

**In the
Supreme Court of Ohio**

Lamar Thomas,

Plaintiff-Appellee

vs.

John Logue, Administrator, Ohio Bureau of
Workers' Compensation

Defendant-Appellant

Case No. 2022-0787

Appeal from the Franklin County Court of
Appeals, Tenth Appellate District, Case No.
21 AP-385

**BRIEF OF AMICUS CURIAE OHIO ASSOCIATION FOR
JUSTICE IN SUPPORT OF PLAINTIFF-APPELLEE**

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I. STATEMENT OF INTEREST

The Ohio Association for Justice (“OAJ”) is a statewide association of over 1,500 lawyers whose mission is to protect and promote Ohioans’ right to a fair and impartial civil justice system, including their constitutional right to trial by jury, through advocacy, education and training.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

This case is presently before this Court because the Ohio Bureau of Workers’ Compensation (BWC) wants this Court to reverse its prior holdings in *Holeton v. Crouse Cartage Co.*, 92 Ohio St. 3d 115 (2001), *Modzelewski v. Yellow Freight Sys., Inc.*, 102 Ohio St. 3d 192 (2004) and *Groch v. Gen. Motors Corp.*, 117 Ohio St. 3d 192, 199 (2008), and instead interpret R.C. § 4123.93(D) in a way that allows the BWC to effectuate an unconstitutional taking from Appellee Lamar Thomas (Mr. Thomas) and all other similarly situated injured workers who do not (and did not) recover these costs in a third party lawsuit. Such a holding would violate the takings clause in Article I, Section 19 of the Ohio Constitution, the workers’ compensation benefits constitutionally guaranteed to Mr. Thomas by Article II, Section 35 of the Ohio Constitution, and the right to a remedy in Article I, Section 16 of the Ohio Constitution. The previous decisions by this Court in *Holeton*, *Modzelewski*, and *Groch* all make it clear that when an injured worker can show that certain damages are not duplicative, any attempt by the BWC to lay claim to them violates the Ohio Constitution and is improper. Since the BWC and its *Amici* are attempting to obtain this result, it is through this lens that OAJ will focus its arguments to show this Court that R.C. § 4123.93(D) cannot be interpreted in this unconstitutional manner.

III. STATEMENT OF FACTS AND THE CASE

OAJ adopts the facts presented by Mr. Thomas and simply reiterates that the amount paid to Dr. Yosowitz by the BWC was not recovered by Mr. Thomas as part of his third-party settlement, nor could this amount have been recovered in the event his case had proceeded to trial.

IV. LAW AND ARGUMENT

OAJ's Proposition of Law:

The cost of an independent medical review paid by the BWC is not part of the "subrogation interest" that can be recovered under R.C. § 4123.93(D) when it is not recovered by the injured worker pursuant to R.C. § 4123.931.

When interpreting R.C. § 4123.93(D), this Court should begin with a look at both the history of R.C. §§ 4123.93 and 4123.931, as well as its previous decisions in *Holeton*, *Modzelewski*, and *Groch*. Viewing these statutes through this lens is important because R.C. § 4123.93 and 4123.931 were the third attempt by the General Assembly to craft a workers' compensation subrogation statute that passed constitutional muster. *Groch*, 117 Ohio St. 3d at 199. While this Court found that the current versions of R.C. §§ 4123.93 and 4123.931 were facially constitutional, the interpretation sought by the BWC and its *Amici* create the same constitutional problems that caused the two previous enactments to be struck down in *Holeton* and *Modzelewski*. To avoid this result, these statutes can only be applied to the extent that they preclude duplicative damages or when the injured worker has obtained a double recovery.

A. Because Mr. Thomas's Settlement did not Include the Amount for Dr. Yosowitz's Review, the BWC has no Right to Recover these Amounts from him.

This Court's analysis of R.C. §§ 4123.93 and 4123.931 must be guided by the explicit language of R.C. § 4123.95, "Sections 4123.01 to 4123.94, inclusive, of the Revised Code shall be liberally construed in favor of employees and the dependents of deceased employees." R.C. § 4123.95. This Court in *Holeton* invalidated former R.C. § 4123.931, stating:

[W]e have also recognized that these kinds of statutes are not rationally related to their purpose **where they operate to reduce a plaintiff's tort recovery irrespective of whether a double recovery has actually occurred. Thus, we have consistently and repeatedly held that due process permits deductions for collateral benefits only to the extent that the loss for which the collateral benefit compensates is actually included in the award.** *McMullen v. Ohio State Univ. Hosp.* (2000), 88 Ohio St.3d 332, 341-344, 725 N.E.2d 1117, 1125-1127; *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 479-482, 715 N.E.2d 1062, 1088-1090; *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.

There is no valid justification for dispensing with these principles in determining the constitutionality of R.C. 4123.931. Like the collateral-benefits-offset statutes, the subrogation statute is aimed at preventing the tort victim from keeping a double recovery, the only conceptual difference being that the intended beneficiary is the statutory subrogee (*i.e.*, the collateral payor) rather than the tortfeasor. **Thus, R.C. 4123.931 must also satisfy the constitutional requirement that deductible or, in this case, subrogable or recoupable items be matched to those losses or types of damages that the claimant actually recovered from the tortfeasor.**

Holeton, 92 Ohio St. 3d at 122 (emphasis added). The *Holeton* Court also concluded that the statute was unconstitutional when it “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.” *Id.* at 123.

The *Modzelewski* Court reiterated this rationale when it held:

R.C. 4123.93 is unconstitutional because it precludes claimants who are parties to actions against third-party tortfeasors from showing that their tort recovery or portions thereof do not duplicate their workers' compensation recovery and, therefore, do not represent a double recovery.

Modzelewski, 102 Ohio St. 3d at 196. These statements are important and must be read in the context and history of the later decision in *Groch*. *Groch* never criticized or overruled either

Holeton or *Modzelewski*, and instead pointed out that Ohio has a rational basis in preventing double recoveries. *Holeton*, 92 Ohio St. 3d at 121. *Groch*, in fact, harmonized the holding that the current statute is facially constitutional because a plaintiff can still “prove that they have not received a double recovery.” *Groch*, 117 Ohio St. 3d at 205. *Groch* further noted, “claimants may have alternatives beyond those specifically recognized in R.C. 4123.931 for demonstrating that a recovered amount is not entirely duplicative.” *Id.* at 207. *Groch* also made it clear that it was only considering and commenting on the facial challenge before it. *Id.* at 208.

In this case, Mr. Thomas did not obtain a double recovery because he did not obtain an amount as part of his third party settlement that included Dr. Yosowitz's review. Therefore, there were no duplicative damages from BWC or a statutory subrogee can pursue a subrogation claim. This Court has routinely noted, “workers’ compensation allows no compensation whatsoever for pain and suffering.” *Sorrell v. Thevenir*, 69 Ohio St. 3d 415, 422 (1994). There was no economic loss to Mr. Thomas as a result of the BWC-generated review of Dr. Yosowitz. Therefore, BWC’s attempt to recover this amount is not permissible under the established precedent of *Holeton* or *Modzelewski*.

In *Groch*, 117 Ohio St. 3d 207, this Court also cited with approval the Lucas County trial court case of *Fry v. Surf City, Inc.*, 137 Ohio Misc. 2d 6, 2006-Ohio-3092. That decision, authored by now Ohio Northern District Judge Jack Zouhary, also limited the constitutionality of current R.C. § 4123.931 to the extent that it prevented a double recovery. *Id.* at ¶ 28. In finding the current version of R.C. § 4123.931 constitutional, Judge Zouhary specifically held:

R.C. 4123.931 is a rational response to the legitimate state concern of minimizing losses to the workers' compensation fund caused by the acts of third-party tortfeasors. **The *Holeton* court agreed that this is a legitimate state concern, to the extent that it prevents a double recovery. As analyzed above, under the amended version of R.C. 4123.931, the statutory subrogee recoups only to the**

extent that there is a double recovery. Further, the claimant is given substantial opportunity in either a trial or a settlement to prove amounts that would not represent a double recovery. Thus, R.C. 4123.931 is a rational response to a legitimate state concern.

Id. (emphasis added). Judge Zouhary reiterated throughout his entire opinion that, “**the formula ensures that the statutory subrogee is reimbursed only from amounts that would constitute an impermissible double recovery.**” *Id.* at ¶ 23 (emphasis added). Judge Zouhary also stated, “in a settlement situation, contrary to the holding in *McKinley*, the new statute allows ample opportunity for the plaintiff to demonstrate there was no double recovery.” *Id.* at ¶ 24. Finally, Judge Zouhary noted, “The new subrogation statute provides ample opportunity for a claimant to prove what amount of the settlement represents a double recovery. In a trial, evidence may be presented and jury interrogatories may be submitted, under Civ.R. 49, to determine what parts of the damages represents workers' compensation benefits and what parts represent the claimant's unreimbursed interests.” *Id.* at ¶ 25.

It is also important to note that the First District in *Beer v. Cincinnati Machines, Inc.*, 2005-Ohio-901 (1st Dist.) struck down a Kentucky workers' compensation subrogation statute applying these same principles as well. In *Beer*, the First District precluded workers' compensation subrogation because the Kentucky statute, “[did] not provide a means for a claimant who proceeds to trial against a tortfeasor to show that any damages recovered are not duplicative of any workers' compensation benefits received. In *Modzewelski*, the Ohio Supreme Court concluded that this failure violated the Ohio Constitution. Similarly, application of the Kentucky statute would violate Ohio law.” *Id.* at ¶ 11. Because Mr. Thomas did not claim or recover the cost of Dr. Yosowitz's review, the BWC and any statutory subrogee have no right of subrogation pursuant to R.C. § 4123.931 without violating Ohio law.

B. Applying R.C. §§ 4123.93 and 4123.931 in the Manner Sought by BWC would Result in an Unconstitutional Taking and Denies Injured Workers a Remedy by Due Course of Law.

In *Groch*, this Court noted:

Section 19, Article I of the Ohio Constitution, which provides, 'Private property shall ever be held inviolate, but subservient to the public welfare. * * * [W]here private property shall be taken for public use, a compensation therefor shall first be made.'

Section 19 requires that '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, 21 O.O. 422, 38 N.E.2d 70. See, also, *Froelich v. Cleveland* (1919), 99 Ohio St. 376, 391, 124 N.E. 212 (laws 'must be suitable to the ends in view, they must be impartial in operation, and not unduly oppressive upon individuals, must have a real and substantial relation to their purpose, and must not interfere with private rights beyond the necessities of the situation').

The Due Process and Remedies Clauses, Section 16, Article I of the Ohio Constitution...provides that 'every person, for an injury done * * *, shall have remedy by due course of law.'

The rights encompassed by the "remedy" aspect of Section 16, Article I are well settled. "'When the Constitution speaks of remedy and injury to person, property, or reputation, it requires an opportunity granted at a meaningful time and in a meaningful manner.'" (internal citations omitted)

This court has recognized the "due course of law" aspect of Section 16, Article I as the equivalent of the Due Process Clause of the United States Constitution.

Groch, 117 Ohio St. 3d at 200-201. Additionally, as *Holeton* noted:

No government could long continue to function if all property rights were unqualifiedly inviolate. But, on the other hand, the constitutional guaranty of the right of private property would be hollow if all legislation enacted in the name of the public welfare were *per se* valid. To be truly in the public welfare within the meaning of Section 19, and thus superior to private property rights, any legislation must be reasonable, not arbitrary, and must confer

upon the public a benefit commensurate with its burdens upon private property. This general doctrine was comprehensively stated by this court in *Froelich v. City of Cleveland* [1919], 99 Ohio St. 376, at 391, 124 N.E. 212 [216]: "It must be remembered that neither the state in the passage of general laws, nor the municipality in the passage of local laws, may make any regulations which are unreasonable. The means adopted must be suitable to the ends in view, they must be impartial in operation, and not unduly oppressive upon individuals, must have a real and substantial relation to their purpose, and must not interfere with private rights beyond the necessities of the situation.

Holeton, 92 Ohio St. 3d at 121.

Pursuant to *Holeton* and *Modzelewski*, for the current version of R.C. § 4123.931 to be constitutional, it "must also satisfy the constitutional requirement that deductible or, in this case, subrogable or recoupable items be matched to those losses or types of damages that the claimant actually recovered from the tortfeasor." *Id.* at 122. In light of this, the BWC cannot lay claim to amounts that do not amount to a double or duplicative recovery.

The *Holeton* Court also stated:

We are now confronted with similar determinative issues under Sections 16 and 19, Article I of the Ohio Constitution. Whether expressed in terms of the right to private property, remedy, or due process, the claimant-plaintiff has a constitutionally protected interest in his or her tort recovery to the extent that it does not duplicate the employer's or bureau's compensation outlay. **Thus, if 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.**

Id. at 122 (emphasis added). While *Groch* found that the current version of R.C. § 4123.931 was facially constitutional because there could be instances where BWC could constitutionally recover against a claimant who made a duplicative recovery for medical bills and lost wages from a

tortfeasor, this is not the case here. BWC's attempt take money from Mr. Thomas through alleged subrogation here is exactly what caused former R.C. § 4123.931 to be struck down.

As noted in *Holeton*, *Modzelewski*, and *Groch*, injured workers must be afforded the opportunity to prove that portions of their recoveries from negligent third parties do not represent a double recovery or duplicative damages. *Groch* determined that the current version of R.C. 4123.931 was constitutional because it still gave injured workers the ability, either in a settlement or a trial, to show that certain amounts did not constitute a double recovery. *Groch*, 117 Ohio St. 3d at 207. In this case, this fact is not even in controversy. As such, BWC's attempt to recover the cost of Dr. Yosowitz's examination, when this was not recovered from the third-party tortfeasor, means that Mr. Thomas had to pay this sum from either the amount of his settlement that represented noneconomic damages for pain and suffering, or from what he was paid from his lost wages from his workers' compensation claim. BWC and the government have no right to our constitutionally protected private property. When the BWC took this amount from Mr. Thomas as part of a claimed subrogation interest, it was a denial of due process and an unconstitutional taking of his private property pursuant to Article I, Sections 16 and 19 of the Ohio Constitution. As such, the BWC's subrogation claim for the funds at issue must fail.

In the event that the BWC and its *Amici* attempt to argue that it can lay claim to the entire tort settlement, even funds that do not solely constitute economic loss and a double recovery, they would be equally wrong. In *Jones v. VIP Developmental Co.*, 15 Ohio St. 3d 90 (1984), this Court rejected this exact argument by holding, "Allowing a worker to receive workers' compensation benefits in conjunction with common-law damages in no way constitutes a double recovery. The common-law award represents a supplemental remedy for pain and suffering, and...loss of services." *Id.* at 99. Additionally, as noted by *Holeton*, "Due process permits deductions for

collateral benefits only to the extent that the loss for which the collateral benefit compensates is actually included in the award.” *Holeton*, 92 Ohio St. 3d at 122 (emphasis added). Finally, as *Holeton* pointed out, “It can hardly be said that a double recovery results where a tort victim is allowed to retain two recoveries, that, when combined, still do not make him whole.” *Id.* at 126.

The Third and Fifth District Court of Appeals, in addition to the Lucas County and Franklin County Court of Common Pleas, have all followed the precedent established by this Court in *Holeton*, *Modzelewski*, and *Groch*. In *Smith v. Jones*, 175 Ohio App. 3d 705, 2007-Ohio-6708 (3rd Dist. 2007), the Third District struck down an attempted constitutional challenge for virtually the exact same reason as *Groch* did two months later. *Id.* The Third District, like *Groch*, noted that the current version of R.C. §4123.931 was constitutional because afforded injured workers the opportunity to demonstrate that their tort recovery did not duplicate their workers’ compensation benefits. *Id.* at 713-15, ¶¶ 25-28. Likewise, the Fifth District in *McKinney v. Omni Die Casting, Inc.*, 2017-Ohio-2949 (5th Dist.) cited *Holeton*, noting, “a claimant has a constitutionally protected interest in his tort recovery only to the extent that is does not duplicate the amount paid by the BWC. Ohio ‘has an important interest in preserving the process of seeking reimbursement for benefits expended, and avoiding double recovery by workers’ compensation claimants.’” *Id.* at ¶ 43. Again, nothing in these decisions even remotely suggest that the BWC can recoup amounts from an injured worker’s third-party settlement that does not constitute a double recovery or duplicative damages, yet that is exactly what the BWC wants to do to Mr. Thomas.

Attached as Appendix 1 is the October 11, 2019, decision of *Walborn v. Crofts*, Lucas County Case Number CI17-2469. There, a jury returned a verdict of \$400,000 in economic damages, and \$1.4 million in noneconomic damages. The statutory subrogee attempted to assert its subrogation right against the entire verdict, not just the economic damages. The Lucas County

Court rejected this argument, holding “Workers’ compensation benefits by definition exclude noneconomic damages and thus are not to be included as [the subrogee’s] interest.”

Finally, the Franklin County Common Pleas Court in *Saffell v. Greatwide Truckload Mgmt.*, Case Number 18-3965, 2020 Ohio Lexis Misc. 120* (August 7, 2020), prohibited the BWC from attempting to assert a subrogation claim against the entire gross settlement of a minor child when the recovery was purely for noneconomic damages. In *Saffell*, the plaintiff filed a wrongful death case on behalf of the eight children of the decedent. The youngest child, a minor, had 25% of the settlement allocated to him. *Id.* The BWC was paying death benefits to him (through his mother) pursuant to R.C. § 4123.58. Following the settlement, BWC first claimed that it should receive 50% of the net amount recovered from the minor child. *Id.* The plaintiff, on behalf of the minor child, had a damages trial to the trial court to determine both the BWC’s subrogation interest, as well as the demonstrated or proven damages. *Id.* Plaintiff, just like in the underlying tort case, put on no evidence of economic damages or lost earning capacity. The BWC put on evidence of the present value of the future death benefits the child would receive through age 22 while simultaneously trying to argue against significant noneconomic wrongful death damages pursuant to R.C. §2125.02(B)(1), (2), and (4). *Id.*

The trial court initially issued a finding of fact that the minor child’s damages amounted to \$693,000 and were purely noneconomic, while finding that the BWC had paid \$59,000 in past death benefits and would pay \$170,000 in future benefits. Despite this, the BWC still attempted to argue that it should be entitled to assert the full amount of its subrogation interest (approximately \$231,000) against the entire amount of the noneconomic damages to obtain 1/3 of the net amount recovered. *Id.* The trial court, citing *Holeton*, *Groch*, *Fry*, and *McKinney* found that the BWC could not demonstrate a double recovery since none of the minor child’s wrongful death damages

were economic in nature. *Id.* As such, the BWC was not entitled to subrogation and the plaintiff's as-applied constitutional challenge was rendered moot. *Id.* The BWC did not appeal this decision.

Stare decisis "dictates adherence to prior judicial decisions." *State v. Harper*, 160 Ohio St.3d 480, 2020-Ohio-2913. It has long been established that the workers' compensation subrogation statute cannot pass constitutional muster if it operates to take more than the amount that represents a double recovery. Since a double recovery did not occur here, and Mr. Thomas did not recover the amount of Dr. Yosowitz's review, stare decisis should be applied as there is no good reason to overturn prior precedent of *Holeton*, *Modzelewski*, and *Groch*. There is likewise no rational basis to allow the state to engage in an unconstitutional taking from Mr. Thomas and all other similarly situated individuals. As such, the Tenth District's decision should be affirmed.

C. Well-Established Principles of Statutory Construction Preclude the BWC's Proposed Interpretation of R.C. § 4123.93(D).

This Court has held on several occasions, "We first recognize that statutes are presumed to be constitutional and that courts have a duty to liberally construe statutes in order to save them from constitutional infirmities. *Eppley v. Tri-Valley Loc. Sch. Dist. Bd. of Educ.*, 122 Ohio St. 3d 56, 59 (2009) (quoting *Desenco, Inc. v. Akron*, 84 Ohio St.3d 535, 538 (1999)). In this vein, this Court has also noted, "It is a cardinal rule of statutory construction that a statute should not be interpreted so as to make the statute ineffective. A court must construe the statute so as to render it compatible with other enactments and construe it so as to avoid unreasonable consequences." *Gulf Oil Corp. v. Kosydar*, 44 Ohio St. 2d 208 (1975).

In addition to these guiding principles for examining R.C. § 4123.93(D), it is also important to remember that the BWC and this Court have already expressly stated that the BWC's sole fiduciary responsibility is to the State Insurance Fund. *State ex rel. Harry Wolsky Stair Builder, Inc. v. Indus. Comm. of Ohio*, 58 Ohio St. 3d 222 (1991). This is why, for example the BWC could

reduce the present value of a claimant's lump sum settlement by 30% and use inaccurate mortality data in calculating the present value of a claim without breaching any fiduciary duty to claimants in *Cristino v. Bur. of Workers' Comp.*, 2014-Ohio-1383 (10th Dist.).

Looking at R.C. §§ 4123.341 and 4123.931 in this manner shows why the BWC's interpretation is flawed. If this Court holds that the costs of the physician review of Dr. Yosowitz can be recouped from Mr. Thomas, the statute will be rendered unconstitutional under *Holeton*, *Modzelewski*, *Groch*, as well as numerous courts of appeals throughout the state because it was not recovered by Mr. Thomas in his settlement with the negligent third party. To avoid this constitutional infirmity and avoid the unreasonable consequence of the state taking either Mr. Thomas's constitutionally-protected private property or his workers' compensation benefits to pay for Dr. Yosowitz's review, this Court should affirm the Tenth District and find that this is a cost and expense incident to the discharge of the duties and performance of activities of the BWC and should be borne by the state and employers alone. The exam was done with the best interests of the State Insurance Fund in mind, not for the benefit of Mr. Thomas.

Additionally, the costs of Dr. Yosowitz's review would not be costs that either the BWC or Mr. Thomas would be able to obtain if this case went to trial. This was not a cost for medical care or treatment as there was no physician-patient relationship between Mr. Thomas and Dr. Yosowitz pursuant to R.C. § 2315.18(A)(2)(b). It would also not be considered a cost that could be recouped by a prevailing party in a lawsuit because these would be limited to things like filing fees or deposition transcripts used during trial. Finally, if this Court finds that this cost can be recovered in a third-party claim, it means that the BWC and any statutory subrogee can attempt to pass it onto every claim against an automobile, commercial, liability, or professional malpractice insurance carrier, rather than solely "borne by the state and by other employers amenable to this

chapter." R.C. § 4123.341. This would be an equally unreasonable consequence that can be avoided by interpreting R.C. § 4123.93(D) in the manner in which Mr. Thomas seeks, and well-established precedent by this Court, and the Tenth District Court of Appeals have all supported.

V. CONCLUSION

For all these aforementioned reasons, this Court should affirm the decision of the Tenth District Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX

FILED
LUCAS COUNTY

2019 OCT 11 PM 4:18

COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURT

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

Thomas L. Walborn, et al.,

Plaintiffs,

v.

Eric Crofts, et al.,

Defendants.

* Case No. CI17-2469

* Judge Michael R. Goulding

* **OPINION AND ORDER**

Before the court is Plaintiff Thomas and Carol Walborn's Motion for Judgment Circumscribing Plaintiff Johns Manville's Subrogation Claim under ORC 4123.931 filed on May 20, 2019. On June 14, 2019, Defendants Eric Crofts and Ferrellgas ("Crofts") and Defendant Johns Manville filed separate opposition briefs. Plaintiffs filed reply memoranda to each opposition brief on June 21, 2019. Then, on July 10, 2019 Crofts filed a sur-reply to which Plaintiffs filed their sur-reply on July 16, 2019.

Background

This case was tried to a jury beginning on April 29, 2019. Plaintiffs litigated a negligence action against Crofts for injuries Plaintiff Thomas Walborn sustained while employed by Johns Manville. Johns Manville, a self-insuring employer, is a party due to its subrogation interest in the workers' compensation benefits it paid to Thomas Walborn. Johns Manville also asserts a contractual claim against Crofts for indemnity. At trial, no evidence was introduced of Thomas Walborn's workers' compensation claim or amounts paid by Johns Manville to or on

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behalf of Thomas Walborn. Johns Manville, while present during trial through counsel, took no active role as a party in presenting evidence or cross-examining witnesses. The jury awarded Plaintiffs \$1,900,000 in compensatory damages against Crofts. Interrogatories split the award for economic loss in the amount of \$400,000 and for noneconomic loss in the amount of \$1,400,000. (The jury also awarded Plaintiff Carol Walborn compensatory damages for loss of consortium in the amount of \$100,000. Her award is unaffected by the instant motion consideration.)

The jury was unaware of Johns Manville's involvement in any way in the trial: counsel sat in the gallery as an observer, and no jury instructions implicated or mentioned Johns Manville per counsel's request. R.C 4123.931(H) allowed Johns Manville to essentially litigate alongside Plaintiffs at trial, but Johns Manville strategically chose not to avail itself of this opportunity. Johns Manville also agreed that amounts it actually paid as workers' compensation benefits to Plaintiff would not be disclosed to the jury. In fact, Johns Manville represented to the court that it had paid an amount to Plaintiff in settlement of such benefits.

Discussion

Johns Manville has a statutory right to subrogation for the workers' compensation benefits it paid to or on behalf of Thomas Walborn. R.C. 4123.931(D) delineates these rights.

The statute reads:

(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 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.

R.C. 4123.93 defines the terms "Claimant," "Statutory subrogee," "Third party," "Subrogation interest," "Net amount recovered," and "Uncompensated damages" as those terms are used in R.C. 4123.931. The court reads these statutes in pari materia. See, *Rivers v. Otis Elevator*, 8th Dist. Cuyahoga No. 99365, 2013-Ohio-3917; *Johnson's Markets, Inc. v. New Carlisle Dep't of Health*, 58 Ohio St.3d 28, 567 N.E.2d 1018 (1991).

As shown, the statute provides for jury interrogatories separating economic and noneconomic damages as well as a formula to calculate Johns Manville's recoverable "Subrogation interest." The purpose of the subrogation statutes is to eliminate double recovery by the Plaintiff/"Claimant" for compensation and expenses that the Plaintiff/"Claimant" receives from both his self-insuring employer and the "Third party" tortfeasor. See, *Fry v. Surf City, Inc.*, 137 Ohio Misc.2d 6, 2006-Ohio-3092, 851 N.E.2d 573 (C.P.) ¶28.

Plaintiffs move the court to apply the R.C. 4123.931(D)(1) formula to only the economic damages determined by the jury interrogatories. Plaintiffs argue that workers' compensation benefits do not include noneconomic damages. Defendants Crofts and Johns Manville oppose Plaintiffs' motion, arguing that the statutory formula considers the total compensatory damages awarded Plaintiff by the jury. Defendants Crofts and Johns Manville ignore the jury interrogatories and the applicability of the interrogatories to the "net amount recovered." Thus,

the dispute centers on whether the "net amount recovered" includes both economic and noneconomic loss, and whether Johns Manville's "Subrogation interest" is limited to the amount of economic damages found by the jury.

The parties agree that R.C. 4123.931 applies. The parties also agree that the loss of consortium damages awarded to Plaintiff Carol Walborn are not included in Johns Manville's recoverable "Subrogation interest."

As noted, the purpose of the statute is to eliminate a Claimant's double recovery, that is, from obtaining monies from both workers' compensation and the "Third party" tortfeasor for the same medical bills, wages, and any other economic recovery. The statute requires that the damages awarded at trial against the "Third-party" tortfeasor be separated and specified as economic and noneconomic damages. Amounts or items that are not compensable under the workers' compensation statutes are thus separated and are not to be included in the "Net amount recovered." See, *Smith v. Jones*, 175 Ohio App.3d 705, 2007-Ohio-6708, 889 N.E.2d 141 (3rd Dist.). The *Smith* court construed the statute "as requiring the use of the jury interrogatories as guidance in applying the formula." *Id.* at 719.

R.C. 4123.931 was addressed by the Ohio Supreme Court in *Groch v. GMC*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377. The court was faced with a constitutional challenge and held that R.C. 4123.931, as amended, is constitutional. The court did not specifically discuss 4123.931(D) and the interplay between the formula and the required jury interrogatories.

In 2006, a Lucas County Common Pleas Court decision addressed this statute stating in pertinent part:

The new subrogation statute [R.C. 4123.931] provides ample opportunity for a claimant to prove what amount of the settlement represents a double recovery. In a trial, evidence may be presented and jury interrogatories may be submitted, under Civ. R. 49, to determine what parts of the damages represents workers'

compensation benefits and what parts represent the claimant's unreimbursed interests.

Fry v. Surf City, Inc., 137 Ohio Misc.2d 6, 2006-Ohio-3092, 851 N.E.2d 573 (C.P.) ¶25. The court further expounded on the new statute, noting these provisions "give[] a claimant an opportunity to provide evidence as to what portions of a net amount recovered may or may not represent a double recovery." *Id.* at ¶24.

"Whether expressed in terms of the right to private property, remedy, or due process, the claimant-Plaintiff has a constitutionally protected interest in his or her tort recovery to the extent that it does not duplicate the employer's or bureau's compensation outlay." *Holeton v. Crouse Cartage Co.*, 92 Ohio St.3d 115, 121-122, 2001-Ohio-109, 748 N.E.2d 1111 (2001). The employee has a constitutional right to recovery; the employer has a statutory right to its subrogation recovery.

Prior to trial, Plaintiff settled his workers' compensation claim with his self-insuring employer, Johns Manville. This case then proceeded to jury trial on the negligence claim against Ferrellgas and its employee, Eric Crofts. The jury was given instructions on the determination of compensatory damages. Noneconomic damages, per the jury instructions, included "harm other than economic loss that results from the Plaintiff Thomas Walborn's injury, including, but not limited to, pain and suffering; loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education; disfigurement; mental anguish; and any other intangible loss." Interrogatories were submitted pursuant to R.C. 4123.931(D)(2). The jury awarded compensatory damages and per the interrogatories split the damages into economic and noneconomic awards. Workers' compensation benefits by definition exclude noneconomic damages and thus are not to be included as Johns Manville's subrogated interest.

"Uncompensated damages" equal the total award in favor of Plaintiff less Johns Manville's "Subrogation interest." The only evidence in the record of Johns Manville's "Subrogation interest" is the amount of economic damages found in the jury's interrogatory. The "Statutory subrogee's" "Subrogation interest" is equivalent to the amounts the jury found were paid to Plaintiff/"Claimant" Thomas Walborn in "past, present, and estimated future payments of compensation, medical benefits, rehabilitation costs and any other costs or expenses paid to or on behalf of the claimant by the statutory subrogee...." R.C. 4123.931(D).

Pursuant to R.C. 4123.95, the workers' compensation statutes "shall be liberally construed in favor of employees..." Thus, the court finds that in applying the two subsections of R.C. 4123.931(D) in conjunction with the definitions contained in R.C. 4123.93, only the economic damage award stated in the jury interrogatories shall be used as the "Subrogation interest" in the subrogation formula because, as noted, the jury was unaware of any amount actually paid, in settlement or otherwise, to Plaintiff.

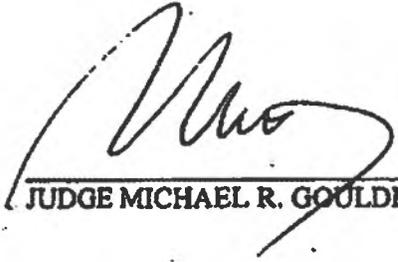
By way of illustration, the following equation might be of assistance. Presume the following: noneconomic damages = \$1,400,000; "Subrogation interest" (as determined by the jury) = \$400,000; "Net amount recovered" (Plaintiff Thomas Walborn's verdict less attorney fees, costs, expenses [here estimated as \$600,000]) = 1,200,000. Per the R.C. 4123.931(D)(1), the claimant would receive $\$1,400,000 / (\$400,000 + \$1,400,000) \times \$1,200,000 = \$9,333,333.33$. In turn, the "Statutory subrogee" would receive $\$400,000 / (\$400,000 + \$1,400,000) \times \$1,200,000 = \$266,666.67$. The balance of the verdict (not including Plaintiff Carol Walborn's award) equals the estimated amount of attorney fees, costs, and expenses.

JUDGMENT ENTRY

Wherefore, in determining the amount "the statutory subrogee shall receive," (R.C. 4123.931(D)(1)), the foregoing analysis shall apply.

IT IS SO ORDERED.

10-11-19
Date



JUDGE MICHAEL R. GOULDING

cc: Marc G. Williams-Young, Esq.
Gregory B. Denny, Esq.
Roy Hulme, Esq.
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