



that the rights of the parties under the contract vested prior to the invalidation of the subrogation provisions. Plaintiff contends that the settlement did not constitute an enforceable contract because all the elements necessary to form a contract were not satisfied. The parties agreed to submit this case on briefs and joint stipulations of fact. However, on October 27, 2003, plaintiff elected to file a second motion for summary judgment even though the court had previously denied both plaintiff's and defendant's motions for summary judgment on November 12, 2002. Accordingly, plaintiff's second motion for summary judgment is DENIED and the supporting memorandum shall be construed as plaintiff's trial brief.

The issues before the court are whether the parties entered into a settlement agreement with all the attendant rights and obligations arising under a contract and, if so, whether defendant may retain funds that were paid to it pursuant to statutory provisions which have subsequently been declared unconstitutional. Plaintiff insists that because the court in *Holeton* found the statute to be unconstitutional on its face, the holding must be applied retrospectively. Plaintiff maintains that once the statutory subrogation provisions of R.C. 4123.931 were declared unconstitutional, the statute was rendered void; the state did not have the right to subrogate ab initio. "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *City of Middletown v. Ferguson* (1986), 25 Ohio St.3d 71, 80, citing *Norton v. Shelby County* (1886), 118 U.S. 425, 442. Accord *ExParte Siebold* (1879), 100 U.S. 371, 376; *Chicago I. & L. Ry. Co. v. Hackett* (1913), 228 U.S. 559, 566.

Initially, the court notes that while the Supreme Court of Ohio found the statutory provisions of R.C. 4123.931 unconstitutional, it did not invalidate the state's right to seek reimbursement of funds paid pursuant to a workers' compensation claim. Indeed, the court in *Holeton*, supra, addressed the principles of subrogation and stated that, in general, statutory provisions enabling a workers' compensation program to subrogate against a tortfeasor exist in nearly every state. The court explained that while the act of subrogation may reduce the total amount of recovery that a worker receives from the

tortfeasor, it does not alter or reduce the sum of workers' compensation benefits received by the claimant.

“\*\*\* the claimant is always left with the full measure of compensation and benefits to which he or she is entitled under the Workers' Compensation Act. Thus, R.C. 4123.931 does not disrupt any of the rights or obligations of the claimant and the employer with regard to the payment of statutory workers' compensation benefits, and the balance of compromise upon which the viability of the workers' compensation system depends remains intact.” *Holeton*, supra at 120, 121. The Supreme Court also reasoned that the subrogation principle was justified inasmuch as BWC recovered monies payable to the worker that were duplicative of the bureau's outlay for medical payments and wage loss reimbursement.

In the instant case, plaintiff has received over \$70,000 in benefit payments from BWC and continues to remain eligible for future payments related to the injuries that he suffered in 1999. The court stated in *Holeton*, “it is constitutionally permissible for the state to prevent a tort victim from recovering twice for the same item of loss or type of damage, once from the collateral source and again from the tortfeasor.” *Holeton*, supra, at 121, 122.

In *Clark v. Ohio Bureau of Workers' Comp.*, 119 Ohio Misc.2d 17, 2002-Ohio-3522, this court ruled that *Holeton* should not be applied retrospectively because to do so would impair the rights and obligations which arose under the contract. This court relied on the holding of *Wendell v. Ameritrust Co.*, 69 Ohio St.3d 74, 1994-Ohio-511, wherein the Supreme Court of Ohio addressed one of the exceptions to the retrospective application of decisions declaring a statute unconstitutional and explained as follows:

“In *Peerless Elec. Co. v. Bowers* (1955), 164 Ohio St. 209, 57 O.O. 411, 129 N.E.2d 467, we held that, generally, a decision of this court overruling a previous decision is to be applied retrospectively with an exception for contractual or vested rights that have arisen under the previous decision. *This reasoning applies with similar force when the court's decision strikes down a statute as unconstitutional.*” (Emphasis added.)

In *Clark*, supra, this court found that defendant's contractual rights vested once the settlement agreement was executed and BWC received payment from plaintiff. In affirming this court's decision in *Clark*, the Tenth District Court of Appeals held that "[a]s an agency of the state of Ohio, the BWC is authorized to enter into contracts \*\*\*. The question is whether the BWC's contractual rights vested before the Ohio Supreme Court declared the subrogation statute unconstitutional. Here, the contractual rights of the BWC vested at the time the contractual obligations of the contract were fulfilled, i.e., at the time the BWC received payment." *Clark v. Bureau of Workers' Comp.*, Franklin App. No. 02AP-743, 2003-Ohio-2193 at paragraphs 11-12. See, also, *Kissinger v. Pavlus*, Franklin App. No. 01AP-1203, 2002-Ohio-3083, at paragraph 27.

Plaintiff maintains that there was no settlement agreement executed between the parties. "In order to formulate a binding, legal agreement, contract law requires an offer, acceptance, consideration, and mutual assent between two parties \*\*\*." *Ginn v. Horn* (Apr. 7, 1987), Franklin App. No. 86AP-668. Upon review of the joint exhibits submitted by the parties, the court finds that plaintiff and BWC reached an agreement to terminate BWC's subrogation lien for the negotiated amount of \$31,000. The letters that were exchanged describe the negotiation process; accordingly, this court finds that defendant asserted a right to more than \$45,000 and subsequently offered to settle the claim for a reduced amount. (Joint Stipulation Exhibits A, C, and D.) Plaintiff accepted the offer and paid \$31,000. (Joint Stipulation Exhibits B, E, and G.) The monies were paid to BWC on May 15, 2001. (Joint Stipulation Exhibits F and G.) Although plaintiff asserts that no consideration was received for this payment, the court disagrees. The parties agreed to settle this claim for a compromised amount in order to avoid the expense of protracted litigation as well as to offset defendant's authority to seek dollar-for-dollar reimbursement.

This court concludes that, based upon review of the evidence, the parties executed a settlement agreement prior to the subrogation provisions being declared unconstitutional. Accordingly, this court will not apply *Holeton* retroactively in the instant case since to do so would impair the rights and obligations of the parties that had already vested. For the foregoing reasons, judgment shall be rendered in favor of defendant.

The court has considered the evidence, and for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

---

J. WARREN BETTIS  
Judge

Entry cc:

Michael D. Portnoy  
200 Dixie Highway  
Rossford, Ohio 43460

Attorney for Plaintiff

Peggy W. Corn  
Assistant Attorney General  
150 East Gay Street, 23rd Floor  
Columbus, Ohio 43215-3130

Attorney for Defendant

SJM/cmd  
Filed June 9, 2004  
To S.C. reporter June 21, 2004