

IN THE SUPREME COURT OF OHIO

Rick A. Holeton, et al.,) CASE NO: 00-428
)
Plaintiffs-Petitioners)
)
vs.) On Certification Order from the
) United States District Court,
) Northern District of Ohio
Crouse Cartage Company, et al.,) Western Division - Toledo
)
Defendants-Respondents) Judge James G. Carr
)
) U.S. DIST. CT. CASE NO. 98CV 7578
)

BRIEF OF AMCUS CURIAE NATIONAL ASSOCIATION OF SUBROGATION
PROFESSIONALS IN SUPPORT OF RESPONDENT C. JAMES CONRAD,
ADMINISTRATOR, OHIO BUREAU OF WORKERS' COMPENSATION

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Pursuant to Rule VI, Section 3(A) of the Rules of Practice of the Supreme Court of Ohio, appendix of Amicus Curiae's brief is omitted, other than as noted, as materials cited are provided in appendix of the petitioners' brief.

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The National Association of Subrogation Professionals ("NASP") is a non-profit trade association of insurance subrogation personnel, attorneys practicing in

the subrogation area and vendors serving the subrogation field. The approximately six-hundred members of NASP are dedicated to the principle that ultimate responsibility for the payment of damages as a result of tortious conduct should be placed upon the party who acted negligently, recklessly or intentionally in causing the harm. Society is benefitted by a justice system which does not permit a tortfeasor to act with impunity because insurance or another third party source of payment happened to be available to pay the victim's damages. Placing responsibility on the tortfeasor encourages careful behavior by all, which is a duty imposed by law on all persons.

Moreover, the long-established right to subrogate against the tortious party contributes to the financial ability of the third party payor to provide insurance and other contracts of protection at the lowest possible price to the consumer. In the absence of subrogation, America's civil justice system would gravitate toward a pure insurance-based compensation system, rather than the tort system that was developed consistent with principles of the free market, in which the individual actor is held personally accountable for tortious acts.

NASP, by this Amicus Curiae brief, seeks to provide this Honorable Court with the unique perspective of the professionals who regularly file, settle, and take to trial subrogation claims.

Virtually all fifty states have some form of a workers compensation subrogation statute.

NASP joins with the Attorney General of the State of Ohio in urging this Honorable Court to uphold the constitutionality of Ohio Revised Code 4123.93 1.

II. STATEMENT OF FACTS

Pursuant to S.Ct. Prac. R.XVIII, Judge James G. Carr of the United States District Court for the Northern District of Ohio, Western Division, on February 17, 2000, certified eight questions of law to this Honorable Court. Six of those questions have to do with the constitutionality of R. C. 4123.93 1, Ohio's workers' compensation subrogation statute, which became effective September 29, 1995.

On May 3, 2000, this Court entered an order determining that it would answer the following questions:

1. Does R.C. Sec. 4123.931 violate Article 11, Section 35 of the Ohio Constitution?
2. Does R.C. Sec. 4123.931 violate Article 1, Section 19 of the Ohio Constitution?
3. Does R.C. Sec. 4123.931 violate Article 1, Section 16 of the Ohio Constitution?
4. Does R.C. Sec. 4123.931 violate Article II, Section 28 of the Ohio Constitution?
5. Does R.C. Sec. 4123.931 violate Article I, Section 2 of the Ohio Constitution?
6. Does R.C. Sec. 4123.931 violate Article 11, Section 15 of the Ohio Constitution?
7. Is R. C. Sec. 4123.931 contrary to Ohio Civil Rule 49(C) and, therefore, invalid and unenforceable?
8. Does R. C. Sec. 4123.931 constitute an invalid waiver of an injured employee's right to receive and retain workers' compensation benefits in violation of R.C. Sec. 4123.80? .

The ensuing brief will address four of the foregoing certified questions. As to all other questions, the Amicus would rely on the arguments of the Attorney General's merit brief

III. LAW AND ARGUMENT

Proposition of Law I

The subrogation provision of R.C. Sec. 4123.931 is authorized by Section 35, Article 11, Ohio Constitution because said statute establishes reimbursement through subrogation as a term and condition for the payment of benefits from the workers' compensation fund.

Petitioners argue that R.C 4123.931 violates Article 11, Section 35 of the Ohio

Constitution, which provision authorizes the workers compensation system, because the statute upsets the "delicate balance" created by that provision.

We agree that a balance is set up under authority of the Constitution. However, the exact parameters of that balance are not set forth in the Constitution itself. Instead, Article 11, Section 35 conveys a grant of authority to the Ohio General Assembly through its specific terms:

[Laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom.

The statute under review is simply a "law" which has been passed which determines a "term and condition" upon which compensation is paid. Article 11, Section 35 does not limit legislative authority. To the contrary, it contemplates that the legislature will exercise its considered discretion to frame legislation which strikes the appropriate balance between the rights of workers and the rights of employers, to the end that fair and swift -- but not necessarily full -compensation will be available to all injured workers.

It is important to note that Article II, Section 3 5 of the Ohio Constitution was an amendment to the Constitution added in 1912. At that time, the concept of subrogation was already well-established in Ohio. See *Newcomb v. Cincinnati Ins. Co.* (1872), 22 Ohio St. 382. Presumably, if Ohio's citizens had determined that subrogation should be specifically excluded

from a workers compensation system, a phrase prohibiting subrogation could easily have been made a part of the amendment. The absence of such a phrase supports the conclusion that it must have been intended that subrogation would be the purview of the legislature.

Proposition of Law No. II

R.C. Sec. 4123.931 does not constitute a taking of any property right in violation of Section 19, Article 1, Ohio Constitution.

The concerns raised by Petitioners that the statute constitutes an impermissible taking of property are largely resolved by reference to the plain language of the statute itself Revised Code

4123.931 provides, in relevant part:

If a claimant disputes the validity or amount of an asserted subrogation interest, the claimant **shall join the statutory subrogee as a necessary party to the action** against the third party.

The entire amount of any award or judgment is presumed to represent compensation and medical benefits and future estimated values of compensation and medical benefits that are subject to a statutory subrogee's subrogation rights unless **the claimant obtains a special verdict or jury interrogatories indicating that the award or judgment represents different types of damages.**

The statute thus provides a specific mechanism by which the recipient of workers

compensation benefits can challenge the validity or amount of a workers compensation subrogation claim. The presumption established by the statute - that the entire amount of an award or judgment is subject to the subrogation claim - is to ensure that in the trial of a personal injury tort case the finder of fact is asked to establish how much of the verdict represents compensation for items of damage already paid under the workers compensation system. It prevents an injured employee or the tortfeasor from characterizing the award in a manner to avoid reimbursement of the amounts due the statutory subrogee.

The same rationale applies to claims which are settled. For example,

Academy of Trial Lawyers suggests that since the statute requires that the entire amount of a settlement is subject to the statutory subrogee's right of subrogation, injured parties will not be fairly compensated in situations where the tortfeasor's insurance or other resources are limited. They contend that the statute requires that the "less-than-make-whole recovery be sacrificed to the subrogee, in whole or in part, as the price of being permitted to settle..... Not so. The statute by its plain language states that "No settlement ... shall be final unless the claimant provides the statutory subrogee with prior notice and a reasonable opportunity to assert its subrogation rights." Only "[i]f a statutory subrogee is not given that notice, the third party and the claimant shall be jointly and severally liable to pay the statutory subrogee the full amount of the subrogation interest." Although here, as elsewhere, Petitioner and their amicus are prone to describe the "most horrible outcome" scenario, it is only if the claimant fails to abide the minimal duties under the statute of providing notice and opportunity to the statutory subrogee that the entire amount or an unduly large proportion of the settlement must be paid to the statutory subrogee.'

Nevertheless, there will be instances when the resources of the tortfeasor - whether insurance limits or otherwise- will be insufficient to fully compensate the injured employee or the statutory subrogee or both. That is unfortunate. However, the simple fact is that this situation exists elsewhere in the tort system, indeed in the entire system of justice. All too often, a tortfeasor, a contract scofflaw, or a criminal offender for that matter, will have insufficient means

1 See e.g., *In re Estate of Ross* (1997), 116 Ohio App. 3d 402, discretionary appeal allowed, 80 Ohio St. 3d 1998, appeal dismissed, 80 Ohio St. 3d 1453 wherein the plaintiff settled

with the tortfeasor without providing the Bureau of Workers Compensation with notice of and opportunity to participate in the settlement.

from which to remedy the wrong they have caused. That sad reality is not changed by the workers compensation subrogation statute, and will not be changed no matter how this Court rules.

It is true that most cases settle. The statute does not prevent in any way those settlements from occurring. The statute only requires, in the settlement context, that settlement discussions do not go forward without due regard for the rights of the statutory subrogee to participate in those settlement talks. As with all negotiations of a court-enforceable right, all parties concerned must evaluate, with the aid of capable and knowledgeable counsel, the risks and opportunities inherent in presenting their respective claims and defenses to a jury. After due consideration of the equities, a compromise will be reached in the overwhelming majority of cases.

The fact the subrogation statute as presently constituted is no impediment to the settlement of cases is perhaps best illustrated by *In re Estate of Ross* (1997), 116 Ohio App. 3d 402, discretionary appeal allowed, 80 Ohio St. 3d 1448, appeal dismissed, 80 Ohio St. 3d 1453. *Ross* raised many of the constitutional issues at issue herein, yet that case was settled by the parties prior to a hearing on the merits by this Court. This amicus respectfully suggests that innumerable other cases have been successfully negotiated, settled, and dismissed under the authority of Revised Code 4123.931 in the five years since it was enacted. This shows that able counsel for the interests of the defense, the injured claimants, and the subrogees already understand how to apply the statute in a fair and equitable manner.

Contrary to Petitioners' assertion that plaintiffs' personal injury lawyers will now be forced to represent the interests of workers compensation payors, the statute specifically provides for joining the statutory subrogee as a party to the action. Once the subrogee is a party to the action the subrogee's interests will be represented by separate counsel of its own choosing. The

subrogee will then take those steps it deems necessary or advisable to ensure that its interests are protected, including the submission of appropriate jury instructions, verdict forms, and jury interrogatories.

Petitioner has not cited a single appellate decision, nor has NASP discovered any, where this procedure was fully employed by an Ohio personal injury plaintiff and found to be unworkable. Indeed, no cases have been cited wherein a personal injury plaintiff employed the procedure at all. Petitioners' arguments about the operational inefficacy of the statute are based on pure surmise. This Court should not be persuaded by arguments that the statute is unworkable where the interests represented by Petitioners and their Amicus have not even attempted to follow the procedure provided in the statute.

The Court should consider just what it is that Petitioners say has been "taken" through operation of the subrogation statute. Petitioners correctly state that they have the "right to bring civil actions for the recovery of damages against negligent third parties," citing *Conley v. Schearer* (1992), 64 Ohio St. 3 d 284, 290. The property right at issue is the **right to sue a tortfeasor**. The subrogation statute does nothing to take away this fight. The injured employee has the same fight to sue for damages as before the effective date of the statute. Petitioners, however, extend this fight to sue to mean that they have a vested property fight to recover the same damages twice, once from the employer, and once from the tortfeasor. In addition, Petitioners contend that the statute authorizes an employer to "take back" from the claimant what the employer previously gave the claimant in benefits.

This argument overlooks the plain language of the statute which states that the subrogation fight is created in favor of the statutory subrogee and against third parties. It is the tortfeasor's money which is taken (with due process of law)

under the statute, not the claimant's money.

Amicus OATL goes even further in its argument, contending that the property right which is taken is the right to be "made whole" in a settlement, and further suggests that this is a "fundamental right" for purposes of constitutional analysis. Thus, OATL would ask this Court to recognize an entirely new constitutionally protected property right: the right for a injured worker to receive a full recovery of compensation for each and every injury.' This is an astonishing, quixotic, and completely unrealistic notion.

If this Court recognizes a constitutionally protected fundamental property right for an injured worker to be made whole for his injury, what would be the limits of such a right? Under their Proposition of Law 111, Petitioners argue that equal protection is violated by treating injured workers differently from injured people who were not hurt on the job. Both classifications of plaintiffs must be placed on an even footing, according to Petitioners. Thus, recognition of a "made whole" property right for workers would require recognition of the same right for all injured plaintiffs.

The point is that there is no fundamental right to be made whole, nor can there be. The reality is that it is common for an injured party, whether a worker injured on the job or any other tort plaintiff, to achieve a less than full recovery, or even no recovery at all where the tortfeasor is insolvent or where the economics of pursuing the claim prevent the claim from even being made.'

' Under some circumstances, through application of contract or other principles, an injured plaintiff may have some superior claim to be made whole. See, *Blue Cross and Blue Shield Mutual of Ohio v. Hrenko* (1995), 72 Ohio St.3d 120. However, this right, to the extent it exists, has never been considered a "fundamental right" under the Ohio Constitution.

' Note: Every person has the freedom of choice to purchase first party disability, accident and life insurance to protect themselves regardless of the financial status of the tortfeasor who

That result, as unfair as it may be, is part and parcel of the American tort system. People are injured every day by tortfeasors who have no ability to pay for the damages they cause, and no one is heard to say that the result, while unfortunate, offends the Ohio Constitution.

Further, it is at least arguable that every case which is settled' is a case in which the plaintiff is not made whole, for every settlement is a compromise from the full value of the claim. Every settlement reflects the evaluation of the parties' respective risks and advantages of going to trial on the matter. There is, in the usual instance, no fiscal incentive for the tortfeasor to pay the full measure of damages in settlement when at a trial he may be required to pay less, and commensurately, every incentive for the plaintiff to accept somewhat less than full value to avoid the inevitable risk of trial.

Plaintiffs' counsel routinely counsel their clients to accept settlements which do not make their clients whole. Does this mean that these attorneys counsel their clients to give up constitutional property rights? The point is not that a less-than-whole settlement is improper. The point is that there never has been, and can never be under our tort compensation system as we know it (as opposed to a purely insurance based or state social welfare system), a constitutionally recognized right to be made whole for injuries.

Proposition of Law No. III

R.C. 4123.931 does not violate Article 1, Section 16 of the Ohio Constitution as it does not violate petitioners' due process of law.

injures them. *Cf. Savoie v. Grange Mut. Ins. Co.* (1993), 67 Ohio St.3d 500, 507-508 ("Regrettably, the General Assembly has not succeeded in its effort to force every motorist to maintain liability insurance coverage.** *The purchase of full uninsured/underinsured coverage is the only possible means for responsible motorists to protect themselves and their families").

As Amicus OATL points out, that is the overwhelming majority of cases.

Petitioners argue that R.C. 4123.931 deprives them of a "remedy by due course of law" in violation of Article 1, Section 16 of the Ohio Constitution.

Quite to the contrary, the statute provides a specific procedure for aggrieved claimants to follow, fully satisfying the requirements of due process. The "right to a remedy" has previously been interpreted to mean: "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." *Burgess v. Eli Lilly & Co.* (1993), 66 Ohio St. 3d 59, 62. There is nothing in this standard that suggests a constitutional guarantee of a particular dollar amount of recovery for an injury. What the Constitution guarantees is an "opportunity" to have one's claim heard and decided in a trial court.

Petitioners once again pose a worse case scenario which they believe results in a constitutional violation. They suggest that an injured employee who has had his damages assessed by a jury verdict at \$ 100,000, with comparative negligence of 33 1/3 %, receives \$66,666 in a net award. If the worker had previously received \$25,000 in workers compensation benefits, and must repay this amount, Petitioners argue that since the worker recovered only 2/3 of his lost economic benefits from the jury award, but repays 100% to the statutory subrogee, the worker has been denied his "right to a remedy."

Petitioner's argument fails, for at least two reasons. First, and most incredibly, Petitioners' scenario omits the procedural rights specifically set forth in the statute, i.e., the claimant's right to

' They also argue this constitutes a "taking" of \$8,500. The Court is referred to this *amicus's* arguments under the previous Proposition of Law.

join the statutory subrogee as a party to the case, and the claimant's further right to have a jury decide, through a special verdict or jury interrogatories, the amount of the subrogated party's interest. Petitioners can hardly complain they have been denied access to the courts, which is the essence of the constitutional "right to a remedy," when they do not take advantage of the specific procedure for access to the courts which is provided in the statute. This is like saying they are denied access to the courts when they have failed to file a complaint.

Claimants who follow the extremely simple procedures set forth in the statute, procedures which were obviously written into the statute to protect their rights, will receive full access to the courts and thus all the due process required under the Ohio Constitution.

Next, under Petitioners' "worse case" scenario, it should be noted that the injured worker will have received a total of \$66,666 for an injury in which the worker is 33 1/3 % comparatively negligent. Not coincidentally, this is exactly the same amount a victim who is injured outside of his employment relationship would receive for the same injury and same degree of self negligence. Do Petitioners believe that plaintiffs who are hurt on the job should be treated differently than plaintiffs who are hurt off the job? Apparently so. However, this logic is at odds with Petitioners' arguments under the next Proposition of Law that Article 1, Section 2, "equal protection" mandates that plaintiffs hurt on the job should be treated the same as similarly situated plaintiffs hurt off the job.

Proposition of Law No. IV

R.C. 4123.931 does not violate Article 1, Section 2 of the Ohio Constitution, as it neither grants a "special privilege or immunity" to employers, nor denies to claimants "equal protection" of the laws.

Petitioners maintain that R. C. 4123.931 violates Article 1, Section 2 of the Ohio Constitution in that it grants a special privilege and immunity and in that it violates equal protection of the law.

Petitioners maintain, without citation to precedent, that the statute must be analyzed under the "strict scrutiny test." To the contrary, strict scrutiny is appropriate only where the challenger is a member of a protected class, or where a fundamental right is involved. *Morris v. Savoy* (I 991), 61 Ohio St. 3d 684. Workers compensation has never been held by this Court to be a fundamental right. Therefore, this Court must apply the rational basis test.

In applying the rational basis test, the statute must be upheld if there are any conceivable set of facts under which the statute rationally furthers a legitimate legislative objective. *Schwan v. Riverside Methodist Hospital* (1983), 6 Ohio St. 3d 300, 301. In reviewing legislation, it must be remembered that "the legislature is the final arbiter of public policy, unless its acts contravene the state or federal Constitutions." *State v. Smorgala* (1990), 50 Ohio St.3d 222, 224. Or, as stated in *Williams v. Scudder* (I 921), 102 Ohio St. 305, syllabus: "The legislature is the primary judge of the needs of public welfare, and this court will not nullify the decision of the legislature except in the case of a clear violation of a state or federal constitutional provision."

The statute does not purport to grant any special privilege or immunity to employers, in that any special status enjoyed by employers has already been authorized by the Ohio Constitution. Specifically, Article II, Section 35 of the Ohio Constitution provides that employers who comply with laws requiring the payment of compensation "shall not be liable to respond in damages at common law or by statute." Thus, a special privilege or immunity has already been accorded employers under the Constitution. The statute at issue does no more to immunize

employers than any other workers compensation statute.

As for the claim that the statute grants a special privilege, the right to subrogation has long existed in Ohio for the benefit of insurers and others who are obligated to pay the debts of others'. How can a statute which simply puts a workers compensation subrogee on the same footing as other insurers be said to grant a "special privilege?"

The argument by Petitioners and their amicus that the statute violates equal protection by treating injured workers differently from a person injured off the job ignores the significant fact that the entire workers compensation scheme makes that classification. The whole point of workers compensation is to give workers the right to receive rapid, but less than full, compensation regardless of fault. Other injured people do not have these rights. To the extent that R.C. Section 4123.931 relies on the same classification, it does not offend due process. It certainly does not create an "arbitrary classification" as Petitioners claim. The classification under the statute is no more arbitrary than the same classification made under other sections of Chapter 4123 of the Revised Code, which is to say that it is not arbitrary at all.

Revised Code 4123.931 has been upheld by all three Ohio Courts of Appeal which have addressed the constitutionality of this statute. See *In re Estate of Stewart* (June 28, 2000), *Unreported*, Lorain Co. App. No .99CA007422 *Yoh v. Schlachter* (March 17, 2000),

Unreported, Williams App. No. WM-99-008; and *In re Estate of ross (I 997)*, 116 Ohio App. 3d, 402. Of these, *Estate of Stewart and Yoh* specifically found no violation of equal protection.

6*Newcomb v. Cincinnati Ins. Co.* (I 872), 22 Ohio St. 3 8.

IV. CONCLUSION

amicus Curiae National Association of Subrogation Professionals respectfully urges this Court to uphold the constitutionality of R.C. 4123.931 for all of the foregoing reasons.

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00-LW-2827 (9th)

IN RE: ESTATE OF WALTER L. STEWART, DECEASED

C.A. NO. 99CA007422
9th District Court of Appeals of Ohio, Lorain County.
Decided on June 28, 2000.

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN,
OHIO CASE NO. 96 ES 1203

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

OPINION

SLABY, Judge.

Appellant, Kokosing Construction Co. ("Kokosing"), appeals an order of the Lorain County Court of Common Pleas, Probate Division, that found R. C. 4123.931, the worker's compensation subrogation statute, to be unconstitutional. We reverse.

1.

In May 1996, Walter Stewart ("Decedent") was killed while in the course of his employment with Kokosing. As relevant to this appeal, he was survived by appellee Phyllis Brown-Stewart ("Claimant") and three minor children. Claimant and the minor children applied for worker's compensation benefits and received monthly benefits and payment of Decedent's medical and funeral expenses from Kokosing, a self-insuring employer under R.C. 4123.35(B).

Decedent's estate was opened in the Lorain County Court of Common Pleas, Probate Division, on November 1, 1996, solely for the purpose of pursuing one or more wrongful death actions. Claimant was named administratrix of the estate. In January 1997, Claimant filed a complaint against Charles Myles, who was alleged to have negligently caused the death of Decedent. The parties agreed to a settlement of \$950,000 in July 1997- the probate court approved the settlement on December 8, 1998.(Fn1)

In October 1998, Kokosing asserted its subrogation right under R. C. 4123.93 1 (fn2) and sought the sum of \$418,000 from the Myles settlement.(fn3) Claimant moved for summary judgment on May 17, 1999, arguing that the statute was unconstitutional. Kokosing opposed the motion.(fn4) On August 13, 1999, the probate court granted Claimant's motion and declared R.C. 4123.931 unconstitutional. Kokosing timely appealed to this court.

II.

Kokosing asserts three assignments of error.(fn5) We will address each in due course.

A. Standard of Review

APP. "1"

The probate court granted summary judgment in favor of Claimant on the issue of the Constitutionality of R.C. 4123.931. Summary judgment is proper under Civ.R. 56(C) if:

(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law- and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc. (1977), 50 Ohio St.2d 317, 327. Appellate review of a lower court's entry of summary judgment is de novo, applying the same standard used by the trial court. McKay v. Cutlip (1992), 80 Ohio App.3d 487, 491. The question of whether a statute passes constitutional scrutiny is a question of law, which we also review de novo. See Long Beach Assn., Inc. v. Jones (1998), 82 Ohio St.3d 574, 576.

B. Due Process/Takings

First Assignment of Error

The Probate Court erroneously ruled that Ohio Revised Code § 4123.931 [sic] violates Article I, §§ 1, 16 and 19 [sic] of the Ohio Constitution and the due process clause [sic] of the Fourteenth Amendment to the United States Constitution for the reasons advanced by Appellee.

In the first assignment of error, Kokosing argues that the probate court erred by finding that R.C. 4123.931 violated due process under the Ohio and United States Constitutions. We agree.

A statute is presumed constitutional and will be declared invalid only if the challenging party demonstrates beyond a reasonable doubt that the statute violates a constitutional provision. Desenco Inc. v. Akron (1999), 84 Ohio St.3d 535, 538. R.C. 4123.931 states:

(A) The payment of compensation or benefits pursuant to [R. C. Chapter 4123 creates a right of subrogation in favor of a statutory subrogee against a third party. A statutory subrogee's subrogation interest includes past payments of compensation and medical benefits and estimated future values of compensation and medical benefits arising out of an injury to or disability or disease of a claimant.

(B) A claimant shall notify a statutory subrogee of the identity of all third parties against whom the claimant has or may have a right of recovery. No settlement, compromise, judgment, award, or other recovery in any action or claim by a claimant shall be final unless the claimant provides the statutory subrogee with prior notice and a reasonable opportunity to assert its subrogation rights. If a statutory subrogee is not given that notice, the third party and the claimant shall be jointly and severally liable to pay the statutory subrogee the full amount of the subrogation interest.

(C) The right of subrogation under this chapter is automatic, regardless of whether a statutory subrogee is joined as a party in an action by a claimant against a third party. A statutory subrogee may assert its subrogation rights through correspondence with the claimant and the third party or their legal representatives. A statutory subrogee may

institute and pursue legal proceedings against a third party either by itself or in conjunction with a claimant. If a claimant disputes the validity or amount of an asserted subrogation interest, the claimant shall join the statutory subrogee as a necessary party to the action against the third party.

(D)The 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. Any settlement or compromise that excludes the amount of compensation or medical benefits shall not preclude a statutory subrogee from enforcing its rights under this section. The entire amount of any award or judgment is presumed to represent compensation and medical benefits and future estimated values of compensation and medical benefits that are subject to a statutory subrogee's subrogation rights unless the claimant obtains a special verdict or jury interrogatories indicating that the award or judgment represents different types of damages.

(E)Subrogation does not apply to the portion of any judgment, award, settlement, or compromise of a claim to the extent of a claimant's attorney's fees, costs, or other expenses incurred by a claimant in securing the judgment, award, settlement, or compromise, or the extent of medical, surgical, and hospital expenses paid by a claimant from the claimant's own resources for which reimbursement is not sought. No additional attorney's fees, costs, or other expenses in securing any recovery may be assessed against any subrogated claims of a statutory subrogee.

Kokosing, as a self-insuring employer, is a statutory subrogee. See R.C. 4123.93(13).

The probate court found R. C. 4123.931 to be unconstitutional under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Sections 1, 16, and 19, Article I of the Ohio Constitution. Section 1, Article I of the Ohio Constitution states: "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of *** acquiring, possessing, and protecting property * * *." Section 16, Article I of the Ohio Constitution guarantees that "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law[.]" "The'due course of law'provision is the equivalent of the 'due process of law' provision in the Fourteenth Amendment to the United States Constitution." Sorrell v. Thevenir (1994), 70 Ohio St. 3d 351, 354 (discussing the tests for due process under both constitutions). In addition, "where private property shall be taken for public use, a compensation therefor shall first be made in money[.]" Section 19, Article I of the Ohio Constitution.

In support of her motion for summary judgment, Claimant argued below that R. C. 4123.93 1 violated these constitutional provisions because (1) under R. C. 4123.93 1 (D), the entire amount of any settlement or judgment is subject to subrogation for worker's compensation benefits, regardless of whether or what amount of the settlement represents compensation, medical benefits, or the future value for such- and (2) under R. C. 4123.931 (A), the subrogation interest includes "estimated future values of compensation and medical benefits" when the future value of worker's compensation benefits may, as a result of remarriage or other condition, be less than the amount that is subject to subrogation.

In Yoh v. Schlachter (Mar. 17, 2000), Williams App. No. WM-99-008, unreported, 2000 Ohio App. LEMS 1057, the Sixth District Court of Appeals held that R.C. 4123.931 does not constitute a

taking or violate due process. The court found that the designation of the entire settlement as representing compensation and medical benefits was not unconstitutional because, under R. C. 4123.93 1 (D), a subrogee's right to subrogation was limited to compensation and medical benefits, and the right to subrogation did not attach to the portion of an award or jury representing other types of damages, as specified by a special verdict or jury interrogatories. Yoh supra, at *16-*18. The court also found that the statute was rationally related to the legitimate state interest of preventing double recoveries. Id. at *15-*16. The Yoh court also concluded that the subrogation of estimated future values of compensation and benefits did not violate these constitutional provisions. Id. at *19-*23.

Similar arguments were also rejected in In re Estate of Ross (1997), 116 Ohio App.3d 402. In Ross, the Third District Court of Appeals concluded that R. C. 4123.931 does not constitute a taking or violate due process. Id. at 406-07. The court also held that the statute did not violate the "open courts" provision of Section 16, Article I of the Ohio Constitution because the subrogee is merely being reimbursed for compensation that has been and will be paid and because the claimant could have avoided the presumption of R. C. 4123.93 1 (D) by seeking a special jury verdict. Ross, II 6 Ohio App.3d at 408.

We find Yoh and Ross persuasive. As such, we conclude that R.C. 4123.931 does not violate the Due Process Clause or Sections 1, 16 and 19, Article I of the Ohio Constitution. Accordingly, the probate court erred by holding the statute unconstitutional under those provisions and granting summary judgment in favor of Claimant. The first assignment of error is sustained.

C. Equal Protection

Second Assignment Of Error

The Probate Court erroneously ruled that Ohio Revised Code § 4123.931 [sic] violates Article I, § 2 [sic] of the Ohio Constitution and the equal protection clause [5iLc] of the Fourteenth Amendment to the United States Constitution for the reasons advanced by Appellee.

Kokosing argues in its second assignment of error that the probate court erred by holding R.C. 4123.931 unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Section 2, Article I of the Ohio Constitution. We agree.

"A statutory classification which involves neither a suspect class nor a fundamental right does not violate the Equal Protection Clause of the Ohio or United States Constitutions if it bears a rational relationship to a legitimate governmental interest." Menefee v. Queen City Metro (I 990), 49 Ohio St.3d 27, 29. The party urging the constitutionality of a statute need not support the argument with evidence; the statute may survive this lesser equal protection analysis based on rational speculation. Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ. (1999), 87 Ohio St.3d 55, 58.

Claimant argues that R. C. 4123.931 makes three legislative distinctions: (1) between claimants who receive settlements and claimants who receive jury verdicts accompanied by a special verdict or interrogatories; (2) between statutory subrogees and claimants- and (3) between claimants who seek legal recourse against third-party tortfeasors and other persons who seek legal recourse against thirdparty tortfeasors. Claimant does not assert that the distinctions involve a suspect class or fundamental right. Therefore, we undertake a rational basis review of the statute.

We conclude that R.C. 4123.931 furthers the legitimate governmental interest of discouraging collusive settlements that allow claimants to reap a double recovery. The statute does not allow a claimant to recover damages from a third-party tortfeasor that compensates the claimant for the same expenses and compensation for which he or she receives worker's compensation benefits. See @oh, supra, at * 15-* 16.

Furthermore, the statute is rationally related to this legitimate governmental interest. R.C. 4123.931 prohibits the subrogation of compensation that is not also covered by worker's compensation benefits.

Under R.C. 4123.931(E), subrogation cannot extend to any portion of a claimant's settlement or judgment that represents "attorney's fees, costs, or other expenses incurred by a claimant in securing" the settlement or judgment. A claimant also retains the portion of a settlement that represents the claimant's out-of-pocket expenses for which the subrogee has not paid. Id. As noted above, any portion of a jury award designated by interrogatories or special verdict as compensation for types of damages not covered by worker's compensation is also beyond the reach of subrogation. R.C. 4123.931(D). These protections are rationally related to the legislature's goal of preventing double recoveries by worker's compensation claimants.

Each of the three legislative distinctions asserted by Claimant are rationally related to the legitimate governmental interest of preventing double recoveries.

We hold that R.C. 4123.931 does not violate the equal protection guarantees of the United States and Ohio Constitutions. Therefore, the probate court's ruling to the contrary was in error, and Claimant was not entitled to summary judgment on this issue. The second assignment of error is sustained.

D. Wrongful Death Damages Limitation

Third Assignment of Error

The Probate Court erroneously ruled that Ohio Revised Code § 4123.931 [sic] violates Article I, § 19a [sic] of the Ohio Constitution for the reasons advanced by Appellee.

Kokosing contends in its third and final assignment of error that the probate court erred by holding that R.C. 4123.931 violates Section 19a, Article I of the Ohio Constitution. We agree. (fn6)

Section 19a, Article I states: "The amount of damages recoverable by civil action in the courts for death caused by the wrongful act, neglect, or default of another, shall not be limited by law." The court in *Ross*, 116 Ohio App. 3d at 408-09, stated:

Section 19a, Article I prohibits only the enactment of laws that place a specific limitation on the amount of recovery. In the present case, R. C. 4123.931 does not limit the amount of recovery an injured party is entitled to recover. On the contrary, R.C. 4123.931 merely compensates the employer for any past and future payments it has had, or will have, to pay as a result of the third-party tortfeasor's actions. Moreover, if the amount recovered from the tortfeasor is greater than the amount contributed by the employer under the workers' compensation law, the injured party is entitled to that additional amount.

(Citation omitted.) We agree with the reasoning of the *Ross* court. Accordingly, the probate court erred by holding that R.C. 4123.931 was unconstitutional under Section 19a, Article I of the Ohio Constitution. The third assignment of error is sustained.

III.

Kokosing's assignments of error are sustained. The judgment of the Lorain County Court of Common Pleas is reversed, and the cause is remanded for further proceedings consistent with this opinion.

Judgment reversed, and cause remanded.

BATCHELDER, P.J., QUILLIN, J., CONCUR

(Quillin, J., retired Judge of the Ninth District Court of Appeals, sitting by assignment pursuant to Section 6 (C), Article IV, Constitution.)

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BETTY D. MONTGOMERY, Ohio Attorney General, and ELISE W. PORTER and JAMES A. BARNES, Assistant Solicitors, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215-3428, for amicus curiae, Ohio Bureau of Workers' Compensation.

Footnotes:

1. Decedent's **estate** also filed suit against the hospital that provided care for Decedent immediately prior to his death. That action was settled for \$887,500.
2. Pursuant to Section 12, Am. Sub.H.B. No. 278, R.C. 4123.931 applies to subrogation of claims from a cause of action that accrued on or after September 29, 1995. In the case at bar, Decedent died in May 1996.
3. Other claims asserted against the **estate** were for unpaid child support in the amount of \$30,520.26; attorney fees and expenses in the amount of \$330,516.64; and various claims of the mother, siblings and children of Decedent that totaled approximately \$20,000.
4. Kokosing also argued that the probate court lacked jurisdiction to determine the amount of the settlement that was subject to its subrogation interest under R.C. 4123.931. This issue has not been raised on appeal and therefore will not be addressed.
5. On appeal, Claimant attempts to raise an issue not brought before the probate court. We decline to address this new argument. See LeFort v. Century 21-Maitland Realty Co. (1987), 32 Ohio St.3d 121, 123.
6. We also note that Claimant states on page 30 of her brief to this court that, "[d]ue to page limitations herein," she incorporates by reference her arguments on this issue from her briefs before the probate court. "We reiterate that incorporation by reference cannot be used to circumvent the page

limitations set by [Loc.R.7(D) of the Ninth District Court of Appeals] and will not be countenanced by this court. " Cincinnati Ins. Co. v. Colelli & Assoc., Inc. (June 17, 1998), Wayne App. No. 97CA0042, unreported, at 6, fn. 2, citing Durgan v. Ohio Bur. of Emp. Servs. (1996), 110 Ohio App.3d 545, 552.

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00-LW-1221 (6th)

Patsy A. **Yoh**, etc., Appellant
V.
Kevin M. Schlachter, et al., Appellees

Court of Appeals No. WM-99-008
6th District Court of Appeals of Ohio, Williams County.
Decided March 17, 2000

Trial Court No. 97-C1- 1 74

Jack G. Fynes, for appellant.

Michael J. Reidy, for appellees.

OPINION

KNEPPER, J.

This is an appeal from the judgment of the Williams County Court of Common Pleas which found that R.C. 4123.931 was constitutional and that appellee, the Ohio Turnpike Commission ("OTC"), had a valid and enforceable right of subrogation in the amount of \$313,182.82 against the proceeds of appellant's settlement of \$620,000 with the involved insurance companies. For the following reasons, we affirm the decision of the trial court.

On July 31, 1997, Richard Lee **Yoh** was a passenger in a motor vehicle operated by Duane E. Cisek, both employees of OTC acting in the scope of their employment. Both **Yoh** and Cisek exited the vehicle to perform maintenance work near the off ramp for Exit 2 of the Ohio Turnpike. Both were struck and killed by an oncoming vehicle operated and owned by Kevin Schlachter. **Yoh** was survived by his wife and administratrix of his estate, Patsy **Yoh** (appellant), and four children, one of whom was still a minor.

At the time of the accident, OTC was a self-insured employer for purposes of workers' compensation benefits. As such, OTC was a statutory subrogee within the meaning of R. C. 4123.93 1. Pursuant to R.C. 4123.59, appellant and her minor child received workers' compensation benefits as a result of **Yoh**'s death.

In addition to workers' compensation, the parties had insurance. Schlachter had motor vehicle liability insurance with Progressive Preferred Insurance Company ("Progressive"). OTC had motor vehicle insurance, including uninsured and underinsured coverage, with Continental Casualty Company ("Continental") that covered OTC employees acting in the course and scope of their employment. OTC also had an umbrella liability insurance policy with American Guaranty and Liability Insurance Company, aka Zurich American Insurance Group ("American Guaranty"), which included excess uninsured and underinsured motorist coverage for OTC employees acting in the course and scope of their employment. Appellant sued Schlachter, Continental, American Guaranty and OTC, claiming Schlachter's actions were negligent.

On behalf of the decedent and the surviving members of his family, appellant sought damages for

APP. "2"

injuries, including pain and suffering, mental anguish and terror, lost past and future wages, medical and funeral expenses, property damage, and loss of consortium. OTC filed a cross-claim against Continental and American Guaranty and filed a third-party complaint against Progressive. OTC asserted that, pursuant to R.C. 4123.391, it had a subrogation lien against any proceeds of the action. Appellant alleged that OTC's subrogation lien, pursuant to R.C. 4123.93 1, for workers' compensation benefits paid to appellant was unconstitutional and unenforceable.

OTC and appellant filed motions for summary judgment concerning the constitutionality of R. C. 4123.93 1. In appellant's motion, filed September 29, 1998, appellant made numerous arguments, such as, the subrogation statute, R.C. 4123.93 1, (1) did not apply to compensation paid on account of an employee's death; (2) violated Section 35, Article II of the Ohio Constitution- (3) violated the "impairment of contract" clause of the Ohio Constitution; (4) violated the "privileges and immunities" clause of the Ohio Constitution; (5) constituted an invalid, coercive waiver of workers' compensation benefits; (6) was fundamentally unfair; (7) violated plaintiff's rights of privacy and marriage; and (8) violated the "remedy by due course of law" clause of the Ohio Constitution insofar as the "estimated future value of compensation" had to be determined and paid from the proceeds of a settlement or verdict.

OTC responded to appellant's motion and argued that appellant's motion should be denied because: (1) the estate of Richard Yoh was not a workers' compensation claimant and, therefore, had no standing to challenge the subrogation rights of OTC; and (2) the subrogation statute (R.C. 4123.93 1) applied to all workers' compensation benefits including death benefits. OTC also moved for summary judgment in its behalf on the basis that (1) OTC had an enforceable subrogation interest pursuant to R. C. 4123.93 1; and (2) equity required recognition of OTC's subrogation interest.

On January 13, 1999, the trial court granted OTC's motion for summary judgment and denied appellant's motion. The trial court held that R.C. 4123.931 was constitutional and that OTC had a valid subrogation interest. The trial court further held that the value of OTC's subrogation interest would be determined at a later time.

On May 28, 1999, the trial court entered its final judgment entry. According to the trial court, appellant ultimately settled with Progressive, Continental and American Guaranty in the total amount of \$620,000. Schlachter and the insurance companies were therefore dismissed with prejudice. With respect to OTC's subrogation interest, the trial court found that, through April 1, 1999, OTC had paid \$38,087.41 in benefits, comprised of \$3,200 in funeral expenses, \$50 in medical expenses, and \$400.43 per week since August 20, 1997, in death benefits. The trial court further found that the "estimated future value of compensation" was \$275,095.41. The trial court made the following order with respect to the proceeds awarded OTC for future compensation payments:

"This amount, if reimbursed to OTC from the proceeds of the settlement, will be deposited in and allocated to OTC's administrative fund for the payment of general expenses, including workers' compensation benefits, as they become due."

Appellant timely appealed the trial court's ruling and raises the following issues in her assignment of error:

"1. ASSIGNMENT OF ERROR

"The Trial Court Erred In Granting Appellees' Motion For Summary Judgment And

Denying Appellant's Motion For Summary Judgment Concerning The Validity And Constitutionality Of O.R.C. § 4123.93 1.

"A. O.R.C. § 4123.931 Violates Article II, Section 35 Of The Ohio Constitution.

"B. O.R.C. § 4123.931 Limits Damages Recoverable For Death In Violation Of Article I, Section 19a Of The Ohio Constitution.

"C. O.R.C. § 4123.931 Mandates The Taking Of Property Without Compensation In Contravention Of Article I, Section 19 Of The Ohio Constitution.

"D. O.R.C. § 4123.931 Denies Injured Employees Their Remedy By Due Course Of Law' In Violation Of Article 1, Section 16 Of The Ohio Constitution.

"E. O.R.C. § 4123.931 Violates The Due Process' Requirement Of The 14th Amendment To The United States Constitution.

"F. As Part Of Am. Sub.H.B. 278, O.R.C. § 4123.931 Violates Article 11, Section 15(D) Of The Ohio Constitution.

"G. O.R.C. § 4123.931's Right Of Subrogation For Estimated Future Values Of Compensation' Violates Article 1, Section 16 Of The Ohio Constitution.

"H. O.R.C. § 4123.931 Is An Unlawful Impairment Of Contract In Violation Of Article U, Section 28 Of The Ohio Constitution.

"I. O.R.C. § 4123.931 Violates The Privileges Or Immunities' Clause Of Article 1, Section 2 Of The Ohio Constitution.

"J. O.R.C. § 4123.931 Constitutes A Waiver Under O.R.C. § 4123.80.

"K. O.R.C. § 4123.931 Violates Plaintiff s Rights Of Privacy And Marriage.

"L. O.R.C. § 4123.931 Does Not Apply To Workers' Benefits Paid On Account Of An Employee's Death.

"M. O.R.C. § 4123.931 Is Fundamentally

Unfair.

"N. In Re Estate Of Ross Is Inapposite And Distinguishable."

The issue in this case concerns the constitutionality of R.C. 4123.93 1. R.C. 4123.93 1(fnl) states that the payment of workers' compensation benefits creates a right of subrogation in favor of a selfinsuring employer, such as OTC, against a third party. The subrogation interest "includes past payments of compensation and medical benefits and estimated future values of compensation and medical benefits arising out of an injury to or disability or disease of a claimant. " R.C. 4123.93 1 (A).

Upon reviewing the trial court's decision of the parties' motions for summary judgment, we must apply the same standard as the trial court. Lorain Natl. Bank v. Saratoga Apts. (I 989), 61 Ohio App. 3d 127, 129. Accordingly, summary judgment will be granted when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of

the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

Initially, we note that legislative enactments are presumed constitutional. Adamsky v. Bucke@ Local School Dist. (1995), 73 Ohio St.3d 360, 361; R.C. 1.47(A). This presumption is rebuttable. However, before a court can declare a statute unconstitutional, it must appear beyond a reasonable doubt that the statute violates a constitutional provision. State ex rel. Dickman v. Defenbacher (1955), 164 Ohio St. 142, paragraph one of the syllabus. See, also, Fabrey v. McDonald Police Dept. (1994), 70 Ohio St.3d 351, 352.

The purpose of the workers' compensation law is set forth in Section 3 5, Article H, Ohio Constitution, which states in part:

"For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. ***"

According to the Ohio Supreme Court, the Workers' Compensation Act ("Act") "operates as a balance of mutual compromise between the interests of the employer and the employee whereby employees relinquish their common law remedy and accept lower benefit levels coupled with the greater assurance of recovery and employers give up their common law defenses and are protected from unlimited liability." Blankenship v. Cincinnati Milacron Chem. (1982), 69 Ohio St. 2d 608, 614.

The Act, however, was not designed to provide complete compensation for injured employees. Id. See, also, State, ex rel. Crawford, v. Indus. Comm. (1924), 10 Ohio St. 271, 275. For instance, under the Act, injured employees are unable to recover damages for pain and suffering, loss of consortium or for punitive damages. Blankenship at 614-615.

1. Section 35, Article H, Ohio Constitution

Appellant initially argues that R.C. 4123.931 violates Section 35, Article H of the Ohio Constitution. Specifically, appellant argues that R.C. 4123.931 "effectively deprives employees of the 'benefit of the bargain' and destroys the balance struck between employers and employees" because it allows a self-insuring employer to recover one hundred percent of the compensation and benefits it paid to an injured employee while continuing to enjoy immunity from suit. Appellant also argues that R.C. 4123.931 forces the plaintiff to choose between remedies although the constitution guarantees him the right to both. Appellant further argues that R.C. 4123.931 is contrary to the express language

of Section 3 5, Article 11 of the Ohio Constitution, insofar as the section states " [f]or the purpose of providing compensation to [workers] and their dependents, * * * laws may be passed * * * ." (Emphasis added.) Appellant asserts that the statute does not provide compensation, but rather takes it away.

Section 35, Article 11 of the Ohio Constitution states that laws may be passed to determine the "terms and conditions" upon which workers' compensation benefits shall be made. R.C. 4123.931 requires that a self-insured employer must be reimbursed from the proceeds that are recovered from a third-party tortfeasor for amounts the employer paid and will pay in the form of workers' compensation benefits. R. C. 4123.931 does not interfere with the employers' initial obligation to pay workers' compensation benefits. Rather, the statute merely prevents the employee/beneficiary from receiving a double recovery for the same damages. Insofar as R.C. 4123.931 specifies a term and condition concerning how funds are to be distributed, we find that the statute does not violate Section 35, Article][I of the Ohio Constitution.

With respect to the "bargain" between employers and employees, we also find that R.C. 4123.931 does not violate Section 35, Article 11 of the Ohio Constitution. Employers are still required to provide workers' compensation benefits at the onset. And, although employers may recoup the entire amount they paid in workers' compensation benefits from the tortfeasor, in the end, the employees/beneficiaries still have received all the compensation and medical benefits to which they are entitled. The issue is not whether the amounts representing compensation and medical benefits comes from the employer's pocket or the tortfeasor's pocket, but whether appellant received those benefits. R.C. 4123.931 does not interfere with appellant's receipt of those benefits.

Furthermore, we disagree with appellant's argument that R.C. 4123.931 forces the plaintiff to choose between remedies. The Workers' Compensation Act does not provide for employees or beneficiaries to be compensated for damages such as pain and suffering, loss of consortium, etc. As such, in order to recover these other damages, the only available remedy is from the tortfeasor. Accordingly, we find not well-taken appellant's arguments concerning the alleged violation of Section 35, Article I of the Ohio Constitution.

II. Sections 16, 19, 19a, Article 1, Ohio Constitution

In an effort to avoid repetition of our analysis, we will attempt to consolidate several of appellant's other arguments. Appellant argues that OTC should not be subrogated to the entire amount of her settlement with the tortfeasor because to do so violates several of her constitutional rights. Specifically, appellant argues that R.C. 4123.931 limits the damages recoverable in a wrongful death action, in violation of Section 19a, Article I, Ohio Constitution- denies her a remedy by due course of law, in violation of Section 16, Article 1, Ohio Constitution and the Fourteenth Amendment to the United States Constitution; and constitutes a taking, in violation of Section 19, Article 1, Ohio Constitution.

We initially note that the only appellate court that has considered these identical arguments found them not well-taken. See *In re Estate of Ross* (1997), 116 Ohio App.3d 402. Appellant argues that Ross is inapposite and distinguishable from the case at hand because she raised in her appeal more issues than were addressed in Ross. We, however, find that Ross is persuasive and applicable insofar as it addresses appellant's arguments.

Appellant argues that R.C. 4123.931 reduces the amount of her settlement with the tortfeasor, which she asserts limits the amount she can receive for her wrongful death action and constitutes a

taking. We disagree.

R.C. 4123.931 does give employers a subrogation interest in beneficiaries' wrongful death claims. However, this interest neither limits the amount of damages beneficiaries are entitled to receive in wrongful death cases nor constitutes a taking. Rather, R.C. 4123.931 merely prevents beneficiaries from recovering twice, once from the employer and once from the tortfeasor, for the same damages. As stated above, regardless of an employer's subrogation rights, beneficiaries nevertheless fully recover the amount of damages to which they are entitled for lost compensation and medical expenses. Moreover, beneficiaries are fully entitled to any damages obtained from the tortfeasor, in excess of the amount paid by the employer for compensation and medical benefits, for damages incurred as a result of pain and suffering, loss of consortium, or the like. Accord Ross, supra at 406-407.

Additionally, appellant argues that R. C. 4123.93 1 denies her rights to a meaningful remedy by due course of law and due process, and that it constitutes a taking, because it states 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. " Appellant argues that this allows employers to be subrogated to amounts that are not actually awarded for compensation and medical expenses.

Although the entire amount of any award or judgment is presumed to represent compensation and medical benefits that are subject to a statutory subrogee's subrogation rights, R. C. 4123.93 1 (D) allows claimants to obtain "a special verdict or jury interrogatories indicating that the award or judgment represents different types of damages." As such, by allowing the jury to designate the nature of the award, the funds to which a self-insured employer is subrogated can be limited to the amount of damages that actually represents compensation and medical benefits. Accordingly, because R.C. 4123.931 allows for such a designation, we find that R.C. 4123.391 does not violate appellant's rights to a meaningful remedy by due course of law or due process, or that it constitutes a taking.

As support of her argument, appellant relies heavily on the analysis in Sorrell v. Thevenir (1994), 69 Ohio St.3d 415, wherein the Ohio Supreme Court found R.C. 2317.45 to be unconstitutional. R.C. 23 17.45 required the entire jury award against the tortfeasor to be reduced by collateral source benefits, regardless of whether the collateral benefits were actually duplicated in the jury's verdict. The Ohio Supreme Court held that this allowed trial courts to enter judgments in disregard of the jury's verdict, thereby violating one's right to jury trial, due process, equal protection, and meaningful remedy. Unlike R.C. 2317.45, R.C. 4123.931 allows a plaintiff to obtain a special verdict designating the nature of the award, thus limiting the amount to which the statutory subrogee can be subrogated. Accordingly, we find that Sorrell is factually distinguishable from the case at hand and, therefore, its analysis is unpersuasive.

We note that no designation of damages is available when settling with a tortfeasor; nevertheless, unlike R.C. 2317.45, appellant could have sought a special verdict at trial. Moreover, appellant knew when she settled with the tortfeasor that she was foregoing her ability to have the damages designated as anything other than compensation and medical benefits and that the entire settlement amount would be subjected to OTC's subrogation interest. Appellant must have taken these factors into consideration when agreeing upon a settlement amount.

Appellant additionally argues that the rationale for R. C. 4123.93 1, to avoid a double recovery, is no longer a valid purpose. According to appellant, Am. Sub.H.B. No. 350's Tort Reform Act, "will substantially reduce, if not eliminate, the risk of a double recovery by injured

employees." Am. Sub.H.B. No. 350, however, was declared unconstitutional in toto. State

ex rel. Ohio Academy of Trial Lawyers v. Sheward (I 999), 86 Ohio St. 3 d 45 1. We therefore find appellant's arguments in this regard not well-taken.

HI. Estimated Future Values of Compensation and Benefits

Appellant asserts that the portion of R.C. 4123.931 that grants a statutory subrogee a subrogation interest in "estimated future values of compensation and medical benefits" is unconstitutional because it constitutes a taking and violates her rights to a remedy by due course of law and to privacy.

a. Taking

With respect to appellant's taking issue, we note that there may exist a potential problem with respect to the "estimated future values of compensation and medical benefits" aspect of R.C. 4123.93 1. For instance, OTC will receive in a lump sum the entire estimated future amount it is supposed to pay to appellant and her minor child. The statute, however, fails to specify what is to be done with any remainder of this sum once OTC is no longer required to pay workers' compensation, such as, if appellant remarries or dies. The entire amount could be paid in the form of workers' compensation benefits, in which case there arguably would be no taking issue because the beneficiaries would have received the full amount of compensation and medical benefits to which they were entitled. However, if OTC's obligation to pay workers' compensation benefits expired with money still remaining in the pool of funds obtained through R. C. 4123.93 1, then OTC arguably would have a windfall if it was not required to release the remainder to appellant or her estate.

We find, however, that because this situation has not yet arisen, the matter is not ripe for our consideration. Therefore, we specifically hold that, although the argument may potentially arise at a later time, we reach no determination on the merits as to the constitutionality of R. C. 4123.931 insofar as it grants statutory subrogees a right of subrogation with respect to estimated future compensation and medical benefits. Accordingly, we find that R.C. 4123.931 does not violate Section 19, Article I of the Ohio Constitution with respect to reimbursement of workers' compensation benefits that were already paid by the employer to the beneficiary; however, we make no finding with respect to this issue as it concerns the award and distribution of estimated future compensation and medical benefits.

b. Remedy by Due Course of Law

With respect to the right of subrogation for "estimated future values of compensation and medical benefits," appellant argues that it denies her a remedy by due course of law, in violation of Section 16, Article I of the Ohio Constitution. Appellant asserts that "future lost wages are only recoverable in civil action upon proof of reasonable certainty and must be reduced to present value." Whereas, R.C. 4123.931 creates a right of recovery for "estimated future values of compensation and medical benefits * * *," which, appellant asserts, is not defined in R. C. Chapter 4123, thereby leaving "to the total discretion each self-insured employer to decide how the 'estimated future value' of compensation should be determined. " Further, appellant argues:

"[T]he criteria used to predict future lost wages in a civil action are entirely different from the criteria utilized to calculate workers' compensation death benefits. In this case, for example, plaintiff's claim for future lost wages was based upon Richard Yoh's future projected earnings and his work- life expectancy. However, the value of estimated future

workers' comp payments is, per statute, based upon Richard Yoh's prior earnings, the life (not work-life) expectancy of plaintiff (not Richard Yoh) and the possibility of plaintiff's remarriage. "

Initially, we note that, contrary to appellant's assertion, the court, not the self-insured employer, determines what constitutes "estimated future values of compensation and medical benefits." Nevertheless, the phrase "estimated future values of compensation and medical benefits" is not defined in the statute. Undefined words used in a statute must be accorded their usual, normal, or customary meaning. State ex rel. Hawkins v. Pickaway Cty. Bd. of Elections (1996), 75 Ohio St.3d 275, 277; R.C. 1.42. Accordingly, we find that it is within the trial court's discretion to calculate and determine the "estimated future values of compensation and medical benefits." We therefore find that, even though R.C. 4123.931 does not set forth the formula for determining the estimated future value of benefits, it does not violate Section 16, Article I of the Ohio Constitution, because it provides for a remedy by due course of law.

In this case, the "estimated future values of compensation and medical benefits" were calculated by determining the present value of the amount of future benefits to be paid. Todd Starker, expert for OTC, testified that this amount was determined by multiplying \$400.43 (the current weekly amount of workers' compensation benefits received) by six hundred eighty-seven (the annuity factor assigned to a forty-seven year old surviving spouse from the actuarial tables of the BWC). Starker further testified that the annuity factor of six hundred eighty-seven included the statistical likelihood of remarriage. Based on this computation, Starker testified that the estimated future value of compensation and medical benefits totaled \$275,095.41. Appellant offered no other method of computation in opposition. Accordingly, we find that the method of calculation used by the trial court in this case to determine the "estimated future values of compensation and medical benefits" was reasonable.

c. Right to Privacy

Appellant argues that R.C. 4123.931 violates appellant's rights of privacy and marriage, in violation of the Fourteenth Amendment to the United States Constitution. Appellant asserts that freedom to marry has long been recognized as one of the basic civil rights of man and is a fundamental "right of privacy" implicit in the Due Process Clause. Appellant argues that R.C. 4123.931 interferes with her right to marry because, in order to receive the full amount of the estimated future values of compensation and benefits recovered by OTC from the tortfeasor, appellant will have to remain unmarried.

We noted above that there is a potential taking issue with respect to the award for "estimated future values of compensation and medical benefits." However, because that situation has not yet arisen, we found that the issue was not yet ripe for our review. Likewise, insofar as there is no evidence that appellant has remarried or that any remarriage has caused her to lose a portion of the funds recovered by OTC pursuant to R.C. 4123.931, we find that this issue is also not ripe for our review. Accordingly, we specifically do not reach a decision with respect to appellant's argument that R.C. 4123.931 violates her rights of privacy and marriage.

IV. One Subject Rule

Section 15(D), Article 11, Ohio Constitution

Appellant argues that R.C. 4123.931 violates Section 15(D), Article II of the Ohio Constitution, which states in part:

"(D) No bill shall contain more than one subject, which shall be clearly expressed in its title. * * * "

Specifically, appellant asserts that Am. Sub.H.B. No. 278, which included R.C. 4123.93 1, was primarily an appropriations bill for BWC funds and accounts" and established "detailed reporting requirements, procedures and functions for the Bureau and its various divisions." As such, appellant argues that there clearly is no common purpose or relationship between these enactments and R.C. 4123.931.

Appellant compares Am.Sub.H.B. No. 278 with Am.Sub.H.B. No. 117, which was found to violate the one-subject rule of Section 15(D), Article 11, Ohio Constitution. See Simmons-Harris v. doff (1999), 86 Ohio St.3d 1. In deteffnining that Am.Sub.H.B. No. 117 violated the one-subject rule, the Ohio Supreme Court held:

"It is obvious that none of the first six provisions of Am. Sub.H.B. No. 117 has anything to do with the School Voucher Program. Am. Sub.H.B. No. 117 contains many other examples of topics that 'lack a common purpose or relationship.' [Footnote omitted.] Am.Sub.H.B. No. 117 contained three hundred eighty-three amendments in twenty-five different titles of the Revised Code, ten amendments to renumber, and eightyone new sections in sixteen different titles of the Revised Code."

The first six provisions of Am. Sub.H.B. No. 117 included topics concerning: the residency of certain elected officials; entitlement of certain government entities to contract for private operation of correctional facilities; confidentiality of certain ethics committee files; requirement of candidates for elective office to file financial statements with the Ethics Commission; creation of a joint legislative committee on federal funds; and requirement that certain state agencies submit proposals to that committee.

With respect to Section 15(D), Article II, Ohio Constitution, the Ohio Supreme Court stated as follows:

II*** we have adopted the position that 'the one-subject provision is not directed at plurality but at disunity in subject matter.' [State ex rel. Dix v. Celeste (I 984), 1 1 Ohio St.3d 141, 1461. See, also, State ex rel. Hinkle v. Franklin Cty. Bd. of Elections (1991), 62 Ohio St. 3 d 145, 148, * * *. Thus, 'the mere fact that a bill embraces more than one topic is not fatal, as long as a common purpose or relationship exists between the topics.' [Hoover v. Franklin Cty. Bd. of Commrs. (1985), 19 Ohio St.3d 1, 61; State ex rel. Ohio AFL-CIO v. Voinovich (I 994), 69 Ohio St. 3 d 225, 229]. However, 'when there is an absence of common purpose or relationship between specific topics in an act and when there are no discernible practical, rational or legitimate reasons for combining the provisions in one act, there is a strong suggestion that the provisions were combined for tactical reasons, i.e., logrolling. Inasmuch as this was the very evil the one-subject rule was designed to prevent, an act which contains such unrelated provisions must necessarily be held to be invalid in order to effectuate the purpose of the rule.' Dix, 11 Ohio St.3d at 145, ***. See, also, Beagle v. Walden (1997), 78 Ohio St.3d 59, 62, ***; Hinkle, Supra,

62 Ohio St.3d at 148-149, ***; Hoover, supra, 19 Ohio St.3d at 6, ***." State ex rel. OATL v. Sheward (1999), 86 Ohio St.3d 451, 496-497.

In contrast to Am. Sub.H.B. No. I 1 7, Am. Sub.H.B. No. 278 concerned only workers' compensation matters. Am. Sub.H.B. No. 278 amended five sections of existing workers' compensation law:

1. R.C. 4121.62, entitled "Contracts for rehabilitation services; obtaining federal funds; rehabilitation division; fees; Camera center fund";
2. R.C. 4123.32, entitled "Rules for administering state insurance fund";
3. R. C. 4123.3 5, entitled "Payment of premiums; certificate of payment; granting of self-insuring employer status; self-insured construction projects";
- 4.R.C. 4123.51 1, entitled "Notice to claimant and employer; information from other persons; investigations; orders; administrative appeals-repayment schedule"; and
5. R.C. 4123.93, entitled "Definitions."

In addition, Am. Sub.H.B. No. 278 enacted a new workers' compensation section, R.C. 4123.93 1, entitled "Subrogation right of statutory subrogee against third party". We find that although Am.Sub.H.B. No. 278 addressed a variety of workers' compensation issues, there is a common relationship between the topics. See Sheward, supra, citing Hoover, supra. Accordingly, we find not well-taken appellant's argument concerning the alleged violation of the one-subject rule, Section 15 (D), Article II, Ohio Constitution.

V. Impairment of Contract

Section 28, Article 11, Ohio Constitution

Appellant next argues that R.C. 4123.931 is an unlawful impairment of contract in violation of Section 28, Article 11 of the Ohio Constitution, which states:

"The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state."

Specifically, appellant asserts that, pursuant to Section 35, Article II of the Ohio Constitution, there is a contractual agreement between employers and employees of Ohio. Employers agreed that they would pay, without proof of fault, reasonable compensation to employees injured on the job. In exchange for that promise, the employees agreed that employers would be immune from suit for tort liability. Appellant argues:

"Now, however, the subrogation statute has imposed a very material and unilateral change upon that constitutional contract. The statute requires injured employees to repay all benefits received from their employers if the employees exercise their fundamental

right to seek damages from third parties. In that event, however, the employers do not relinquish their immunity. Very clearly, the subrogation statute imposes an unlawful and one-sided impairment upon the contract of employment."

Generally, the rights conferred by statute are not contractual by nature and, therefore, do not preclude subsequent legislative modification or abrogation. In considering whether a statute creates an unconstitutional impairment of contract in violation of Section 28, Article 11 of the Ohio Constitution, the Ohio Supreme Court held as follows:

"In analyzing whether a statute violates the Contract Clause, 'generally, we first ask whether the change in state law has "operated as a substantial impairment of a contractual relationship. "' Gen. Motors Corp. v. Romein (I 992), 503 U. S. 181, 186, * * * quoting Allied Structural Steel Co. vs spannaus (1978), 438 U.S. 234, 244, ***. 'This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial., Romein, 503 U.S. at 186, ***.

"In determining whether a contractual relationship exists in the first instance, we are mindful that a state legislative enactment may be deemed a contract for purposes of the Contract Clause only if there is a clear indication that the legislature has intended to bind itself in a contractual manner. Natl. RR. Passenger Corp. v. Atchison. Topeka & SantaFe Ry. Co. (1985), 470 U.S. 451, 465-466, ***. Accordingly, we begin with a presumption that, absent a clearly stated intent to do so, statutes do not create contractual rights that bind future legislatures. Id. Courts have coined the phrase 'unmistakability doctrine' for this legal principle. See, "., McGrath v. Rhode Island Retirement Bd. (C.A. 1, 1996), 88 F.3d 12, 19, citing United States v. Winstar Corp. (1996), 518 U.S. 839, ***. The requirement inherent in the unmistakability doctrine that

"the government's obligation unmistakably appear thus serves the dual purposes of limiting contractual incursions on a State's sovereign powers and of avoiding difficult constitutional questions about the extent of state authority to limit the subsequent exercise of legislative power." ' Parker v. Wakelin (C. A. 1, 1997) , 123 F. 3 d 1, 5, quoting United States v. Winstar CM., 518 U.S. at 875, ***. The unmistakability doctrine is useful not only in determining whether a contractual relationship exists, but also in 'defining the contours' of any contractual obligation that is found to exist. Atchison, 470 U. S. at 466, * * * . "

State ex rel. Horvath v. State Teachers Retirement Bd. (1998), 83 Ohio St.3d 67, 76.

Although Section 35, Article 11 of the Ohio Constitution, creates a system that provides mutual benefit to both employer and employee, neither the Ohio Constitution, nor R. C. 4123.35, concerning an employer's obligation to make premium payments into the workers' compensation fund, contain a clear intent to create contractual rights that bind future legislatures. See Horvath, supra. To the contrary, Section 35, Article 11, Ohio Constitution, specifically grants the legislature the authority to create a state workers' compensation fund and to determine the terms and conditions of such a fund. Accordingly, insofar as there is no contractual relationship, we find that R.C. 4123.931 is not an unlawful impairment of contract, in violation of Section 28, Article 11 of the Ohio Constitution.

VI. Privileges or Immunities

Section 2, Article 1, Ohio Constitution

Appellant argues that R.C. 4123.931 violates Section 2, Article I of the Ohio Constitution, which states that "no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly." Specifically, appellant asserts that the subrogation statute constitutes a special immunity because it allows OTC to recover one hundred percent of the workers' compensation benefits paid, yet still maintain immunity.

Appellant's argument is nonsensical because Section 35, Article III of the Ohio Constitution, grants employer immunity for participating in workers' compensation system, not R. C. 4123.93 1. Notwithstanding, appellant's argument fails because R. C. 4123.93 1 does not state that it "may not be altered, revoked, or repealed by the general assembly." See Section 2, Article I, Ohio Constitution. Accordingly, we find appellant's argument not well-taken.

VII. Unlawful Waiver of Benefits

Appellant next argues that R.C. 4123.931 constitutes a waiver pursuant to R.C. 4123.80. Appellant asserts that R.C. 4123.931 "functions as a waiver of an injured employee's right to receive and retain workers' [compensation] benefits" because it forces appellant to make a choice to "either receive and retain workers' [compensation] benefits without pursuing a civil action against third parties for damages, or pursue damages against third parties and waive the right to retain benefits previously paid and to receive future benefits owed."

R.C. 4123.80 states that "[n]o agreement by an employee to waive his rights to compensation under this chapter is valid," except under certain circumstances which do not apply herein. As stated above, R.C. 4123.931 only acts to reimburse employers for the amount of compensation and medical benefits that they have already paid or will pay in the future. As such, even though an employer is subrogated to the amounts it paid or will pay, the beneficiaries nevertheless will have received the full value of workers' compensation benefits to which they are entitled. Accordingly, we find that R. C. 4123.93 1 does not require any waiver of a beneficiary's right to receive workers' compensation benefits.

VIH. Application to Death Benefits

Appellant next argues that R.C. 4123.931 does not apply to benefits paid on account of an employee's death. R.C. 4123.93 1 (A) states, in pertinent part: "A statutory subrogee's subrogation interest includes past payments of compensation and medical benefits and estimated future values of compensation and medical benefits arising out of an injury to or disability or disease of a claimant." (Emphasis added.) Appellant argues that because "death" is not specifically listed, the subrogation interest does not include damages arising as a result of death.

With respect to rules of statutory construction, the Supreme Court of Ohio has stated:

"A number of basic rules must be followed by a reviewing court in construing the regulations and statutes at issue. First, all statutes which relate to the same general subject matter must be read in *pari materia*. See *Maxfield v. Brooks* (1924), 110 Ohio St. 566 ***; *State, ex rel. Bigelow, v Butterfield* (1936), 132 Ohio St. 5, ***.

And, in reading such statutes in pari materia, and construing them together, this court must give such a reasonable construction as to give the proper force and effect to each and all such statutes. Maxfield v. Brooks, supra. The interpretation and application of statutes must be viewed in a manner to carry out the legislative intent of the sections. See Benjamin v. Columbus (1957), 104 Ohio App. 293, *** affirmed (1957), 167 Ohio St. 103, ***; In re Hesse (1915), 93 Ohio St. 230, ***. All provisions of the Revised Code bearing upon the same subject matter should be construed harmoniously. State v. Glass (I 971), 27 Ohio App. 2d 214, * * *; State v. Hollenbacher (I 920), 1 01 Ohio St. 478, ***. This court in the interpretation of related and co-existing statutes must harmonize and give full application to all such statutes unless they are irreconcilable and in hopeless conflict. Couts v. Rose (1950), 152 Ohio St. 458,

Johnson's Markets, Inc. v. New Carlisle Dept. of Health (1991), 58 Ohio St.3d 28, 35.

R.C. 4123.931 does not specifically state that it applies to compensation awarded for death; however, when construed together with statutes of the same general subject matter, i.e. workers' compensation, we find that a statutory subrogee must also have a subrogation interest in compensation paid as a result of death. R.C. 4123.93(A) defines "claimant" as "a person who is eligible to receive compensation or medical benefits under this chapter or Chapter 4121., 4127., or 413 1. of the Revised Code, including any dependent or person whose eligibility is the result of an injury to or occupational disease of another person." (Emphasis added.) A "dependent" is only entitled to receive workers' compensation benefits upon the death of a covered employee. See, ". , R.C. 4123.54. Accordingly, insofar as a statutory subrogee has a subrogation interest in benefits paid to a "claimant," we find that R. C. 4123.391 applies in instances of death. To construe the statute otherwise would create an absurd result.

Sallach v. United Airlines, Inc. (1997), 121 Ohio App.3d 89, held that the subrogation rights created by former R. C. 4123.93 did not include a right of subrogation for payments made for wrongful death or survivorship claims. We find, however, that Sallach is distinguishable on the facts. Former R.C. 4123.93 stated that a self-insuring employer was "subrogated to all the rights of [the] employee against a third-party tortfeasor. " (Emphasis added.) Because a wrongful death claim is a claim belonging to the wrongful death statutory beneficiaries, and not the decedent employee, the court held that the employer did not have a right of subrogation in such instances. To the contrary, R.C. 4123.931 specifies that, rather than an "employee," the statutory subrogee is subrogated to the amount of benefits paid to a "claimant," which specifically includes dependents. Unlike an "employee," a dependent can be a party to a wrongful death action. Accordingly, insofar as the wording between former R.C. 4123.93 and current R.C. 4123.931 are dissimilar, we find that the rationale in Sallach is inapplicable to the present subrogation statute.

IX. Fundamentally Unfair

Appellant next asserts that R.C. 4123.931 is fundamentally unfair because: (1) self-insured employers are not required to pay a share of the attorney fees and court costs incurred as a result of the litigation against the third-party tortfeasor; and (2) "it forces injured employees to take their actions against negligent third parties to trial rather than negotiate a reasonable settlement."

We disagree with appellant's arguments. First, R.C. 4123.93(E) states that "[s]ubrogation does not apply to the portion of any judgment, award, settlement, or compromise of a claim to the extent of a claimant's attorney's fees, costs, or other expenses incurred by a claimant in securing the judgment,

award, settlement, or compromise, or the extent of medical, surgical, and hospital expenses paid by a claimant from the claimant's own resources for which reimbursement is not sought." (Emphasis added.) Hence, amounts paid for attorney's fees, costs, and other expenses are automatically deducted from the amount that is subject to subrogation. Moreover, we find that R.C. 4123.931 is not fundamentally unfair because, despite the statute, appellant would be responsible for fronting the litigation expense of an action brought against a tortfeasor.

Second, we find that R.C. 4123.931 does not force injured employees/beneficiaries to try, rather than settle, their actions against third-party tortfeasors. Appellant, like all claimants, had a choice to try her case and have the jury determine what portion of the award against the tortfeasor represented compensation and medical benefits, or settle and take into consideration, when agreeing on a settlement amount, that OTC would be subrogated to a portion of her settlement. There are advantages and disadvantages to either scenario; however, we find that R.C. 4123.931 is not fundamentally unfair because the decision whether to settle or try the case is left to appellant.

X. Conclusion

Accordingly, we find appellant's sole assignment of error, and her fourteen sub-parts, not well-taken. As such, we find that the trial court did not err in granting summary judgment in favor of OTC. On consideration whereof, the court finds substantial justice has been done the party complaining and the judgment of the Williams County Court of Common Pleas is affirmed. Appellant is ordered to pay the court costs of this appeal.

JUDGEMENT AFFIRMED.

Melvin L. Resnick, J., Richard W. Knepper, P.J. CONCUR.

Footnotes:

1. RC. 4123.931 states in part:

"(A) The payment of compensation or benefits pursuant to this chapter or Chapter 4121., 4127., or 4131., of the Revised Code creates a right of subrogation in favor of a statutory subrogee against a third party. A statutory subrogee's subrogation interest includes past payments of compensation and medical benefits and estimated future values of compensation and medical benefits arising out of an injury to or disability or disease of a claimant.

"(C) The right of subrogation under this chapter is automatic, regardless of whether a statutory subrogee is joined as a party in an action by a claimant against a third party. A statutory subrogee may assert its subrogation rights through correspondence with the claimant and the third party or their legal representatives. A statutory subrogee may institute and pursue legal proceedings against a third party either by itself or in conjunction with a claimant. If a claimant disputes the validity or amount of an asserted subrogation interest, the claimant shall join the statutory subrogee as a necessary party to the action against the third party.

"(D) The 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. Any settlement or compromise that excludes the amount of compensation or medical benefits shall not preclude a statutory subrogee from enforcing its rights under this section. The entire amount of any award or judgment is presumed to represent compensation and medical benefits and future estimated values of compensation and medical benefits that are subject to a statutory subrogee's subrogation rights unless the claimant obtains a special verdict or jury interrogatories indicating that the award or judgment represents different types of damages.

" (E) Subrogation does not apply to the portion of any judgment, award, settlement, or compromise of a claim to the extent of a claimant's attorney's fees, costs, or other expenses incurred by a claimant in securing the judgment, award, settlement, or compromise, or the extent of medical, surgical, and hospital expenses paid by a claimant from the claimant's own resources for which reimbursement is not sought. No additional attorney's fees, costs, or other expenses in securing any recovery may be assessed against any subrogated claims of a statutory subrogee. "

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SERVICE

A copy of the foregoing Brief of Amicus Curiae National Association of Subrogation

Professionals in Support of Respondent, C. James Conrad, Administrator, Ohio Bureau of

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