

ORIGINAL

IN THE SUPREME COURT OF OHIO

OHIO BUREAU OF WORKERS' COMPENSATION,

Plaintiff-Appellant,

v.

JEFFREY MCKINLEY, and HERITAGE WTI, INC.,

Defendants-Appellees.

- * Case No. 2014-0795
* On Appeal from the Seventh District Court of Appeals Case No. 12 CO 41
*
*

FILED JUN 16 2014 CLERK OF COURT SUPREME COURT OF OHIO

MEMORANDUM IN OPPOSITION TO JURISDICTION

Gregory Brunton (0061722) D. Patrick Kasson (0055570) Melvin Davis REMINGER CO. L.P.A. 65 East State Street, 4th Floor Columbus, OH 43215 Phone: (614) 228-1311 Fax: (614) 232-2410 Counsel for Appellant Heritage WTI, Inc.

T. Jeffrey Beausay (0039436) THE DONAHEY LAW FIRM 495 S. High Street, Suite 100 Columbus, OH 43215 Phone: (614) 224-8166 Fax: (614) 849-0475 Counsel for Claimant Jeffrey McKinley

Russell Gerney (0080186) LAW OFFICES OF RUSSELL GERNEY 11 E. Beau Street Washington PA 15301 Email: rwg@gerneylaw.com

Counsel for Amicus Curiae Law Offices of Russell Gerney

- * Michael DeWine (0009181) Attorney General of Ohio
* Eric E. Murphy (0083284) Solicitor General
* Counsel of Record Stephen P. Carney (0063460)
* Jeffrey Jarosch (0091250) Deputy Solicitors
* Sherry M. Phillips (0054053) Assistant Attorney General
* 30 East Broad Street, 17th Floor Columbus, OH 43215
* Phone: (614) 466-8980 Fax: (614) 466-5087
* Counsel for Plaintiff-Appellant Ohio Bureau of Workers' Compensation
* Bradley R. Glover (0084028)
* Lee M. Smith (0020861) LEE M. SMITH & ASSOCIATES
* 929 Harrison Avenue, Suite 300 Columbus, OH 43215
* Phone: (614) 464-1626 Fax: (614) 464-9280
* Special Counsel for Plaintiff-Appellant Ohio Bureau of Workers' Compensation
*

RECEIVED JUN 16 2014 CLERK OF COURT SUPREME COURT OF OHIO

TABLE OF CONTENTS

TABLE OF CONTENTS..... p. ii.

STATEMENT OF INTEREST..... p. 1.

STATEMENT OF THE CASE..... p. 1.

STATEMENT OF FACTS..... p. 1.

ARGUMENT..... p. 1.

Proposition of Law No. 1

Where a third-party tortfeasor has caused an injury to an Ohio worker which arises out of and is as a result of that worker's employment, R.C. 4123.931 makes the BWC a statutory subrogee, it gives the BWC standing to pursue an action against the third-party to recover subrogated funds and it creates a cause of action for the BWC to sue both claimants and third-parties where there has been a settlement and the BWC has not received proper notification or payment.

Introduction..... p. 1.

BWC'S Right of Subrogation..... p. 3.

BWC'S Standing to Bring Direct Action Against Third-Party Tortfeasor..... p. 4.

BWC'S Cause of Action Against Claimant and Third-Party Tortfeasor..... p. 5.

The Time During Which the BWC Must Assert Its Subrogation Interest... p. 7.

CONCLUSION..... p. 10.

CERTIFICATE OF SERVICE..... p. 12.

STATEMENT OF INTEREST

The Law Offices of Russell Gerney is a firm representing injured persons in both the State of Ohio and the Commonwealth of Pennsylvania. Persons represented by the firm have an interest in the outcome of this matter *sub judice*.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Amicus Curiae Law Offices of Russell Gerney concurs in the recitation of the case and recitation of the facts as set forth in the memorandum in opposition to jurisdiction of Appellee, Heritage WTI, Inc. (Heritage).

ARGUMENT

The Appellant has not suggested that the matter *sub judice* raises a substantial constitutional question, nor is this matter a felony case. Amicus agrees that this is not a felony case nor are any constitutional questions at issue.

Rather, Appellant only argues that this is a matter of public or great general interest.

Appellant's Proposition of Law

When a workers' compensation claimant settles a lawsuit with a third party for the same injury underlying the workers compensation claim, the claimant and the third party are jointly and severally liable for the interest of the statutory subrogee if the settlement does not include the required payment to the subrogee. The settlement "excludes" an amount paid by the subrogee, for purposes of R.C.4123.931(G), if it fails to include that interest, and no express mention of the subrogee is needed to count as an exclusion.

Any analysis of 4123.931(G) must start with the statute itself.

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.

4123.931(G)

The Appellant's argument can be summarized as follows: 4123.931(G) "requires [that the BWC's interest] be meaningfully included in settlement negotiations." *Memorandum in Support of Jurisdiction of Plaintiff-Appellant Ohio Bureau of Workers' Compensation*, p. 15--hereinafter "*BWC Memorandum*." The problem with the BWC's position is that the phrase "meaningfully included" does not appear anywhere in the statute. Rather, the term used is "excluded."

Thus, the BWC is arguing that the Court amend 4123.931(G) such that the word "excluded" is deleted and the phrase "meaningfully included" is substituted. The Court has a long history and tradition of interpreting the statutes passed by the General Assembly rather than amending them. Amicus urges the Court to continue in that tradition and decline jurisdiction.

In its decision, the Court of Appeals for the Seventh District held "The statute does not require the parties to identify the agreement, the extent of the BWC's participation in the settlement, how BWC is to be paid from the settlement, the timing of the settlement payments, or any of a dozen other terms that BWC might prefer to have included in the final settlement. The statute merely directs that if the settlement clearly excludes amounts owed to BWC, BWC has other recourse to collect."¹ An examination of the statute shows that the analysis of the appellate court is correct. There is no requirement that the BWC be

¹ *Ohio Bureau of Workers' Compensation v. Jeffrey McKinley and Heritage-WTI, Inc.*, Court of Appeals Seventh District No. 12 CO 41, ¶ 25.

“meaningfully included” nor is there any requirement of any other sort, other than the settlement must not exclude any amount paid by the BWC. As noted by the appellate court, the settlement clearly contemplates the amount paid by the BWC.

This is not a matter of public or great general interest

There has never been a question in this matter that the BWC was on notice. Nor has there ever been any question that the BWC was involved in the settlement negotiations. There is no issue of public or great general interest because this entire matter is as a result of the BWC failing to assert its rights.

This is in many ways an isolated issue. The BWC makes no mention of other situations where this has occurred. Nor does it provide any sort of statistical analysis that thousands or millions of dollars are being lost due to the settlement agreement in this case. Instead, the BWC notes that it collected “almost \$20 million in subrogation claims in 2013.” *BWC Memorandum*, p. 9. It seems, based upon its own admission, that the BWC is quite able to collect on its subrogation claims.

This memorandum is brief because the issue is actually quite simple. The decision of the Seventh Appellate District Court is correct. It is properly based upon the concurring opinion of Justice Pfeifer in *Ohio Bureau of Workers' Compensation v. McKinley et al.* There is no reason for the Supreme Court of Ohio to revisit this case. As such, Amicus respectfully asks the Court to DECLINE jurisdiction and allow the decision of the appellate court to stand.

Respectfully submitted

LAW OFFICES OF RUSSELL GERNEY



Russell Gerney
Attorney for Amicus Law Offices of Russell Gerney

CERTIFICATION

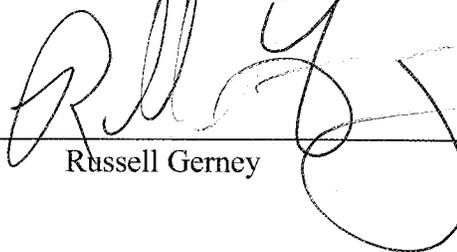
This is to certify that a copy of the foregoing **Memorandum in Opposition to Jurisdiction** was sent this 13th day of June, 2014, via ordinary U.S. mail, postage pre-paid, to:

Gregory Brunton (0061722)
D. Patrick Kasson (0055570)
Melvin Davis
REMINGER CO. L.P.A.
65 East State Street, 4th Floor
Columbus, OH 43215
Phone: (614) 228-1311
Fax: (614) 232-2410
*Counsel for Appellant
Heritage WTI, Inc.*

T. Jeffrey Beausay (0039436)
THE DONAHEY LAW FIRM
495 S. High Street, Suite 100
Columbus, OH 43215
Phone: (614) 224-8166
Fax: (614) 849-0475
*Counsel for Claimant
Jeffrey McKinley*

Michael DeWine (0009181)
Attorney General of Ohio
Eric E. Murphy (0083284)
Solicitor General
Counsel of Record
Stephen P. Carney (0063460)
Jeffrey Jarosch (0091250)
Deputy Solicitors
Sherry M. Phillips (0054053)
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, OH 43215
Phone: (614) 466-8980
Fax: (614) 466-5087
*Counsel for Plaintiff-Appellant
Ohio Bureau of Workers' Compensation*

Bradley R. Glover (0084028)
Lee M. Smith (0020861)
LEE M. SMITH & ASSOCIATES
929 Harrison Avenue, Suite 300
Columbus, OH 43215
Phone: (614) 464-1626
Fax: (614) 464-9280



Russell Gerney