

STATE OF MICHIGAN
COURT OF APPEALS

GORDON M. PERRY,

Plaintiff-Appellee,

and

STATE OF OHIO, WORKERS'
COMPENSATION BUREAU,

Intervening Plaintiff-Appellant,

v

MARV BRODBECK and MARV BRODBECK,
INC.,

Defendants-Appellees.

UNPUBLISHED

February 9, 2001

Nos. 214377;214404

Monroe Circuit Court

LC No. 96-004897-CH

Before: Smolenski, P.J., and Wilder and Meter, JJ.

PER CURIAM.

In these consolidated appeals, intervening plaintiff State of Ohio Workers' Compensation Bureau appeals from a circuit court order dismissing its subrogation complaint. We reverse and remand.

On July 6, 1994, plaintiff Gordon Perry was injured in the course of his employment, while delivering fuel to defendants' Michigan facility, and he received Ohio workers' compensation benefits for his injuries. Plaintiff filed this tort action against Michigan defendants and the bureau intervened, claiming a right of subrogation under Ohio Rev Code § 4123.93. The instant appeal concerns the effective date of that statute.

The Ohio Legislature provided that the statute would take effect on October 20, 1993, but the Ohio Supreme Court stayed the effective date of the statute for a ninety day period, by opinion issued on April 8, 1994. *State ex rel Ohio AFL-CIO v Voinovich*, 69 Ohio St 3d 225, 236; 631 NE2d 582 (1994) ("*Voinovich I*"). The Ohio Supreme Court later clarified that opinion, holding that the stay applied only to programs authorized but not yet implemented on April 8, 1994. *State ex rel Ohio AFL-CIO v Voinovich*, 69 Ohio St 3d 1208; 632 NE2d 907 (1994) ("*Voinovich II*"). In the present case, plaintiff moved to dismiss the bureau's subrogation

complaint, asserting that the Ohio subrogation statute did not become effective until July 7, 1994, after the expiration of the Ohio Supreme Court's ninety day stay. Plaintiff therefore argued that the bureau did not have a right of subrogation in plaintiff's case because his injury occurred on July 6, 1994. The trial court agreed and granted plaintiff's motion to dismiss the bureau's subrogation complaint.¹

When reviewing a motion decided under MCR 2.116(C)(8), this Court accepts as true all factual allegations made in support of the claim, and any reasonable inferences drawn from those facts. *Stott v Wayne Co*, 224 Mich App 422, 426; 569 NW2d 633 (1997), aff'd 459 Mich 999 (1999). Summary disposition for failure to state a claim should be upheld only when the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and thus justify recovery. *Id.*

At the time of the trial court's decision, Ohio law was unsettled regarding the effective date of § 4123.93. In *Nationwide Mutual Ins Co v Kidwell*, 117 Ohio App 3d 633, 643; 691 NE2d 309 (1996), the Ohio Court of Appeals ruled that the statute applied to "any action or claim brought pursuant to a cause of action that arose on or after' October 20, 1993." Other districts of the Ohio Court of Appeals interpreting *Voinovich I* and *Voinovich II* later ruled that the statute became effective on a later date, and that no right of subrogation existed as to the rights of injured employees against third-party tortfeasors where the employees were injured before the effective date of the statute. *Hyams v Bureau of Workers' Compensation*, 126 Ohio App 3d 755, 760-761; 711 NE2d 307 (1998) (statute became effective on July 7, 1994); *Murphy v Clarkliff of Cleveland*, unpublished opinion of the Ohio Court of Appeals, issued May 22, 1997 (Docket No. 71103) (statute became effective on July 8, 1994). In the present case, the trial court relied on the *Hyams* and *Murphy* decisions to grant plaintiff's motion. While we cannot fault the trial court's reasoning in light of the law as it existed at the time, the Ohio Supreme Court subsequently resolved this conflict, ruling that the stay described in *Voinovich I* and *Voinovich II* did not delay the effective date of the subrogation provision, which took effect on October 20, 1993. *Laidlaw Waste Systems, Inc v Consolidated Rail Corp*, 85 Ohio St 3d 413, 414; 709 NE2d 124 (1999). Accordingly, the bureau's subrogation complaint should not have been dismissed² and the trial court erred in granting plaintiff's motion.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter

¹ Plaintiff and defendants then entered into a settlement agreement and stipulated to a voluntary dismissal of plaintiff's complaint.

² Because the issue regarding the effect of the voluntary dismissal on the bureau's right to relief has not been presented to the trial court, and because the parties have not effectively briefed this issue, we decline to address it. *Palo Group Foster Care, Inc v Dep't of Social Services*, 228 Mich App 140, 152; 577 NW2d 200 (1998).