

[Cite as *Bush v. Senter*, 141 Ohio Misc.2d 1, 2006-Ohio-7155.]

In the Common Pleas Court of Montgomery County, Ohio

BUSH et al., : Case No. 05-2038
Plaintiffs, : (Judge Jeffrey E. Froelich)
v. : DECISION, ORDER AND ENTRY
SENER et al., : GRANTING, IN PART, AND
Defendants. : DENYING, IN PART, PLAINTIFFS'
: MOTION TO FIND R.C. 4123.93 AND
: 4123.931 UNCONSTITUTIONAL, AND
: GRANTING, IN PART, AND
: DENYING, IN PART, THE BUREAU
: OF WORKERS' COMPENSATION'S
: MOTION FOR JUDGMENT ON THE
: PLEADINGS

November 13, 2006

Dwight D. Brannon and Kevin A. Bowman, for plaintiffs.

Kevin C. Connell, for defendant Gina Senter.

Bradley A. Powell and Lawrence White, for defendant Deborah M. Caudill.

Jeffrey C. Turner, for defendant Public Entities Pool of Ohio.

James D. Utrecht, for defendant Westfield Insurance Company.

Benjamin W. Crider and Lee M. Smith, for defendant James Conrad,
Administrator, Ohio Bureau of Workers' Compensation.

Raymond H. Decker Jr., for defendant Setina Manufacturing Company, Inc.

FROELICH, Judge.

I. FACTS

{¶1} The facts in this case have been detailed in previous decisions.

{¶2} Plaintiffs have filed a motion to find R.C. 4123.93 and 4123.931 (the workers' compensation subrogation provisions of Senate Bill 227) unconstitutional. They argue that the legislation is an unconstitutional taking and that it violates equal protection, separation of powers, and due process. The Bureau of Workers' Compensation contends that the legislation is constitutional, states that plaintiffs' motion is actually one for summary judgment, and asks the court for judgment on the pleadings with regard to the plaintiffs' request for declaratory relief.

II. STANDARD OF REVIEW

A. Constitutional Challenge

{¶3} All legislative enactments enjoy a strong presumption of constitutionality. *Austintown Twp. Bd. of Trustees v. Tracy* (1996), 76 Ohio St.3d 353; *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 418-419; *Sedar v. Knowlton Constr. Co.* (1990), 49 Ohio St.3d 193, 199. The party challenging the statute bears the burden of proving otherwise. *State v. Thompkins* (1996), 75 Ohio St.3d 558, 560.

{¶4} A party may challenge a statute as unconstitutional on its face or as applied to a particular set of facts. *Belden v. Union Cent. Life Ins. Co.* (1944), 143 Ohio St. 329, ¶ 4 of syllabus. A facial challenge is the most difficult to bring successfully

because the challenger must establish that there exists no set of circumstances under which the statute would be valid. *United States v. Salerno* (1987), 481 U.S. 739, 745. The fact that a statute might operate unconstitutionality under some plausible set of circumstances is insufficient to render it wholly invalid. *Id.* A statute will be declared facially invalid only if it appears beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible. *Austintown*, 77 Ohio St.3d at 356, 667 N.E.2d 1174, 1177.

B. Judgment on the Pleadings

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

III. LAW AND ANALYSIS

A. Legislative history

{¶6} The Bureau of Workers' Compensation ("BWC") was first given the right of subrogation in 1993. R.C. 4123.93(B). In 1995, this section was divided in two: R.C. 4123.93 and 4123.931. *Raker v. Palmer* (Aug. 2, 2006), Warren C.P. No. 05CV64147.

{¶7} The 1993 statute, as amended in 1995, was found to be in violation of Sections 2, 16, and 19 of Article I of the Ohio Constitution. *Holeton v. Crouse Cartage Co.* (2001), 92 Ohio St.3d 115. *Holeton* held that the 1995 amendments were an unconstitutional taking and violated due process for two reasons: they required the claimant to reimburse the BWC for future benefits that the claimant might never receive, and R.C. 4123.931(D) established a procedural framework under which settlements were treated differently from cases that proceed to trial. *Id.* The court held that R.C. 4123.93(D) violated equal protection because it arbitrarily distinguished between claimants who proceed to trial on their claims and those who settle. *Id.*

{¶8} The law reverted to the 1993 statute, which was then held unconstitutional in *Modzelewski v. Yellow Freight Sys. Inc.* (2004), 102 Ohio St.3d 192. The court, relying on *Holeton*, held that R.C. 4123.93 was unconstitutional because it precluded claimants who were parties to actions against third-party tortfeasors from showing that their tort recovery did not duplicate their workers' compensation recovery and, therefore, did not represent a double recovery. *Id.* The court also held that the former

statute treated claimants who litigate their claims differently from those who settle claims out of court. *Id.*

{¶9} The Ohio General Assembly enacted S.B. 227, which became effective on April 9, 2003, apparently in an attempt to address the constitutional infirmities found in *Holeton and Modzelewski*.

B. *Holeton* and Constitutionality

{¶10} *Holeton* held that there were two problems with former R.C. 4123.931. “(1) the portion of R.C. 4123.931(A) that gives the statutory subrogee a right of subrogation with respect to ‘estimated future values of compensation and medical benefits,’ and (2) the portion of R.C. 4123.931(D) providing 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’” violate Sections 2, 16, and 19 of the Ohio Constitution. *Holeton*, 92 Ohio St.3d at 117, 748 N.E.2d 1111, quoting R.C. 4123,931.

1. Estimated Future Benefits

{¶11} Former R.C. 4123.931(A) required a claimant to turn over the entire amount of the estimated value of future benefits to the statutory subrogee (the BWC). In some cases, the claimant never received the future benefits, which resulted in a windfall for the statutory subrogee and a “taking” from the claimant.

{¶12} The current version of R.C. 4123.931, however, eliminates the possibility of such a windfall, as the claimant is no longer required to reimburse the statutory subrogee for future benefits that are not received. R.C. 4123.931(E)(1) states, “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.”

{¶13} The present version of R.C. 4123.931(E) no longer gives the statutory subrogee a current collectable interest in estimated future payments. *Fry v. Surf City*,

Inc. (Apr. 5, 2006), Lucas C.P. No. CI05-2471; *Raker v. Palmer*, Warren C.P. No. 05CV64147. Instead, it allows a claimant to establish an interest-bearing trust account in which he or she may deposit the full amount of the subrogation interest that represents the estimated future payments of compensation or benefits.

{¶14} The statute does not indicate how the future interest should be calculated and by whom; however, no evidence has been offered to show that the estimation of future damages makes this provision unconstitutional. The settlement provisions in the statutes resolve any problem that might be created by the calculation of the future interest. Further, the fact that the amount in the account might prove to be an overestimate of the future benefits is not controlling, because the statutory subrogee (the BWC) has no interest in the trust account.

{¶15} Hypothetically speaking, if the parties, including the BWC, agree that the estimated future's total is \$25,000, the claimant could place \$25,000 of his recovery into a trust account. The statutory subrogee would provide payment notices to the claimant twice a year, and the claimant would pay over those amounts to the statutory subrogee. If the BWC's duty to continue making payments ends, the remainder would revert to the claimant or his estate. The problems that *Holeton* detected in the former R.C. 4123.93 and 4123.931 are largely resolved by the creation of the trust account. See *McKinley v. Ohio Bur. of Workers' Comp.*, ___ Ohio App.3d ___, 2006-Ohio-5271,

overruling the common pleas court case cited by plaintiffs. See, also, *Smith v. Jones* (Aug. 29, 2006), Hancock C.P. No. 2005CV00152.

{¶16} However, there is a problem if the claimant chooses not to create a trust account. R.C. 4123.931(F) provides, “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 the 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.” This creates a problem similar to that in *Holeton*.

{¶17} “By giving the subrogee a current collectible interest in estimated future expenditures, R.C. 4123.931(A) creates the conditions under which a prohibited taking may occur. This would happen in those situations where the amount of the reimbursement for ‘estimated future values compensation and benefits’ proves to be substantially greater than the subrogee’s eventual compensation outlay. In other words, R.C. 4123.931(A) requires the claimant to reimburse the bureau or self-insuring employer for the future benefits that the claimant may never receive. In that event, the statute operates not to prevent the claimant from keeping a double recovery, but to provide the statutory subrogee with a windfall at the expense of the claimant’s tort recovery.” *Holeton*, 92 Ohio St.3d at 123.

{¶18} The way that R.C. 4123.931 is now written, the claimant may, at his option, create a trust account. The creation of the trust account is not a violation of the Constitution. However, if the claimant chooses not to create the trust account, R.C. 4123.931(F) mandates that the claimant turn over all of the estimated future payments to the BWC. This could be interpreted to require the claimant to relinquish all of his/her interest in the estimated future payments and potentially creates the situation rejected in *Holeton*; therefore, to this extent, R.C. 4123.931(F) is unconstitutional.

{¶19} A statute may be constitutional in one part and unconstitutional in another, and if the invalid part is severable from the rest, the portion that is constitutional may stand while the unconstitutional portion is stricken. *State ex rel. Outcalt v. Guckenberger* (1938), 134 Ohio St.457; *Emmons v. Keller* (1970), 21 Ohio St.2d 48, 50 O.O.2d 90, 254 N.E.2d 687, overruled on other grounds by *Kinney v. Kaiser Alum. & Chem. Corp.* (1975), 41 Ohio St.2d 120. Separation of the constitutional from the unconstitutional is permitted as long as the provisions of the statute are separable. *Franklin Cty. Bd. of Elections v. State ex rel. Schneider* (1934), 128 Ohio St. 273.

{¶20} Inseparability is determined by asking whether (1) the constitutional and the unconstitutional parts are capable of separation so that each may be read and may stand by itself, (2) the unconstitutional part is so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the

legislature if the clause or part is stricken, and (3) the insertion of words or terms is necessary in order to separate the unconstitutional part, and to give effect to the former only. *Emmons*, 21 Ohio St.2d 48, 50 O.O.2d 90, 254 N.E.2d 687.

{¶21} R.C. 4123.931 deals with many different topics. Each topic stands on its own. Subsections (E) and (F) deal with estimated future payments. Subsection (E) discusses the option of setting up a trust account, and subsection (F) requires a claimant to transfer estimated future benefits to the statutory subrogee if a trust account is not established. These two sections are independent, and each can stand on its own. Further, these sections are not so connected with each other that the intention of the legislature is thwarted by the abolition of one provision. To the contrary: it appears that the intent of the legislature—to avoid double recovery—would be met if the possibility of the trust account continued. Finally, no additional words or terms are necessary in order to separate subsection (F) from the remainder of the statute. Each subsection can stand on its own. Subsection (F) can be stricken as unconstitutional, and the remainder of the statute can remain.

{¶22} Should the claimant choose not to create a trust account, the result, in the absence of R.C. 4123.931(F), will be that the statutory subrogee will be given the same kind of offset or credit against future payments that has always been used to recoup overpayments of compensation. *Holeton*, 92 Ohio St.3d at 125.

{¶23} Regardless of whether the estimated future payments are determined by settlement or by jury interrogatory and whether the plaintiff chooses to establish a trust account, the compensation to which he is entitled is protected by the procedures in R.C. 4123.931(E); if the plaintiff chooses not to establish a trust account, any future payments due from the subrogee (the BWC) will be not be made, will be credited, or will be setoff (the exact word is not important) against the compensation that the plaintiff has received by settlement or judgment to the extent it represents double recovery.

2. Settlements vs. Trials

{¶24} Under former R.C. 4123.931(D), when the claim was tried, the claimant could obtain a 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 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.

{¶25} 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. *McKinley*, 2006-Ohio-5271, ¶ 24. R.C. 4123.931(B) states:

{¶26} “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.”

{¶27} Similarly, R.C. 4123.931(D) states: “When a claimant’s action against a third party proceeds to trial and damages are awarded, both of the following apply: (1) The claimant shall receive an amount equal to the uncompensated damages divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered, and the statutory subrogee shall receive an amount equal to the subrogation interest divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered. (2) the Court in a 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 compensatory damages; (b) The portion of the compensatory damages specified pursuant to division (D)(2)(a) of this section that represents economic loss; (c) The portion of the compensatory damages specified pursuant to division (D)(2)(a) of this section that represents non-economic loss.”

{¶28} In that these provisions attempt to translate mathematics into words, they are potentially confusing and burdensome; that alone does not make them unconstitutional.

{¶29} R.C. 4123.931 provides several methods for determining how a recovery by the workers’ compensation claimant against a third-party tortfeasor is to be distributed. First, the claimant has the option of joining the BWC or a self-insured

employer as a party to the underlying tort action, such as was done in this case. 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—past and future—can be determined as part of the damages proven through use of jury interrogatories submitted by the court pursuant to Civ.R. 49(B).

{¶30} Second, if the claimant does not join the BWC as a party to the underlying tort action and has settled with the tortfeasor without the participation of the BWC, the BWC and the claimant may choose to use the aforementioned formula, use some other mutually agreed-to allocation, or seek a declaratory judgment to determine the respective amounts to be recovered by the claimant and the subrogee. Consider the following: the claimant has \$2,000,000 in demonstrated or proven damages, receives a \$1,000,000 settlement, and the statutory subrogee has a \$100,000 interest (\$75,000 already paid and \$25,000 future benefits).

$$\frac{\$ 900,000}{\$100,000 + \$900,000} \quad \times \quad \$660,000 \quad = \quad \$594,000 \text{ for claimant}$$

$$\frac{\$100,000}{} \quad \times \quad \$660,000 \quad = \quad \$66,000 \text{ for statutory subrogee}$$

\$100,000 + \$900,000

Of the \$66,000 for the statutory subrogee, 75 percent, or \$49,500, would be transferred immediately to the statutory subrogee for amounts already paid, and 25 percent or \$16,500, would be placed in a trust account for future benefits.

{¶31} 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.

{¶32} Plaintiffs argue that R.C. 4123.93 and 4123.931 destroy the incentive to settle, much like in *Holeton*. In *Holeton*, the entire amount of any settlement was subject to the reimbursement right of the statutory subrogee; the claimant was precluded, under any circumstance, from showing that his or her settlement did not represent or duplicate workers' compensation or medical benefits; the claimant was, in essence, penalized for settling. That is no longer the case. Plaintiffs are not precluded, or even "deincentivized," from settlement. The same formula is used for both settlement and trial.

{¶33} It is understood that sometimes the parties will disagree about the numbers to be used in a formula or on a final settlement amount, but this is not different from a "regular" personal-injury-case negotiation in which the parties disagree

on the amount, or even existence, of past, let alone future, damages. Such situations, regardless of how frustrating, are often-times inherent in an adversarial system and are not a reason to find a statute unconstitutional.

C. Equal Protection

{¶34} Plaintiffs argue that R.C. 4123.93 and 4123.931 violate Article I, Section 2 of the Ohio Constitution, which states: “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.”

{¶35} The rational-basis test is used when addressing equal-protection challenges in workers’ compensation cases. *State ex rel. Doersam v. Indus. Comm* (1989), 45 Ohio St.3d 115. 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.

{¶36} *Holeton* held that the state’s concern for minimizing losses to the worker’s compensation fund caused by the acts of third-party tortfeasors is legitimate to the extent that it prevents a double recovery. *Holeton*, 92 Ohio St.3d at 121-122. Under

the current version of R.C. 4123.931, the statutory subrogee (BWC) recoups only to the extent that there is a double recovery. The claimant is provided with the opportunity to choose the means by which he or she may prove amounts that do not represent a double recovery.

{¶37} The plaintiffs argue 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. *Holeton* determined that the prior version of R.C. 4123.931 violated Article I, Section 2 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 the same via jury interrogatories.

{¶38} The current version of R.C. 4123.931 eliminates this distinction. *McKinley*, 2006-Ohio-5271. The pro rata formula employed by R.C. 4123.931 ensures that the statutory subrogee does not recoup more 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.

D. Statutory Subrogation v. Right of Recovery

{¶39} Plaintiffs argue that statutory subrogation exists only against a wrongdoer, citing *Blue Cross & Blue Shield Mut. of Ohio v. Hrenko* (1995), 72 Ohio St.3d 120, 122. While this is a correct statement of the law, it does not defeat the BWC’s right of recovery under R.C. 4123.931.

{¶40} R.C. 4123.931(A) grants the “right of recovery in favor of a statutory subrogee against a third party,” and it provides that the “statutory subrogee is subrogated to the rights of a claimant against that third party.” The BWC is not pursuing a subrogation claim against the claimant, but is exercising its independent right of recovery against the net amount that may be recovered by the claimant as a result of this action. *Holeton* explicitly held that there is nothing unconstitutional, per se, about the BWC’s exercising such subrogation rights.

E. R.C. 4123.931 does not usurp a judicial function.

{¶41} Plaintiffs contend that R.C. 4123.931 usurps the function of a judiciary because the BWC can attempt to enforce R.C. 4123.931 over the Supreme Court’s decision in *Holeton*.

{¶42} It is presumed that lawfully enacted legislation is constitutional. *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35. In *State ex rel. United Auto Aerospace & Agricultural Implement Workers of Am. v. Bur. of Workers’ Comp.*, 108 Ohio St.3d 432, 2006-Ohio-1327, the court reaffirmed that workers’ compensation subrogation statutes

were not per se unconstitutional and that R.C. 4123.93 and 4123.931 constituted new legislation that should be given its own deference. “[T]his case is not a rare and extraordinary case in which the challenged legislation operates directly and broadly to divest courts of judicial power. S.B. 227 does not ‘transform[], the civil justice system’ as did Am.Sub.H.B. No. 350, which was at issue in *Ohio Academy*. * * *. And unlike 1996 Am.Sub.H.B. No. 350, there is no indication that the General Assembly intended to ignore or disregard our precedent * * *.” (Emphasis deleted.) *Id.* at ¶ 50.

IV. CONCLUSION

{¶43} Plaintiffs’ motion to find R.C. 4123.93 and 4123.931 unconstitutional is granted in part and denied in part. The BWC’s motion for judgment on the pleadings is granted in part and denied in part. R.C. 4123.931(F) is unconstitutional. The remainder of R.C. 4123.931 and all of R.C. 4123.93 are constitutional.

So ordered.