

IN THE SUPREME COURT OF OHIO

Ohio Bureau of Workers' Compensation

Plaintiff-Appellant

v.

Jeffrey McKinley et al.

Defendants-Appellees

Case No. 2014-0795

On Appeal from the Columbiana County
Court of Appeals, 7th Appellate District

Court of Appeals Case No. 12 CO 41

AMENDED AMICUS BRIEF OF JEFFREY MCKINLEY

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I. Table of Contents

I. Table of Contents.....	1
II. Table of Authorities Cited.....	2
III. Introduction.....	1
IV. Brief Summary.....	1
V. Argument.....	1
A. Statutory Construction	1
B. "Double Recovery"	2
C. Vagueness	7
VI. Conclusion	8

II. Table of Authorities Cited

Cases

Groch v. General Motors Corp., 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.3d 192. .. 5

Holeton v. Crouse Cartage Co., 92 Ohio St.3d 115, 748 N.E.2d 1111 (2001) 3, 4, 5, 7

Modzelewski v. Yellow Freight Sys., Inc., 102 Ohio St.3d 192, 2004-Ohio-2365, 808
N.E.2d 381 4, 5

Statutes

RC 4123.931..... 2, 6, 7, 8

RC 4123.95..... 3

III. Introduction

We have been advocating for repeal and re-writing of this statute (RC 4123.931) since it was enacted in 2003.¹ The BWC on the other hand – instead of advocating for a better statute – has chosen to support the existing one with the hope that the courts will interpret it favorably to them. We urge the court to tell it like it is: this is a poorly-written statute with several flaws, and it should be re-done.

There are several glaring flaws in 4123.931 a few of which we will address here.

IV. Brief Summary

The BWC can prevail here only if the settlement between McKinley and WTI "excludes any amount paid by [the BWC]." The settlement does not exclude any amount paid by the BWC. That resolves this appeal, but we invite the court to consider other aspects of this statute.

V. Argument

A. Statutory Construction

RC 4123.95 states, "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." Therefore, any ambiguity in those sections should be construed in favor of employees, and there is plenty of ambiguity.

¹ Since the McKinley date of injury was just a few months after 4123.931 (2003) became active, it was one of the first cases of its kind.

B. "Double Recovery"

Any good analysis of the subject matter should start with *Holeton v. Crouse Cartage Co.*, 92 Ohio St.3d 115, 748 N.E.2d 1111 (2001). In *Holeton*, the court struck down the 1995 version of RC 4123.931, holding as follows:

In dealing with the constitutionality of various collateral-benefits-offset statutes under Section 16, Article I, this court has recognized that the state has a legitimate interest in preventing double recoveries. Thus, it is constitutionally permissible for the state to prevent a tort victim from recovering twice for the same item of loss or type of damage, once from the collateral source and again from the tortfeasor. However, we 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. [Citations omitted].

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.

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.

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 or her whole. Indeed, in some situations the available insurance may

not even be sufficient to cover the subrogee's interest, in which case the entire amount of the settlement will be taken by the subrogee. R.C. 4123.931(D) operates unconstitutionally in these situations because it allows for reimbursement from proceeds that do not constitute a double recovery.

R.C. 4123.931(D) essentially creates a presumption that a double recovery occurs whenever a claimant is permitted to retain workers' compensation and tort recovery. Claimants who try their tort claims are permitted to rebut this presumption, while claimants who settle their tort claims are not. Such disparate treatment of claimants who settle their tort claims is irrational and arbitrary because, as demonstrated in Part II above, there are situations where claimants' tort recovery is necessarily limited to amounts that if retained along with workers' compensation cannot possibly result in a double recovery.

When the 1995 statute was declared unconstitutional in *Holeton*, the 1993 version was restored under an old common law rule that reinstates a statute if a subsequent statute (later declared unconstitutional) repeals and replaces it in the same act. But the 1993 version was then nullified in *Modzelewski* for essentially the same reasons the 1995 statute was nullified in *Holeton*. *Modzelewski v. Yellow Freight Sys., Inc.*, 102 Ohio St.3d 192, 2004-Ohio-2365, 808 N.E.2d 381. *Modzelewski* emphasized the disparate treatment given to trial verdicts versus settlements. Since settlements are preferred to trials, the statutory disincentive to settle (and incentive to proceed to trial) rendered the statute unconstitutional as offensive to equal protection. The court stated further:

Under the rational-relationship test, and for the reasons stated in *Holeton*, RC 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.²

Holeton has not been overruled or criticized. In fact, in *Groch* and *McKinley*, the court cited *Holeton* with apparent approval. Can we not assume that the rationale in *Holeton* still obtains?

Yet the current (2003) statute does not address the double recovery issue. Indeed, the phrase "double recovery" cannot be found in the current statute. The formula set forth in 4123.931 simply *assumes* a double recovery occurred, just as did the prior two versions of 4123.931. So when *Groch* was heard, we expected the court to invalidate the 2003.³ Instead, the court essentially ignored the rationale in *Holeton* and upheld the statute stating:

In light of the formula, further concerns about a claimant's ability to retain any nonduplicative damages have lost their force.⁴

Further concerns have lost their force? Unless the court overrules *Holeton*, should we not be "concerned" about our clients' constitutional rights? The statutory formula does not allay our concerns; it completely ignores them.

A double recovery occurs when a claimant recovers twice for the same *item* of damages. For example, if a specific medical bill is paid by the BWC, and the claimant then recovers from a third party tortfeasor for the *same bill*, a double recovery has

² *Modzelewski v. Yellow Freight Sys., Inc.*, 102 Ohio St.3d 192, 2004-Ohio-2365, 808 N.E.2d 381, ¶15.

³ When this court accepted the *Groch* case, *McKinley* had proceeded through the court of appeals, whereas the *Groch* case was still at the trial level, and was taken as a question from the federal trial court. *Groch v. General Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.3d 192. *Groch*, not *McKinley*, was selected as the lead case for some unknown reason. Consequently, several issues that could and should have been raised in *Groch* were not. We regret not getting involved in the discussion then, but we won't make the same mistake twice; so here we are.

⁴ *Groch*, 117 Ohio St.3d at ¶ 88.

occurred. *That* is the situation the General Assembly intended to address in passing RC 4123.931. The Bureau's lawyers seem to think that whenever a third-party claim is settled, a double recovery occurs, and that is simply not so.

When we settle a case, we usually do not specify the individual damages being compensated. A settlement usually takes into consideration the nature of the facts, reliability/likeability of the witnesses, all of the damages submitted (some more "supportable" than others), along with any "liability" issues that may exist. Any trial lawyer knows that several factors go into a settlement demand or offer; some are objective, some are subjective; some are more sustainable than others.

The point is this: We usually do not specify which damages are being paid in a settlement; the parties just agree to a figure in the totality of the circumstances. A settlement in the great majority of cases is a compromise of all claims. A defendant settling a case will of course insist that the settlement encompass all claims, whether or not there was full, partial, or no compensation for any or all of them. And then the claimant is forced to reconcile with the lienholders their claims against the settlement. So, in many cases (we would say virtually all of them), we do not specify whether and to what extent a settlement covers a particular lien. The liens are usually negotiable just as are the underlying claims.

The problem we have here is a poorly-written statute. Instead of passing a law that reads: The BWC is entitled to recover from a claimant⁵ that aspect of a settlement that represents a double recovery of benefits" (or words to this effect), we have this 4-

⁵ Recovery against a *third party* is a different matter.

page morass that has already caused years of wasteful litigation, and will surely cause more.

When RC 4123.931 was passed in 2003, it had on its face the same flaw of the prior versions: It did not limit the BWC's recovery against a claimant to the claimant's double recovery. We therefore had good reason to think that the Supreme Court would treat the 2003 statute in the same manner the prior two were treated. Would it be reasonable for us to assume that the new statute was any more valid than its predecessors when it had the same defect? The answer is no.

The issue now before the court is fairly simple: The BWC cannot recover because its interests were not excluded in the settlement agreement; the settlement encompasses "all claims and actions of Plaintiff for damages." It would be difficult to use clearer language.

The Bureau's problem is that there was no double recovery here. They know they cannot prove that Mr. McKinley recovered twice for anything because he didn't. "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 or her whole."⁶ The settlement between McKinley and WTI was, like most settlements, a compromise of all aspects of damages. A motion for summary judgment had been filed by the third party, and we were rightfully concerned that the motion might be granted, whereby Mr. McKinley (and the BWC) would receive nothing. Mr. McKinley, understanding the risks, opted to accept the offer made by the third party. But the settlement was far short of full compensation.

⁶ *Holeton*, 92 Ohio St.3d at 126.

Since there was no double recovery, the BWC is placing its hopes for some recovery in section G of 4123.931. That claim fails as well for the reason previously stated. We notified both the BWC and the attorney general of the third party action. The BWC had ample time to assert their claim, and they did in fact assert it. And in settling with the third party, the settlement encompassed all claims. The BWC therefore has no rights under Section G.

Several parts of 4123.931(G) are ambiguous. The first sentence requires the claimant to identify all potential third parties. That was done in this case. The second sentence requires the claimant to provide "prior notice⁷ and a reasonable opportunity to assert its subrogation rights."⁸ Again, in this case, the BWC had notice of the third party case, the identity of the third party, notice of settlement discussions, and an ample opportunity to assert its claim, which it did do. And the settlement between McKinley and WTI did not exclude any amount paid by the BWC. Accordingly, the BWC has no rights under section G.

C. Vagueness

The most significant flaw in 4123.931 is the vague denominator in the multiplier. The multiplier is the fraction set forth in 4123.931, which is then multiplied by the net amount recovered:

(Subrogation interest ÷ "demonstrated or proven damages") x net amount recovered

⁷ Prior to what? Notice of what?

⁸ What is a reasonable opportunity? Is the BWC now claiming they did not have an opportunity to assert their rights? They did in fact assert them.

"Demonstrated or proven damages" is vague in the context of a settlement because the claimant may not have "demonstrated or proven" any damages before a settlement is reached. The BWC has taken the position that "demonstrated or proven damages" is the settlement amount. But if the general assembly intended the settlement amount to serve as the denominator, would it not simply have said so?

This issue is not before the court, but it will be eventually unless the general assembly passes another statute before that happens. We raise it here because we want the court to look critically at this statute, and urge the general assembly to pass better legislation on this subject.

VI. Conclusion

The appeal should be denied. We ask the court to admonish the general assembly and urge them to pass new legislation with clearer language.

Respectfully submitted,

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