ohio St.2d 41, 43, 322 N.E.2d 629. Thus, a reviewing court will not consider an issue that a party failed to raise initially in the trial court. See Lippy v. Society Natl. Bank (1993), 88 Ohio App.3d 33, 40, 623 N.E.2d 108. Applying this rule to the appellee's argument, we find that the appellee effectively waived the void-for-vagueness argument when he failed to assert it at the trial-court level. We are now, therefore, precluded from addressing it.

VII. Conclusion

{¶ 39} In our view, neither R.C. 4123.93 nor 4123.931 violate the due process clause, the takings clause, or the equal protection clause as set forth in Sections 16, 19, and 2, Article I of the Ohio Constitution. Accordingly, we reverse the judgment of the trial court and remand the cause for proceedings consistent with this opinion.

Judgment reversed and cause remanded:

ABELE, J., concurs in judgment only.

HARSHA, P.J., dissents.

Abele, J., concurs in judgment only.

Harsha, P.J., dissents.

Harsha, Presiding Judge, dissenting

{¶ 40} Because the statutory scheme for subrogation places the burden of proof on the issue of estimated future payments upon the claimant, I dissent.

FN1. While we realize that R.C. 4123.931 is a lengthy statute, we include it here in its entirety, because most of its subsections are implicated in the challenge sub judice.

Ohio App. 4 Dist., 2006.

McKinley v. Ohio Bur. of Workers' Comp

--- N.E.2d ---, 2006 WL 2846343 (Ohio App. 4 Dist.), 2006 -Ohio- 5271

END OF DOCUMENT

Ohio Final Bill Analysis, 2002 Senate Bill 227

2002

Ohio Legislative Service Commission

2001-2002 Regular Session

Effective Date from the Status Report of Legislation: 04/09/03 Effective

Because of Ohio Supreme Court interpretations, effective dates published in the Status Report of Legislation are not authoritative, and users of the Status Report of Legislation rely upon them at their own risk. The effective dates have been unofficially and undefinitively determined by the LSC Division of Legal Review and Technical Services solely for the convenience of users.

Signed by Governor: 01/08/03

Subject: *Industry/Commerce/and Labor*

Sub. S.B. 227

124th General Assembly

(As Passed by the General Assembly)

Sens. *Wein, Wachtmann, Jacobson, Goodman, White, Austria, Spada, Armbruster, Amstutz, Blessing, Carnes, Robert Gardner, Harris, Mumper*

Reps. *Williams, Collier, Schaffer, Young, Lendrum, Aslanides, Blasdel, Webster, Flowers, Calvert, Gilb, Setzer, Damschroder, Wolpert, Kearns, Cates, Hagan, Buehrer, G. Smith, Fessler, Seitz, Faber*

Effective date: [ENa1]

ACT SUMMARY

- Modifies the workers' compensation subrogation statute regarding the portion of a claimant's recovery from a third party tortfeasor that is subject to subrogation and the means utilized to determine how to divide the recovered amount between the claimant and statutory subrogee.
- Specifies requirements for claimants and statutory subrogees regarding reimbursement payments made to statutory subrogees.
- Requires claimants to notify the Attorney General of all third parties against whom the claimant has or may have a right of recovery when the statutory subrogee is a state fund employer, and specifies limitations applicable when this notice is not provided.
- Specifies new provisions applicable to a claimant when a statutory subrogee institutes legal proceedings against a third party.
- Specifies that when a claim involves wrongful death or minor beneficiaries, amounts allocated pursuant to a subrogation settlement or decision are subject to probate court approval.
- Increases the funeral expense benefit cap from \$3,200 to \$5,500.

CONTENT AND OPERATION

Background

Workers' compensation subrogation

The Workers' Compensation Law (R.C. Chapters 4121., 4123., 4127., and 4131.) contains a provision that creates a right of subrogation in favor of a statutory subrogee against a third party. A statutory subrogee is the entity responsible to pay workers' compensation claims. The law specifically defines "statutory subrogee" as the Administrator of Workers' Compensation, self-insuring employers, and specified employers who make direct payment of medical services. Essentially the statute has allowed a statutory subrogee to recoup money from a third party against whom a claimant has a cause of action so that the statutory subrogee is reimbursed for money it pays out on a workers' compensation claim.

Stated simply, if Mr. Smith, in the course of his employment, is injured when Mr. Jones collides with his vehicle, Mr. Smith may receive workers' compensation benefits and also may sue Mr. Jones. If Mr. Smith sues Mr. Jones, then Mr. Smith's employer, or the Administrator, as appropriate, may seek reimbursement from the amount Mr. Smith recovers in the third party suit.

Supreme Court ruling

The Ohio Supreme Court, in *Holeton v. Crouse Cartage Co.* (2001) 92 Ohio St.3d 115, however, found that the workers' compensation subrogation statute, in its present form, violates provisions of the Ohio Constitution that guarantee equal protection, guarantee a person's right to a remedy by due course of law, and prohibit the taking of private property without just compensation (Sections 2, 16, and 19 of Article 1 of the Ohio Constitution). The Court said that "R.C. 4123.931(D) establishes a procedural framework under which an unconstitutional taking of the claimant's property or a denial of remedy by due course of law can occur. This framework distinguishes between third party claims that are tried and third party claims that are settled." The Court further stated that "R.C. section 4123.931(D) operates unconstitutionally...because it allows for reimbursement from proceeds that do not constitute a double recovery." (*Holeton*, p. 14, 15.) Furthermore, the Court said that

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 tort claims are not. Such disparate treatment of claimants who settle their tort claims 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 a double recovery. (*Holeton*, p. 23.)

The previous subrogation statute

Under the previous subrogation statute a statutory subrogee's "subrogation interest" (see "**Definitions**," below) included past payments of compensation and medical benefits and estimated future values of compensation and medical benefits arising out of an injury to or disability or disease of a claimant. Also, under the previous statute, the entire amount of any settlement or compromise of an action or claim against a third party was subject to the subrogation right of a statutory subrogee, regardless of the manner in which the settlement or compromise was characterized. Any settlement or compromise that excluded the amount of compensation or medical benefits did not preclude a statutory subrogee from enforcing its rights under the subrogation statute. Moreover, the previous statute specified that the entire amount of any award or judgment was presumed to represent compensation and medical benefits and future estimated values of compensation and medical benefits that were subject to a statutory subrogee's subrogation rights unless the claimant obtained a special verdict or jury interrogatories indicating that the award or judgment represented different types of damages. (Sec. 4123.931(A) and (D).)

Under the previous statute subrogation did not apply to the portion of any judgment, award, settlement, or compromise of a claim to the extent of a claimant's attorney's fees, costs, or other expenses incurred by a claimant in securing the judgment, award, settlement, or compromise, or the extent of medical, surgical, and hospital expenses paid by a claimant from the claimant's own resources for which reimbursement was not sought. Under the previous statute, no additional attorney's fees, costs, or other expenses made to secure any recovery were to be assessed against any subrogated claims of a statutory subrogee. (Sec. 4123.931 (E).)

The act

Right of recovery

The act revises the previous subrogation provisions by eliminating all of the foregoing provisions and establishing the new provisions described below. The act states more specifically than the previous statute that payment of compensation or benefits creates a right of recovery, as opposed to prior law's "right of subrogation," 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" (see "**Definitions**," below) is subject to a statutory subrogee's right of recovery. (Sec. 4123.931(A).)

Provisions applicable when attempting to settle

The act specifies that if a claimant, statutory subrogee, and third party settle or attempt to settle a claimant's claim against a third party, the claimant must receive an amount equal to the "uncompensated damages" (see "**Definitions**," below) divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered. The statutory subrogee must 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. However, the act allows the net amount recovered to instead be divided and paid on a more fair and reasonable basis that is agreed to by the claimant and statutory subrogee.

The required calculations described above can be expressed in formulas as follows, where "NAR" means the "net amount recovered," "UD" means the "uncompensated damages," and "SI" means the "subrogation interest":

- The claimant receives an amount equal to: $UD / (SI + UD) \times NAR$.
- The statutory subrogee receives an amount equal to: $SI / (SI + UD) \times NAR$.

The following is a hypothetical example of this formula:

If the net amount recovered = \$70k; the subrogation interest = \$60k; and the uncompensated damages = \$50k, the claimant would receive \$31,818.18. This is calculated as follows: $50k / (60k + 50k) \times 70k$. The statutory subrogee would receive \$38,181.82, which is calculated as follows: $60k / (60k + 50k) \times 70k$. The claimant's and statutory subrogee's amounts total \$70k, which is the net amount recovered. These formulas apply both to settlements (R.C. 4123.931(B)) and, as explained below, also to cases that proceed to trial (R.C. 4123.931(D)) (see "**Provisions applicable when a claimant's action proceeds to trial**").

Bureau conferences and other forms of alternative dispute resolution. If while attempting to settle, the claimant and statutory subrogee cannot agree to the allocation of the net amount recovered, the act allows the claimant and statutory subrogee to file a request with the Administrator 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 are required under the act to 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 act prohibits the Administrator from assessing any fees to a claimant or statutory subrogee for a conference conducted by the Administrator's designee. (Sec. 4123.931(B).)

If a claimant and statutory subrogee request that a conference be conducted by the Administrator's designee, the designee must schedule a conference on or before 60 days after the date that the claimant and statutory subrogee file a request for the conference. The act specifies that a determination made by the Administrator's designee is not subject to the Administrative Procedure Act. (Sec. 4123.931(C).)

Provisions applicable when a claimant's action proceeds to trial

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

(1) The claimant and the statutory subrogee must receive amounts calculated using the same formulas described above under "***Provisions applicable when attempting to settle.***" (For claimant: the uncompensated damages divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered. For statutory subrogee: 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 nonjury action 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 noneconomic loss. (Sec. 4123.931(D).)

Means utilized to reimburse statutory subrogee

Trust account. After a claimant and statutory subrogee know the net amount recovered, and after the means for dividing it has been determined either through settlement or by trial, the act specifies that 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 must 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 must be paid to the claimant or the claimant's estate.

A claimant may use interest that accrues on the trust account to pay the expenses of establishing and maintaining the trust account, but the act requires all remaining interest to be credited to the trust account.

Reimbursement payments. If a claimant establishes a trust account, the act requires the statutory subrogee to provide payment notices to the claimant on or before June 30 and December 31 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 act requires the claimant to make reimbursement payments to the statutory subrogee from the trust account on or before July 31 every year for a notice provided by June 30, and on or before January 31 every year for a notice provided by December 31. The claimant's reimbursement payment must be in an amount that equals the total amount listed on the notice the claimant receives from the statutory subrogee. (Sec. 4123.931(E).)

If a claimant does not establish a trust account, the act requires the claimant to pay to the statutory subrogee, on or before 30 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. (Sec. 4123.931(F).)

Administrator's duties

The act requires the Administrator to deposit any money collected through subrogation into the public fund or the private fund of the State Insurance Fund, as appropriate. Also, if a self-insuring employer collects money through subrogation, the self-insuring employer is required to deduct the amount collected, in the year collected, from the amount of paid compensation the self-insured employer is required to report under the workers' compensation laws. (Sec. 4123.931(K).)

Notification requirements

Under prior law, a claimant was required to notify a statutory subrogee of the identity of all third parties against whom the claimant had or may have had a right of recovery. Under the act, a claimant also must notify the Attorney General when the statutory subrogee is a state fund employer. The act makes two additional modifications that correspond to this added notification requirement. Under continuing law, no settlement, compromise, judgment, award, or other recovery in any action or claim is final unless the claimant provides the statutory subrogee with the required prior notice and a reasonable opportunity to assert its subrogation rights. The act adds that this limitation applies also when the Attorney General is not so notified as required. Also under continuing law, the third party and claimant are jointly and severally liable to pay the statutory subrogee the full amount of the subrogation interest if the claimant fails to give the statutory subrogee the required notice. The act applies this penalty also when the Attorney General is not so notified as required. (Sec. 4123.931(G).)

Modifications affecting claimants when a statutory subrogee institutes legal proceedings

Continuing law allows a statutory subrogee to 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 by itself against a third party, the act requires the statutory subrogee to provide notice of that fact to the claimant. Additionally, the act specifies that 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. (Sec. 4123.931(H).)

Probate court approval of allocation amounts for certain types of claims

The act specifies that if a claimant's claim against a third party is for wrongful death or the claim involves any minor beneficiaries, amounts allocated under the act's provisions are subject to the approval of probate court. (Sec. 4123.391(J).)

Definitions

The act adds the following definitions for purposes of the subrogation statute:

"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 under the Workers' Compensation Law.

"Net amount recovered" means 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 by the claimant in securing the award, settlement, compromise, or recovery. It does not include any punitive damages that may be awarded by a judge or jury.

"Uncompensated damages" means the claimant's demonstrated or proven damages minus the statutory subrogee's subrogation interest. (Sec. 4123.93(D), (E), and (F).)

The act modifies the definition of "claimant" in a manner that appears to make no substantive change in the law. Under the previous definition, "claimant" referred to a person who was eligible to receive compensation or medical benefits under the Workers' Compensation Law, including any dependent or person whose eligibility is the result of an injury to or occupational disease of another person. The act adds that a claimant is a person eligible to receive compensation, medical benefits, or death benefits, but eliminates the reference to dependents or persons whose eligibility is the result of an injury to or occupational disease of another person. The only benefits for which dependents may be eligible are death benefits; thus this change appears to be nonsubstantive. (Sec. 4123.93(A).)

The act eliminates the existing definition for "subrogated amounts." Instead, the act specifies that the statutory subrogation right of recovery applies to, but is not limited to, the amounts that are described in the existing definition of "subrogated amounts," with two exceptions. The right of recovery under the act eliminates the prior law's reference to amounts recoverable from any third party, notwithstanding any limitations by the third party concerning its responsibility to make payments in cases involving workers' compensation under the Workers' Compensation Law. Also, the act adds that the right of recovery includes amounts recoverable from an intentional tort action. The existing definition of subrogated amounts does not reference amounts from intentional tort actions. (Secs. 4123.93(C) and 4123.931(I).)

Funeral expenses cap

Under continuing law, if an injury or occupational disease that is covered under the Workers' Compensation Law results in death, the Administrator pays reasonable funeral expenses from the State Insurance Fund up to a statutorily specified maximum amount. Prior law allowed up to \$3,200 to be paid for funeral expenses. The act increases this cap to \$5,500.

HISTORY

ACTION	DATE	JOURNAL	ENTRY
Introduced	01-31-02	p.	1409
Reported, S. Insurance, Commerce, & Labor	04-16-02	p.	1668
Passed Senate (21-12)	04-17-02	p.	1680
Reported, H. Commerce & Labor	08-22-02	p.	1996
Passed House (58-30)	11-14-02	p.	2055
Concurrence	11-20-02	p.	2140

[FN11]. The Legislative Service Commission had not received formal notification of the effective date at the time this analysis was prepared. Additionally, the analysis may not reflect action taken by the Governor.

OH B. An., 2002 S.B. 227
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