[Cite as *Jones et al. v. Greyhound Lines, Inc.* , 2012-Ohio-4409.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Charles C. Jones et al.,	:	
Plaintiffs-Appellants,	:	
		No. 11AP-518
v.	:	(C.P.C. No. 10CVH-09-14358)
Greyhound Lines, Inc.,	:	(ACCELERATED CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on September 27, 2012

Richard D. Topper, for appellants.

Crabbe, Brown, and James, LLP, and *John C. Albert*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} This is an appeal by plaintiffs-appellants, Charles C. Jones and Yvonne P. Jones, from a decision and entry of the Franklin County Court of Common Pleas, granting the motion to dismiss filed by defendant-appellee, Greyhound Lines, Inc.

{¶ 2} Appellant Charles C. Jones (individually "Jones") was employed as a bus driver for appellee. On May 31, 2009, Jones, while in the course and scope of his employment with appellee, suffered injuries as a result of alleged negligent conduct of a third party.

{¶ 3} On September 30, 2010, appellants filed a complaint for declaratory judgment against appellee and Marcia Ryan, administrator of the Ohio Bureau of

Workers' Compensation ("BWC").[1] The complaint alleged that, as a result of injuries Jones received on May 31, 2009, appellants had brought a claim against the insurer of the third party.

{¶ 4} The complaint further alleged the following:

> In September, 2010, Plaintiffs settled the claim for $77,500.00 subject to the subrogation interests if any, of the Defendants. The policy limits of the third party are $100,000.00 and due to the expenses of litigation, the settlement is reasonable. The net amount of said settlement before deduction of punitive damages and loss of consortium and after payment of attorney's fees and expenses of litigation is $51,440.98.
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> As a further result of injuries sustained on May 31, 2009, Plaintiff, Charles C. Jones, brought a claim against defendants for workers compensation benefits under Ohio Revised Code Section 4123.01. * * * Past benefits and future benefits have or will be paid. As such, Defendants have or may have a subrogation interest pursuant to Ohio Revised Code Section 4123.931.
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> Plaintiffs have attempted to negotiate the subrogation interest with Defendants and have been unsuccessful. As such, it is necessary for the court to determine the rights, status and legal relations of the parties.

{¶ 5} On November 10, 2010, appellee filed a motion to dismiss pursuant to Civ.R. 12(B)(6). In the accompanying memorandum in support, appellee argued that appellants' complaint for declaratory judgment constituted an improper attempt to bypass the statutory provisions of R.C. 4123.93 and 4123.931. On November 12, 2010, appellants filed a memorandum contra appellee's motion to dismiss.

{¶ 6} On May 27, 2011, the trial court filed a decision and entry granting appellee's motion to dismiss. The trial court determined that appellants' complaint for declaratory judgment constituted an "improper attempt to bypass a special statutory procedure."

{¶ 7} On appeal, appellants assert the following single assignment of error for this court's review:

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[1] On October 4, 2010, Marcia Ryan was dismissed from the action pursuant to Civ.R. 41(A).

> THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' DECLARATORY JUDGMENT ACTION SEEKING A DETERMINATION OF THE DISTRIBUTION OF THE NET PROCEEDS OF A THIRD PARTY PERSONAL INJURY CLAIM PURSUANT TO R.C. 4123.931 BETWEEN THE APPELLEE, A STATUTORY WORKERS COMPENSATION SUBROGEE, AND THE APPELLANTS.

{¶ 8} Appellants raise two issues under their single assignment of error: (1) whether the trial court erred in finding that appellants' complaint for declaratory judgment was not a proper method for determining the distribution of net proceeds from a personal injury action, and (2) whether R.C. 4123.931 permits an injured worker to settle a third-party personal injury claim and set up a trust account for the monies received without the prior approval of the statutory subrogee. Based upon a motion to supplement the record, discussed more fully below, appellants have essentially withdrawn the second issue presented for review.

{¶ 9} This appeal involves a consideration of Ohio's workers' compensation subrogation statute, R.C. 4123.931. In accordance with R.C. 4123.931(A), "[t]he payment of compensation or benefits pursuant to this chapter * * * creates a right of recovery in favor of a statutory subrogee[2] against a third party, and the statutory subrogee is subrogated to the rights of a claimant against that third party." Under the statutory scheme, the "net amount recovered is subject to a statutory subrogee's right of recovery."[3] R.C. 4123.931(A).

{¶ 10} In the event "a claimant, statutory subrogee, and third party settle or attempt to settle a claimant's claim against a third party," the subrogation statute sets forth a detailed formula to determine the amounts to be received by a claimant and statutory subrogee, with the exception 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." R.C. 4123.931(B). The statute further provides: "If while attempting

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[2] A "statutory subrogee" is defined to mean "the administrator of workers' compensation, a self-insuring employer, or an employer that contracts for the direct payment of medical services pursuant to division (L) of section 4121.44 of the Revised Code." R.C. 4123.93(B).

[3] The "net amount recovered" refers to 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," but does not include punitive damages. R.C. 4123.93(E).

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." Alternatively, "the claimant and statutory subrogee may agree to utilize any other binding or non-binding alternative dispute resolution process." R.C. 4123.931(B).

{¶ 11} Pursuant to R.C. 4123.931(C), "[i]f a claimant and statutory subrogee request that a conference be conducted by the administrator's designee," the administrator's designee is required to schedule a conference on or before 60 days after the date that the claimant and statutory subrogee file such request. The determination of the administrator's designee "is not subject to Chapter 119. of the Revised Code." R.C. 4123.931(C)(2).

{¶ 12} R.C. 4123.931 addresses circumstances in which a claimant's action against a third party proceeds to trial and an award or judgment is rendered, and states in relevant part:

> (D) When a claimant's action against a third party proceeds to trial and damages are awarded, both of the following apply:
>
> (1) The claimant shall receive an amount equal to the uncompensated damages divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered, and the statutory subrogee shall receive an amount equal to the subrogation interest divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered.
>
> (2) The court in a nonjury action shall make findings of fact, and the jury in a jury action shall return a general verdict accompanied by answers to interrogatories.

{¶ 13} Once the net amount recovered is known to the claimant and statutory subrogee, the claimant "may establish an interest-bearing trust account for the full amount of the subrogation interest." R.C. 4123.931(E)(1). If a claimant chooses not to establish a trust account, "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." R.C. 4123.931(F). Pursuant to R.C. 4123.931(H), "[t]he right of subrogation * * * is automatic, regardless of whether a statutory subrogee is joined as a party in an action by a claimant against a third party," and a statutory subrogee "may institute and pursue legal proceedings against a third party either by itself or in conjunction with a claimant."

{¶ 14} In the present case, the trial court granted appellee's motion to dismiss on the basis that the filing of a complaint for declaratory judgment by appellants constituted an attempt to bypass a "special statutory procedure" (i.e., R.C. 4123.931). *See, e.g., Arbor Health Care Co. v. Jackson*, 39 Ohio App.3d 183, 186 (10th Dist.1987) ("Where * * * a specialized statutory remedy is available in the form of an adjudicatory hearing, a suit seeking a declaration of rights which would bypass, rather than supplement, the legislative scheme ordinarily should not be allowed.") Thus, at issue in this case is whether or not a declaratory judgment is appropriate in light of the statutory provisions of R.C. 4123.931.

{¶ 15} Ohio's declaratory judgment statute, R.C. 2721.03, states in part that "any person * * * whose rights, status, or other legal relations are affected by a * * * statute * * * may have determined any question of construction or validity arising under the * * * statute, and obtain a declaration of rights, status, or other legal relations under it." The requirements in seeking this type of remedy are: "(1) the action must fall within the 'spirit' of the Declaratory Judgments Act; (2) it must involve 'a real controversy between adverse parties' which is justiciable in nature; and (3) speedy relief must be necessary to avoid the impairment or loss of rights." *Mines v. Warren*, 11th Dist. No. 90-T-4453 (Apr. 26, 1991). Further, "courts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed." R.C. 2721.02(A).

{¶ 16} Neither side has cited any authority addressing whether the procedures outlined under R.C. 4123.931 constitute a "special statutory proceeding" such that a declaratory judgment action would be inappropriate. Appellants note, however, that several courts, including the Supreme Court of Ohio, have suggested a declaratory judgment as a potential remedy for a claimant in seeking a determination of the

distribution of the net proceeds between the claimant and statutory subrogee following a recovery.

{¶ 17} In *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, the Supreme Court of Ohio considered the constitutionality of R.C. 4123.93 and 4123.931.[4] In addressing a certified question as to whether the subrogation statutes violate equal protection, the court observed that, when a claimant settles with a tortfeasor, "current R.C. 4123.931(B) allows the claimant and subrogee several options: they may use the formula to determine the division of the 'net amount recovered,' agree to divide that amount 'on a more fair and reasonable basis,' request a conference with the administrator of workers' compensation * * * or resort to an 'alternative dispute resolution process.' " *Id.* at ¶ 85. In rejecting the petitioners' argument that the current statutes violate equal protection, the court in *Groch* noted that "the current statutory formula for dividing the 'net amount recovered' applies both to claimants who settle and to claimants who recover at trial." *Id.* at ¶ 87.

{¶ 18} In discussing the equal protection challenge, the court also observed:

> Furthermore, claimants may have alternatives beyond those specifically recognized in R.C. 4123.931 for demonstrating that a recovered amount is not entirely duplicative, as recognized in decisions of other courts that have considered this issue. For example, in *Fry v. Surf City, Inc.*, 137 Ohio Misc.2d 6, 2006-Ohio-3092, * * * the court stated that a claimant may bring a separate declaratory judgment action, through which the claimant who settled with a tortfeasor may show that not all of the recovery from the tortfeasor was a double recovery. * * * See, also, *McKinley v. Ohio Bur. of Workers' Comp.*, 170 Ohio App.3d 161, 2006-Ohio-5271 * * * which also recognized the possibility of a declaratory judgment action for settling claimants * * * to establish the possible duplicative nature of a claimant's award from a third party.

Id. at ¶ 89.

{¶ 19} Appellants maintain that the *Groch* court supported its rationale for upholding the workers' compensation subrogation statute against an equal protection

challenge by citing the possibility of a declaratory judgment as an alternative method for determining the rights and obligations of a claimant and statutory subrogee. Appellants further assert that the potential remedies of R.C. 4123.931 are not exclusive, arguing that the language of the statute sets forth a non-binding, non-mandatory procedure. More specifically, appellants argue that, contrary to the trial court's finding that R.C. 4123.931(B) "directs" the parties to a mediation conference, the statute itself uses the word "may" (i.e., if the claimant and statutory subrogee cannot agree to allocation of the net amount recovered, they "may" file a request with the administrator for a conference or, alternatively, they "may" agree to utilize any other alternative dispute resolution process). Appellants also contend there is no mandatory language requiring the claimant or subrogee to seek a trial.

{¶ 20} Appellee argues that the language in *Groch* is merely dicta, and distinguishes it on the basis that the decision was restricted to a situation where settlement had already occurred, and therefore a determination was needed as to how to disburse the funds. Appellee contends that there has been no agreed settlement in the instant case.

{¶ 21} We note, however, that the posture of this case has changed since the appeal of this matter. Specifically, while appellants' complaint alleged they had unsuccessfully attempted to negotiate the subrogation interest with appellee, appellants have filed with this court, after the time permitted for filing briefs, a motion to supplement the record with the affidavit of Richard D. Topper, counsel for appellants. According to appellants' accompanying memorandum in support, appellants and appellee agreed, subsequent to appellants' appeal of the trial court's decision, to settle the underlying third-party claim with the tortfeasor for $100,000, thus resolving the second issue presented for review before this court (i.e., whether an injured worker is permitted to settle a personal injury case without the statutory subrogee's approval). The attached affidavit of Topper states in part:

> Richard D. Topper, being duly sworn, deposes and says,
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> He is the attorney for the Appellants in the above case.

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[4] A previous version of R.C. 4123.931 was held to be unconstitutional by the Supreme Court in *Holeton v. Crouse Cartage Co.*, 92 Ohio St.3d 115 (2001).

> In early October, 2011, Appellee's attorney and he agreed to a settlement with Nationwide Insurance, the insurance company of Michael Kuzo, the third party who caused Appellant, Charles C. Jones' injuries on May 31, 2011. The agreed settlement amount was $100,000.00 and represents the policy limits of the third party, Mr. Kuzo. By agreement, his money was deposited in a trust account pending resolution of the interests of the parties to the proceeds from the settlement.

{¶ 22} This court granted appellants' unopposed motion to supplement the record on appeal (construed as a motion to submit additional briefing with documents). During oral argument, the parties did not dispute that a settlement had been reached with the third-party tortfeasor; appellants and appellee, however, had not come to an agreement with respect to the allocation of the net amount recovered. Following oral argument before this court, the parties, upon suggestion of the court, engaged in settlement negotiations with this court's mediator. A mediation conference was conducted on December 28, 2011, and the mediator conducted a follow-up discussion with the parties on January 17, 2012. The mediator subsequently issued an order stating that the parties "remain at final impasse and no further mediated negotiations would be beneficial."

{¶ 23} As reflected above, several courts, including the Supreme Court of Ohio, have suggested a declaratory judgment action as an alternative method for determining how a settlement is to be distributed between a claimant and statutory subrogee following a recovery. In *McKinley v. Ohio Bur. of Workers' Comp.*, 170 Ohio App.3d 161, 2006-Ohio-5271, ¶ 26-28 (4th Dist.), one of the cases cited by the Supreme Court in *Groch*, the Fourth District Court of Appeals held in part:

> 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).
>
> 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.
>
> 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.

(Emphasis added.)

{¶ 24} While the case law in this area is limited, courts addressing the constitutionality of R.C. 4123.931 have, at least implicitly, declined to hold that the procedures outlined under the statute constitute the exclusive remedy between a claimant and statutory subrogee in allocating the net amount recovered. *See McKinley* at ¶ 27. *See also Bush v. Senter*, 141 Ohio Misc.2d 1, 2006-Ohio-7155, ¶ 30 (noting that "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 * * * formula [under R.C. 4123.931(B)], 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"). We also note that this court has previously considered an appeal from a trial court's grant of an injured employee's request for declaratory judgment, in which the employee had sought a declaration by the court that the BWC had no subrogation rights under R.C. 4123.93 in the settlement of the employee's claim against a third-party tortfeasor. *Gregory v. Ohio Bur. of Workers'*

Comp., 115 Ohio App.3d 798 (10th Dist.1996) (affirming trial court's grant of summary judgment in favor of employee on complaint for declaratory judgment).

{¶ 25} In light of the somewhat unique posture of this case, and even assuming that the provisions of R.C. 4123.931 might normally provide a statutory remedy, we conclude that a declaratory judgment action is available to determine the allocation of the settlement recovery. As noted, appellants' complaint alleged that appellants had tentatively reached a settlement with the tortfeasor, but had unsuccessfully attempted to negotiate the subrogation interest with appellee; further, the supplemental filings before this court represent that appellants and appellee subsequently settled with the tortfeasor for the limits of the policy ($100,000), and the settlement was acknowledged by the parties during oral argument. Following oral argument in this case, the parties engaged in mediation proceedings with this court's mediator, but remained at an impasse following those negotiations. Thus, the parties have utilized a non-binding alternative dispute resolution process, as contemplated by R.C. 4123.931(B), with the issue of allocation of net proceeds still unresolved.

{¶ 26} Ohio's declaratory judgment act is remedial in nature, and "its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations and is to be liberally construed and administered." *McConnell v. Hunt Sports Ents.*, 132 Ohio App.3d 657, 681 (10th Dist.1999). Further, "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." Civ.R. 57.

{¶ 27} In light of events subsequent to the trial court's decision, i.e., the parties' settlement with the third-party tortfeasor, as well as their attempt to reach a settlement through non-binding arbitration, the current posture of this case negates the issue of whether appellants have failed to utilize a special statutory proceeding. Further, where the parties have negotiated and engaged in alternative dispute resolution, but remain unable to agree as to a division of the net amount, it is less than certain that the procedures outlined under R.C. 4123.931, including the possibility of further alternative dispute resolution, will ensure an adequate remedy. Under these circumstances, we conclude that declaratory judgment is available as a remedy to resolve the uncertainty in determining how a claimant's recovery against a third-party tortfeasor is to be distributed

between the claimant and statutory subrogee. *McKinley* at ¶ 27. Accordingly, we sustain appellants' single assignment of error.

{¶ 28} Based upon the foregoing, the judgment of the Franklin County Court of Common Pleas is reversed, and this matter is remanded to the trial court for further proceedings in accordance with law and consistent with this decision.

Judgment reversed and cause remanded.

CONNOR, J., concurs.
SADLER, J., dissents.

SADLER, J., dissenting.

{¶ 29} Being unable to agree with the majority's opinion in this case, I respectfully dissent.

{¶ 30} At the outset, I disagree with the basis for the trial court's dismissal as discussed by the majority. While the majority characterizes the issue here as whether declaratory judgment is appropriate in light of R.C. 4123.931's provisions, as the trial court noted, appellee sought dismissal for failure to state a claim upon which relief can be granted and for lack of subject-matter jurisdiction. After discussing the various subsections of R.C. 4123.931, the trial court concluded the statute does not contemplate a damages and subrogation interest determination in a suit that does not involve the third party. (Entry at 3.) Thus, in my view, the trial court's final statement that appellants' complaint represents "an improper attempt to bypass a special statutory procedure" is a recognition that appellants' complaint fails to state a claim upon which relief can be granted because the filing is premature and does not include all necessary parties.

{¶ 31} "A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548 (1992). In order for a trial court to grant a motion to dismiss for failure to state a claim upon which relief may be granted, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. *Id.; O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975), syllabus. In construing the complaint upon a Civ.R. 12(B)(6) motion, a court must presume all factual allegations contained in the complaint to be true and make

all reasonable inferences in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192 (1988). Material incorporated in a complaint may be considered part of the complaint for purposes of determining a Civ.R. 12(B)(6) motion to dismiss. *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 249 (1997).

{¶ 32} As noted by the majority, R.C. 4123.931 provides appellee an automatic right of subrogation. Subsection (B) provides a formula to determine what percentage of the "net amount recovered" a claimant and subrogee shall receive. However, this formula applies in the event "a claimant, statutory subrogee, and third party settle or attempt to settle a claimant's claim against a third party." Since appellants' complaint does not allege either settlement or attempts to settle between the "claimant, statutory subrogee, and third party" but alleges only attempts to settle between the claimant and the third party, appellants' complaint does not invoke R.C. 4123.931(B). Moreover, since appellants' complaint does not concern a trial and award of damages involving the third party, appellants' complaint does not invoke R.C. 4123.931(D).

{¶ 33} In reaching a contrary conclusion, the majority relies on the affidavit of appellants' counsel that was attached to counsel's motion to supplement the record on appeal. It is well-settled that "[a]ppellate review is limited to the record as it existed at the time the trial court rendered its judgment." *Franks v. Rankin*, 10th Dist. No. 11AP-962, 2012-Ohio-1920, ¶ 73, citing *Wiltz v. Clark Schaefer Hackett & Co.*, 10th Dist. No. 11AP-64, 2011-Ohio-5616, ¶ 13. Nor can " '[a] reviewing court * * * add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter.' " *Id.*, quoting *State v. Ishmail*, 54 Ohio St.2d 402 (1978), paragraph one of the syllabus. Therefore, I do not believe the affidavit submitted by appellants' counsel, which constitutes new evidence presented for the first time on appeal, can be used to reverse the trial court's judgment.

{¶ 34} For these reasons, I would conclude appellants' complaint fails to state a claim upon which relief can be granted, and I would affirm the judgment of the Franklin County Court of Common Pleas. Because the majority concludes otherwise, I respectfully dissent.
