

ORIGINAL

IN THE SUPREME COURT OF OHIO

OHIO BUREAU OF WORKERS'
COMPENSATION

Plaintiff-Appellee

vs.

JEFFREY MCKINLEY, ET. AL.

Defendants-Appellants

10-0720

Supreme Court Case No. _____

On Appeal from the Seventh District Court
of Appeals Case No. 09CO3
(To Columbiana C.P.C. No. 08CV1143)

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT HERITAGE WTI, INC.

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**EXPLANATION OF WHY THIS CASE IS ONE OF
PUBLIC OR GREAT GENERAL INTEREST**

Appellant Heritage WTI, Inc. (“Heritage”) requests that this Court accept jurisdiction because this case is one which will affect virtually every business, employee and insurer in Ohio. The Court of Appeals – by granting the BWC a statute of limitations on subrogation matters that is four years longer than any other subrogation claim in Ohio and the underlying tort action – has effectively made it impossible to settle injury cases and bring finality to litigation. Businesses and insurance companies will be unable to settle or close their books on an injury in a reasonable amount of time never knowing if the BWC – years down the line – will resurrect the case. Further, there is no incentive for the BWC to act cooperatively so that subrogation claims can be settled.

Indeed, in this case, the BWC waited years after it had actual notice of the injury, and many more years once it had actual notice of the settlement, to pursue the claim at issue. Because there are thousands of subrogation claims every year, and hundreds of thousands of Workers’ Compensation injuries, the uncertainty caused by the Court of Appeals decision is a question of public or great general interest. Despite the fact that every injured employee has two years to file a tort action, the BWC now has at least six years. This puts the same type of financial uncertainty on businesses and insurance companies operating in Ohio that they faced with *Scott Ponzer*.

This case significantly chills settlement. The parties attempted to settle and put the BWC on notice of the settlement. The BWC sat on its rights – waited years – and now the parties are litigating this case again. This Court should accept jurisdiction and ensure that the BWC cannot sit on its rights for six years, ignore settlement discussions and therefore chill legitimate settlement attempts. Why would any party settle a personal injury action when the BWC has the

right to ignore the notice of settlement, wait six years and then sue for the entire amount of the BWC's claim, irrespective of the settlement amount?

Notably, in 2009, there were 118,855 workers' compensation claims filed in Ohio and the BWC paid nearly \$2 billion in total benefits to claimants. (BWC Year End Statistics). Each workers' compensation claim filed in Ohio gives rise to a potential subrogation claim by the BWC if the injury is because of the negligence of a third party.

The amount of subrogation claims filed by the BWC has increased on a yearly basis. In 2003, there were 1,072 subrogation claims filed by the BWC¹. Since 2003, the amount of subrogation claims have doubled. In 2009, the BWC filed 2,599 subrogation claims. (*Id.*). These figures establish that the BWC's subrogation claims generate a significant amount of litigation in Ohio. Logically, the amount of claims will only continue to increase. Likewise, the BWC's subrogation claims will increasingly affect the bottom line of Ohio's businesses. Under the Court of Appeals decision – despite the fact that the injured employee has two years to bring a personal injury action – the BWC has six years. Thus, there are thousands of claims every year which Ohio's businesses and insurance companies must wait at least six years for the BWC to bring.

A determination of the applicable statute of limitations for such claims will enable businesses to assess their potential exposure in personal injury actions wherein the plaintiff has filed a workers' compensation claim. Although this Court has yet to address the statute of limitations applicable to statutory subrogation claims, this Court has long held that the rights of a subrogee are no greater than those of its subrogor. Consequently, if a subrogor's tort claim is barred by the statute of limitations, the subrogation claim must also be barred.

¹ These figures were provided by the BWC in response to a public records request.

The very purpose of statutes of limitation is to encourage prompt resolution of claims. The Seventh District, however, has rendered an opinion that allows the BWC to bring a subrogation action four years after the statute of limitations has passed for the underlying tort claim. The Seventh District's opinion grants the BWC as a subrogor greater rights than those of its subrogee. Further, such a scenario creates an unfavorable environment for businesses by extending their liability in personal injury causes of actions.

In this case, on July 13, 2003, Appellant Jeffrey McKinley (hereinafter "Mr. McKinley") sustained an injury during the course and scope of his employment with Safeway Services, Inc. while he was at Heritage's facility in East Liverpool, Ohio. As a result of his injuries, Mr. McKinley filed a claim with the BWC, which was allowed. Therefore, the BWC had notice at the time Mr. McKinley's claim was allowed that he had suffered a personal injury and there was a potential subrogation claim against Heritage. The BWC further admits that it had notice that Mr. McKinley filed a lawsuit against Heritage for his personal injuries and ultimately entered into a settlement agreement.

The statute of limitations governing a claim for personal injuries is two years. Thus, Mr. McKinley was required to file his personal injury claim by July 13, 2005. The BWC, however, did not file its subrogation complaint until November 4, 2008, more than **three-and-a-half years after** the statute of limitations on Mr. McKinley's personal injury claim expired and **five and a half years** after the date of injury. In light of this Court's previous decision that subrogation claims must be brought within the statute of limitations governing the underlying claim, the BWC's complaint should be time barred. Any other result provides the BWC with greater rights than those of its subrogee, which is not permitted in Ohio.

To circumvent the statute of limitations, the BWC has taken the position that R.C. 4123.931, despite its language that the statutory subrogee is subrogated to the rights of a claimant, creates an independent right of recovery and therefore, the six year statute of limitations set forth in R.C. 2305.07 was applicable. Because this Court has never determined whether R.C. 4123.931 creates a separate right of subrogation or provides a conventional subrogation claim, this Court should accept jurisdiction and provide clarity to Ohio's businesses.

This Court must also accept jurisdiction to overturn the flawed rationale employed by the Seventh District in reaching its decision that R.C. 4123.931 creates an independent right of recovery. The Seventh District focused on the language contained in the statute that there is a "right of recovery" in favor of a statutory subrogee against the third party and determined that this phrase created an independent right of subrogation. The Seventh District, however, failed to give proper consideration to the language that "the statutory subrogee is **subrogated to the rights of a claimant** against that third party." While the Seventh District acknowledged that this language is found in typical derivative subrogation statutes, it concluded that R.C. 4123.931 was not a typical subrogation statute because the BWC could bring its subrogation action on its own without the claimant.

This distinction, however, is insignificant. Rather than focusing on the BWC's ability to bring a claim without the claimant, the correct analysis should be guided by the derivative nature of the BWC's subrogation claims. Indeed, none of the traits of an independent cause of action are present in subrogation claims brought under R.C. 4123.931. The BWC's subrogation rights are dependent upon the claimant in every conceivable way. The BWC may only recover if the claimant has a valid claim against the third-party tortfeasor. Importantly, the BWC cannot bring a subrogation claim unless the claimant recovers damages in the underlying personal injury suit.

Moreover, R.C. 4123.931 does not authorize the BWC to independently maintain a direct action against a tortfeasor. The BWC only has a right to reimbursement of the medical expenses that it paid on the claimant's behalf. There is no right to attorney's fees, punitive damages, or any affirmative defenses that are available to a plaintiff in an independent cause of action. Every right provided to the BWC under R.C. 4123.931 is identical to the rights provided to a typical insurer in a conventional subrogation claim.

Alternatively, the BWC's rights under R.C. 4123.931 are analogous to a loss of consortium claim brought by the spouse of an injured party. While the spouse is allowed to bring a loss of consortium claim in her name, it is dependent upon the existence of a valid underlying claim. The BWC's subrogation rights are no different. Although the BWC may bring a claim on its own, its right to recover is wholly dependent upon the employee's having a valid cause of action against the tortfeasor.

The implications of the Seventh District's expansion of the statute of limitations for subrogation claims brought by the BWC will be devastating to businesses in Ohio and strain Ohio's already fragile economy. This case will affect the thousands of business in Ohio that are subject to the BWC's subrogation claims. Under the Seventh District's analysis, businesses will have to wait four, five, or, as here, six years after a personal injury occurs without knowing whether the BWC will bring a claim. What is more, the BWC could bring a subrogation claim years after the underlying personal injury claim is resolved. There is no reason that the BWC should be permitted to sit back and wait to file its subrogation claim, especially when it has notice of the personal injury and is aware of its subrogation rights.

The Court of Appeals decision simply ignores the basic tenants of subrogation law. Insurance companies routinely bring subrogation claims directly but do not, under Ohio law,

have rights greater than their insured. The BWC's subrogation in this case is clearly derivative on Jeff McKinley's claim. If Jeff McKinley did not have an injury, the BWC would not have a claim. If Jeff McKinley had not been injured by alleged tortious conduct, the BWC would not have a claim. If Jeff McKinley did not incur medical bills and lost wages, the BWC would not have a claim. The Court of Appeals' conclusion that somehow the BWC has an independent right of subrogation is simply unfounded. BWC's claim is completely dependent on Jeff McKinley having a claim in the same way that a loss of consortium claim is contingent upon a spouse having a claim.

There is no question that the Court of Appeals has misinterpreted the statute. Because this will affect thousands of subrogation cases every year and cast uncertainty on every employer and insurer in Ohio, this Court should accept jurisdiction.

STATEMENT OF FACTS AND CASE

This case arises out of an injury sustained by Jeff McKinley on July 13, 2003, during the course and scope of his employment with Safeway Services, Inc., while he was at Heritage WTI, Inc.'s facility. As a result of his injuries, Mr. McKinley filed a claim with the Ohio Bureau of Workers' Compensation. Mr. McKinley's claim was allowed, and the Bureau of Workers' Compensation paid medical bills and compensation on Mr. McKinley's behalf.

Mr. McKinley also filed a claim against Heritage seeking to recover damages for his personal injuries. Mr. McKinley voluntarily dismissed his claim against Heritage in 2004, pursuant to a settlement agreement. Subsequently, on November 4, 2008, five years after the date of Mr. McKinley's injury, the BWC filed a suit against McKinley and Heritage seeking to enforce its subrogation rights pursuant to R.C. § 4123.931. Significantly, the BWC was given notice of the settlement and waited four years from the notice of the settlement to file a

subrogation claim. (Exhibits C and D attached to Heritage's Appellee Brief submitted to Seventh District Court of Appeals).

Heritage filed a motion to dismiss asserting that the BWC's complaint failed to state a claim upon which relief could be granted because the applicable statute of limitations had expired. Specifically, Heritage argued that the BWC's statutory subrogation rights were derivative in nature, and thus, the BWC's right to bring a claim would be barred by the same statute of limitations governing Mr. McKinley's right to bring the underlying personal injury claim. In response, the BWC filed a memorandum in opposition arguing that R.C. 4123.931 creates an independent right of recovery and that the six year statute of limitations set forth in R.C. 2305.07 was applied.

The trial court granted Heritage's motion to dismiss and held that a reading of R.C. 4123.931 reveals that the statute "does not create a separate right of subrogation, but only seeks to set forth the procedures to be followed by the statutory subrogee (BWC) who seeks to exercise derivative rights which the subrogee (BWC) obtained through the claimant (Jeffrey McKinley) against the third party (Defendant Heritage.)" *Ohio Bureau of Worker's Compensation v. Jeffrey McKinley*, Case No. 2008-CV-1143 (Columbiana Cty., Feb. 3, 2009).

As a result, the BWC filed an appeal to the Seventh Appellate District. The BWC argued that the language of R.C. 4123.931 created an independent right of recovery subject to the six-year statute of limitations in R.C. 2305.07. The Court of Appeals reversed the trial court's decision and erroneously held that R.C. 4123.931 created an independent right of recovery and that the six year statute of limitations set forth in R.C. 2305.07 applied.

Defendant-Appellant Heritage now seeks discretionary jurisdiction from this Court to address an issue of great public and general interest.

ARGUMENTS IN SUPPORT OF PROPOSITION OF LAW

Ohio Revised Code Section 4123.931 is a typical subrogation statute and does not provide the Ohio Bureau of Workers' Compensation an independent right of recovery and therefore, claims brought under R.C. 4123.931 are subject to the same statute of limitations that governs the claimant's underlying cause of action.

The Court of Appeals' conclusion that the BWC has an independent right of action is incorrect both factually and legally. Factually, it is simply undisputed that if Jeff McKinley is not injured by tortious conduct and does not incur medical bills and lost wages, the BWC has no claim. Whether that claim can be brought in the BWC's name or not is irrelevant. The BWC's claim is dependent upon Jeff McKinley being injured in the same way that a loss of consortium claim (which is clearly dependent) is dependent upon a spouse being injured. *Bowen v. Kil-Kare, Inc.* (1992), 63 Ohio St.3d 84, 93, 585 N.E. 2d 384. Even though a loss of consortium claim is brought in the spouse's name, it is still a dependent cause of action for which the spouse has no greater rights in terms of statute of limitations than the injured spouse. *Hershberger v. Akron City Hosp.* (1987), 34 Ohio St.3d 1, 516 N.E.2d 204, paragraph two of the syllabus. Therefore, factually, the Court of Appeals is simply incorrect – the BWC does not have a claim unless certain things happen to Jeff McKinley. Therefore, regardless of whether the BWC can bring the claim in its name, it is a dependent claim and the BWC cannot have greater rights – in terms of the statute of limitations – than Jeff McKinley.

Legally, this Court has held that subrogation actions are derivative in nature, and thus a subrogee cannot succeed to a right not possessed by its subrogor. *Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co.* (1982), 42 Ohio St.3d 40, 42, 537 N.E.2d 624; *Galanos v. Cleveland* (1994), 70 Ohio St.3d 220, 221-222, 638 N.E.2d 530. Consequently, where a subrogor's tort

claim is subject to a statute of limitations, so too is the subrogee's subrogation claim. *Nationwide Mut. Ins. Co. v. Zimmerman* (Ohio App. 5 Dist.), 2004-Ohio-7115, ¶ 16.

In this case, the BWC filed a complaint as a statutory subrogee to recover workers' compensation benefits paid on behalf of its subrogor, Jeff McKinley. The BWC's complaint was based on the subrogation rights provided under R.C. 4123.931. Pertinently, the statutory language of R.C. 4123.931 provides:

The payment of compensation or benefits . . . creates a right of recovery in favor of a statutory subrogee against a third party, and **the statutory subrogee is subrogated to the rights of a claimant against that third party.**

R.C. 4123.931(A)(emphasis added).

Because the BWC failed to file its subrogation claim within the two year statute of limitations governing Jeff McKinley's tort claim, the trial court properly dismissed the BWC's complaint. The Seventh District, however, granted the BWC greater rights than those of its subrogor, Jeff McKinley, by holding that R.C. 4123.931 provides an independent right of recovery and is therefore subject to a six year statute of limitations. Significantly, the issue of whether R.C. 4123.931 creates an independent right of recovery or merely creates a subrogation right in favor of the BWC has never been decided by this Court.

Nonetheless, appellate courts have analyzed subrogation statutes with language similar to R.C. 4123.931 and have consistently held that such statutes do not create an independent right of recovery. For example, in *ODHS v. Kozar* (1995), 99 Ohio App. 3d 713, 651 N.E.2d 1039, the Eighth Appellate District held that the statute giving the Ohio Department of Human Services the ability to sue for reimbursement of Medicaid benefits paid to a claimant provided a conventional subrogation right. The statute's language, "[t]he acceptance of aid...gives a right of subrogation..." compelled the court to determine that the statute used the term subrogation in the

conventional sense. *Id.* at 717 (emphasis added). The Eighth District concluded that, with respect to a statute of limitations defense, the state could not be on “better footing” than the injured party and, therefore, the claim was time barred. *Id.* at 716.

Likewise, in *Montgomery v. Doe* (2000), 141 Ohio App. 3d 242, 750 N.E.2d 1149, the Tenth Appellate District addressed a statute that permitted to recover monies paid by the crime victims fund to victims’ families. The statute provided, in part, that “the state, upon the payment of the award or part of the award, is subrogated to all of the claimant’s rights...” *Id.* at 247 (emphasis added). The Tenth District held that the statute was a traditional subrogation statute because the state’s right existed “only after the state was ‘subrogated to all of the claimant’s rights,’” and the state could only recover if the claimant would have a right of recovery. *Id.* at 250. Therefore, since the statute of limitations prevented the claimant from filing an action, it also prevented the state from so doing. *Id.* at pg. 251.

The Seventh District incorrectly relied upon a Sixth Circuit Court of Appeals decision in *United States v. York* 398 F.2d 582 (6th Cir. 1968), holding that the phrase “right of recovery” contained in R.C. 4123.931 created an independent right of recovery. Relying on *York*, the Seventh District concluded that a statute containing the language “right of recovery,” creates an independent right of subrogation. In *York*, the United States brought an action under the Medical Care Recovery Act, to recover the value of medical care furnished to a person who was injured under circumstances creating tort liability upon a tortfeasor. *Id.* at 583. Pertinently, the language of the Medical Care Recovery Act provided, in part, that the United States had “a right to recover from...(a) Third Person...the reasonable value of care and treatment so furnished....” *Id.* at 584 citing 42 U.S.C. § 2651(a).

A careful reading of *York*, however, reveals that the phrase “right to recover” was never addressed by the Sixth Circuit and was therefore not critical to the court’s conclusion that the statute at issue created an independent right of recovery. Rather, the Sixth Circuit relied upon precedent from other circuit courts that uniformly held that the statute did not create an independent right of recovery. *Id.* Moreover, the statute at issue in *York* was properly distinguished by the Tenth District in *Montgomery*. The Tenth District held that the Medical Care Recovery Act was not a subrogation statute because the injured party in *York* did not have a right to recover the value of his treatment. *Montgomery*, supra at 249. Therefore, the injured party had no rights to which the United States could be subrogated. *Id.*

Significantly, the statutory language in *Montgomery* (“is subrogated to all of the claimant’s rights”) is virtually identical to the statutory language in this case (“is subrogated to the rights of a claimant”). As such, the same analysis should have been applied by the Seventh District in this case. Although the Tenth District in *Montgomery* noted that the statute at issue was amended to create an independent right of subrogation, there was absolutely no analysis as to what changes were made to the statute to create an independent right of recovery. *Montgomery*, supra, at 248. The Seventh District, however, focused on the language of the amended statute at issue in *Montgomery*, which stated that the state had “a right of reimbursement...” See R.C. 2743.191. Critically, the Seventh District completely ignored the fact that the amended statute also deleted the language “is subrogated to all of the claimant’s rights.”

The Seventh District further relied on a Second Appellate District decision to support its conclusion that R.C. 4123.931 created an independent right of subrogation. *Corn v. Whitmere* (2009) 183 Ohio App.3d 204, 916 N.E.2d 838. Significantly, the appellate court in *Corn* never

discussed the language of R.C. 4123.931. Instead, the court in *Corn* distinguished subrogation rights in the insurance context from workers' compensation subrogation claims because insurance subrogation claims arise from the insurance policy. *Id.* at 212. However, this distinction ignores this Court's long recognized premise that the workers' compensation laws are "founded upon the principles of insurance." *State, ex rel. Crawford v. Indus. Comm.* (1924), 110 Ohio St. 271, 274.

Moreover, the BWC's rights under R.C. 4123.931 are more dependent upon the claimant's rights than in the insurance context. Unlike in the insurance context, the BWC cannot bring an action on its own directly against the tortfeasor. The BWC's right to recover necessarily depends on the claimant having a valid personal injury claim. The BWC's subrogation right is similar to a loss of consortium claim in that it is derivative and, but for the primary cause of action by the plaintiff, would not exist. *Bradley v. Sprenger Enterprises, Inc.* Lorain App. 07 CA 9238, 2008-Ohio-1988, ¶ 14. Significantly, the BWC's subrogation right, regardless of the language contained within R.C. 4123.931, depends upon the personal injury action that arises from the harm suffered by the claimant.

The BWC's subrogation rights are purely derivative in nature. R.C. 4123.931 does not grant the BWC any independent rights. Whether the BWC can bring an action without joining the claimant is irrelevant. Every characteristic of the BWC's subrogation rights under R.C. 4123.931 mirrors the rights provided under a conventional subrogation claim. To put it simplistically, if it walks like a duck and quacks like a duck—it's a duck.

The Seventh District's decision has granted the BWC, as a subrogor, greater rights than those of its subrogee, which this Court's prior decisions have expressly prohibited. The Seventh District's decision has also imparted a hardship on the businesses in Ohio. The very purpose of a

statute of limitations ensures prompt resolution of claims and provides certainty. If the Seventh District's opinion is permitted to stand, businesses will have years of financial uncertainty following the resolution of a personal injury claim because the BWC could initiate a subrogation action years after the underlying case resolves.

The functional purpose of R.C. 4123.931 is to allow the BWC to recover payments made on behalf of a claimant. There is no reason that the BWC cannot accomplish this directive by filing suit within the statute of limitations applicable to the claimant. The rights of the BWC should not be expanded at the detriment of Ohio's businesses. This Court should accept jurisdiction of this case to provide clarity and address the inequity of the Seventh District's opinion. The resolution of this appeal presents issues of great general and public interest.

CONCLUSION

This Court should accept jurisdiction of this case to address an issue of great general and public interest impacting the economic landscape of businesses in Ohio. Businesses must know the window of potential exposure stemming from personal injury cases. Under the Court of Appeals decision, regardless of whether a claimant brings an underlying personal injury action, employers and insurance companies must wait six years before they can close their books on an injury. This result cannot be allowed for several reasons. First, it is simply contrary to well established law on the nature of subrogation actions – the subrogor cannot have greater rights than the subrogee. Second, it creates a business climate, in the State of Ohio, which drives away jobs and businesses. Therefore, this Court should accept jurisdiction of this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served via ordinary, U.S. mail, postage pre-paid, this 26th day of April, 2010, upon:

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STATE OF OHIO, COLUMBIANA COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

OHIO BUREAU OF WORKERS')	
COMPENSATION,)	
)	CASE NO. 09 CO 3
APPELLANT,)	
)	
VS.)	OPINION
)	
JEFFREY MCKINLEY, et al.,)	
)	
APPELLEES.)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court,
Case No. 08CV1143.

JUDGMENT: Reversed and Remanded.

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: March 15, 2010

VUKOVICH, P.J.

¶{1} Appellant Ohio Bureau of Workers' Compensation (OBWC) appeals from the Columbiana County Court of Common Pleas' decision dismissing its complaint against appellees Jeffrey McKinley and Heritage-WTI, Inc. on the basis that the subrogation claim was barred by the statute of limitations. The issue raised in this appeal is whether R.C. 4123.931 creates an independent or derivative right of subrogation for OBWC. We hold that the language of R.C. 4123.931 entitles OBWC to an independent right of recovery. Thus, the six year statute of limitations in R.C. 2305.07 applies and the trial court erred in dismissing the claim on the basis that it was barred by the statute of limitations. Accordingly, the judgment of the trial court is reversed and this cause is remanded to the trial court for further proceedings.

STATEMENT OF THE CASE

¶{2} On July 13, 2003, while working for Safway Services, Inc. at Heritage-WTI, Inc.'s facility in East Liverpool, Ohio, McKinley was injured. Since Safway was a state funded employer, McKinley filed a claim for workers' compensation benefits with OBWC and received such benefits. McKinley also sued both Safway and Heritage-WTI. The claim against Safway was for an employer intentional tort and was later dismissed. A premises liability claim was brought against Heritage-WTI and was later settled for an undisclosed amount.

¶{3} Later, McKinley brought a declaratory judgment action in the Washington County Common Pleas Court challenging the constitutionality of R.C. 4123.93 and R.C. 4123.931. *McKinley v. Ohio Bur. of Workers' Comp.*, 170 Ohio App.3d 161, 2006-Ohio-5271. In the event that the court of common pleas did not find that the statutes violated the Ohio Constitution, McKinley asked the court to declare the amount owed to OBWC under R.C. 4123.931. *Id.* The Washington County Common Pleas Court found that the statutes violated Sections 2, 16, and 19, Article I of the Ohio Constitution. *Id.* OBWC appealed the decision to the Fourth Appellate District. On appeal, the court found that the statutes did not violate the Ohio Constitution, and accordingly, reversed the decision and remanded the cause to the trial court for further proceedings. *Id.* at ¶39.

¶{4} McKinley appealed that decision to the Ohio Supreme Court. *McKinley v. Ohio Bur. of Workers' Comp.*, 112 Ohio St.3d 1489, 2007-Ohio-724. On the basis of its prior decision in *Groch*, the Ohio Supreme Court affirmed the appellate court's decision. *Id.* at ¶1, citing *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546. Thus, in accordance with the appellate court decision, the cause was remanded to the trial court. On remand, McKinley allegedly dismissed the cause of action against OBWC.

¶{5} Then on November 4, 2008, OBWC filed a complaint against McKinley and Heritage-WTI in Columbiana County Common Pleas Court. The complaint asserted its subrogation rights against both defendants. McKinley filed an answer asserting as defenses that R.C. 4123.931 was unconstitutional, that there was not an independent right of subrogation and that the statute of limitations had run. Likewise, Heritage-WTI filed a motion to dismiss claiming that the six year statute of limitations does not apply because R.C. 4123.931 does not create an independent right of subrogation. Thus, it asserted that the complaint had to be dismissed because the statute of limitations had run. OBWC responded to the motion to dismiss and asserted that R.C. 4123.931 does create an independent right of subrogation and that the six year statute of limitations espoused in R.C. 2305.07 is applicable.

¶{6} After reviewing the arguments, the trial court granted Heritage-WTI's motion to dismiss stating:

¶{7} "The Court is persuaded from a reading of the statute [R.C. 4123.931] that the same does not seek to create a separate right of subrogation, but only seeks to set forth procedures to be followed by the statutory subrogee (BWC) who seeks to exercise derivative rights which the subrogee (BWC) obtained through the claimant (Jeffrey McKinley) against the third party (Defendant Heritage)." 02/03/09 J.E.

¶{8} The court then added that although McKinley did not file a motion to dismiss, his answer set forth that OBWC's claim was barred by the statute of limitations. Accordingly, it also dismissed OBWC's claims against McKinley. This timely appeal follows.

ASSIGNMENT OF ERROR

¶{9} "THE COURT ERRED IN GRANTING DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED BECAUSE OHIO REVISED CODE SECTION 4123.931 IS NOT A TYPICAL SUBROGATION STATUTE AND PROVIDES THE OHIO BUREAU OF WORKERS' COMPENSATION AN INDEPENDENT RIGHT OF RECOVERY."

¶{10} A Civ.R. 12(B)(6) motion to dismiss based upon the statute of limitations may be granted when the complaint conclusively shows on its face that the action is time-barred. *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 493, 2006-Ohio-2625, ¶11. We review the trial court's decision to dismiss a case pursuant to Civ.R. 12(B)(6) de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, at ¶5.

¶{11} The central issue in this appeal is whether R.C. 4123.931 creates an independent rather than derivative right of subrogation for OBWC. OBWC filed its claim for subrogation a little over five years after McKinley was injured. McKinley had a two year statute of limitations for his claims against Heritage. Thus, if OBWC's subrogation rights are derivative then OBWC had to pursue the right to subrogation within that two year statute of limitations. However, if R.C. 4123.931 creates an independent right of subrogation then the six year statute of limitations in R.C. 2305.07 (stating liability created by statute must be brought within six years after cause accrued) applies. Accordingly, the action would have been timely.

¶{12} R.C. Chapter 4123 is the chapter on workers' compensation and R.C. 4123.931 is titled Subrogation Rights. OBWC argues that R.C. 4123.931(A) supports the conclusion that R.C. 4123.931 creates an independent cause of action for subrogation. This section states:

¶{13} "The payment of compensation or benefits pursuant to this chapter or Chapter 4121., 4127., or 4131., of the Revised Code creates a right of recovery in favor of a statutory subrogee against a third party, and the statutory subrogee is subrogated to the rights of a claimant against that third party. The net amount recovered is subject to a statutory subrogee's right of recovery."

¶{14} In arguing that this statute creates an independent right of subrogation, OBWC focuses on the language “creates a right of recovery.” Heritage-WTI, on the other hand, in arguing that this statute does not create an independent right of subrogation, focuses on the language “the statutory subrogee [OBWC] is subrogated to the rights of a claimant [McKinley] against that third party [Heritage].”

¶{15} OBWC cites this court to three cases that it believes are instructive on whether the language in R.C. 4123.931(A) creates an independent or derivative right of subrogation. At the outset we note that these three cases do not interpret the language of R.C. 4123.931, but rather address other subrogation statutes and whether the language of those statutes create an independent or derivative right of subrogation.

¶{16} The first case is *Ohio Dept. of Human Services v. Kozar* (1995), 99 Ohio App.3d 713. In this case the decedent, Carvell, was injured when Kozar's car struck Carvell's moped. Carvell died after receiving substantial medical treatment funded by the Medicaid system. Carvell's estate sued Kozar for wrongful death. The estate voluntarily dismissed the action multiple times and the trial court granted summary judgment for Kozar based on the double dismissal rule. That ruling was appealed and affirmed on appeal. *Id.*, citing *Estate of Carvell v. Kozar* (June 22, 11989), 8th Dist. Nos. 55275 and 55277. Later, the state filed suit against Kozar seeking reimbursement of Medicaid benefits paid on behalf of Carvell. The trial court found that the state's claim, as subrogee, was barred by res judicata and the statute of limitations. It explained that the state's right of subrogation was derivative in nature and thus, since the estate could no longer sue Kozar because of the prior order of summary judgment and because the statute of limitations had expired, the state also could not bring its right of subrogation against Kozar.

¶{17} The state appealed that order. It asserted that it is “not a subrogee in the usual sense.” R.C. 5101.58 is the statute which governs subrogation of Medicaid benefits by the Department of Human Services. The version of R.C. 5101.58 in effect at the time of the *Kozar* decision, stated:

¶{18} “The acceptance of aid pursuant to Chapter 5107., 5111., 5113., or 5115. of the Revised Code gives a right of subrogation to the department of human

services and the department of human services of any county against the liability of a third party for the cost of medical services and care arising out of injury, disease or disability of the recipient. When an action or claim is brought against a third party by a recipient of aid under Chapter 5107., 5111., 5113., or 5115. of the Revised Code, the entire amount of any settlement or compromise of the action or claim, or any court award or judgment, is subject to the subrogation right of the department of human services or department of human services of any county. The department's subrogated claim shall not exceed the amount of medical expenses paid by the departments on behalf of the recipient. Any settlement, compromise, judgment or award that excludes the cost of medical services or care shall not preclude the departments from enforcing their rights under this section."

¶{19} After reviewing this statute, the Eighth District held that the state was subrogated to the estate's claim against Kozar to the extent of the Medicaid benefits paid, but the rights of the state as subrogee were no greater than those of the subrogor with which it was in privity. Thus, it was holding that the statute was a typical subrogation statute that created a derivative right of subrogation.

¶{20} Despite the state's insistence for the court to follow federal authorities which allowed for the government to seek recovery in similar circumstances, the appellate court declined to do so. It explained:

¶{21} "We cannot disregard the plain subrogation language of the controlling Ohio statute. R.C. 5101.58 uses the term 'subrogation' in its conventional sense ('The acceptance of aid * * * gives a right of subrogation to the department of human services * * *') and does not create an 'independent right' of recovery as the federal statute does." *Id.* (Internal citations omitted).

¶{22} As can be seen, the reasoning relies on the general principle espoused by the Ohio Supreme Court that a subrogee has no greater rights than those of the subrogor with which it has privity. *Id.* citing *Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co.* (1989), 42 Ohio St.3d 40, 42. However, and more importantly, it also relies on the language in the statute of "right of subrogation" versus the absent language of "independent right."

¶{23} This "independent right" language comes from the next case cited by the OBWC, *United States v. York* (C.A.6, 1968), 398 F.2d 582. This case deals with the Medical Care Recovery Act, 42 U.S.C. 2651-2653. The government sought to recover the reasonable value of medical care and treatment furnished to Woodman when he was treated in a United States Naval Hospital for injuries caused by York. Woodman sued York and received a judgment. The government did not know of the lawsuit and did not intervene in the action. The government then brought an independent suit to seek its subrogation rights under the Medical Care Recovery Act. The District Court found that the independent action was barred because the government failed to intervene within six months after the first day in which care and treatment had been furnished. The government appealed and the Sixth Circuit reversed the decision.

¶{24} In doing so, it stated the following:

¶{25} " * * *, Congress in 1962 passed the Medical Care Recovery Act giving the United States * * * a right to recover from * * * (a) Third person (who was liable in tort for injuries to persons treated by the United States) * * * the reasonable value of the care and treatment so furnished or to be furnished * * *.' 42 U.S.C. § 2651(a).

¶{26} "Seizing upon other language in Subsection (a) of Section 2651, the Defendants urge an interpretation of the Act that would give the United States only a right of subrogation or a right of assignment. All of the courts that have applied the Act are agreed, however, that the right of the United States is an independent right, subrogated only in the sense that the person sued by the Government must be liable to the injured person in tort. For example, the United States' right to recover for medical expenses is not barred by a state statute of limitations that would bar an action by the injured person. *United States v. Fort Benning Rifle and Pistol Club*, 387 F.2d 884 (5th Cir. 1967). Nor can the Government's recovery by [sic] denied because the injured person has given a release to the tortfeasor. *United States v. Greene*, 266 F.Supp. 976 (N.D.Ill.1967); *United States v. Winter*, 275 F.Supp. 895 (E.D.Penn.1967); *United States v. Guinn*, 259 F.Supp. 771 (D.N.J.1966). Moreover, the legislative history of the Act makes it clear that Congress intended to give the United States an independent right." *Id.* at 584.

¶{27} Therefore, according to *York*, when the statute contains the language “right of recovery,” the statute is creating an independent right of subrogation.

¶{28} The last case cited is *Montgomery v. John Doe* 26 (2000), 141 Ohio App.3d 242. In this case, three John Does committed unrelated murders and each victim's family sought and received reparations from the Crime Victims Fund (R.C. 2743.56). The state then filed suit against the John Does in an attempt to recover the monies paid by the fund to the victim's families. The John Does asserted that the state's claims were barred by the statute of limitations. The state moved for summary judgment, which was granted. The John Does then appealed the cause to the Tenth Appellate District.

¶{29} The appellate court stated that the central issue was whether R.C. 2743.72(A) was a typical subrogation statute or whether it created an independent cause of action. The version of the statute in effect at the time stated:

¶{30} “If an award of reparations is made under section 2743.51 to 2743.71 of the Revised Code, the state, upon the payment of the award or a part of the award is subrogated to all of the claimant's rights to receive or recover benefits or advantages for economic loss for which an award of reparations was made from a source that is a collateral source or would be a collateral source if it were readily available to the victim or claimant. The claimant may sue the offender for any damages or injuries caused by the offender's criminally injurious conduct and not compensated for by an award of reparations. The claimant may join with the attorney general as co-plaintiff in any action against the offender.”

¶{31} In explaining that the statute of limitations had run on the state's right to seek subrogation, the court explained:

¶{32} “Similar to the statute at issue in *Kozar*, R.C. 2743.72(A) uses the term ‘subrogation’ in its traditional sense: the ‘state, upon the payment of an award or part of the award, is subrogated to all of the claimant's rights * * *.’ Unlike the statute at issue in *York*, R.C. 2743.72 never mentions the creation of a ‘right’ in the sovereign. To the contrary, it specifically refers only to the ‘claimant's rights’ that the state acquires through subrogation. Because R.C. 2743.72 is a traditional subrogation statute, the statute of limitations applies against the state. See, also, *Ohio Crime*

Victim's Fund v. Gray (Nov. 9, 2000), Franklin App. No. 00AP-218, unreported, 2000 WL 1678027." Id. at 250.

¶{33} The Tenth District then went on to explain that the statute had since the filing of the action been amended and that the amendment created an independent right of subrogation. Id. at 251. The statute as amended reads:

¶{34} "The payment of an award of reparations from the reparations fund established by section 2743.191 of the Revised Code creates a right of reimbursement, repayment, and subrogation in favor of the reparations fund from an individual who is convicted of the offense that is the basis of the award of reparations." R.C. 2743.72(A).

¶{35} A review of these three cases indicates to us that R.C. 4123.931(A)'s use of phrase "right of recovery" shows that R.C. 4123.931 creates an independent right of subrogation. Or in other words, we find that R.C. 4123.931 is not a traditional subrogation statute.

¶{36} However, in finding as such, this court acknowledges that while R.C. 4123.931(A) uses the phrase "right of recovery," it also states that "the statutory subrogee is subrogated to the rights of a claimant against that third party." The later phrase is more of a typical subrogation phrase. Therefore, R.C. 4123.931(A) contains a typical subrogation clause and also contains a clause that has been concluded to mean that there is an independent right of recovery. As such, one might conclude that this creates an ambiguity problem.

¶{37} A similar ambiguity problem also occurred in the legislation at issue in *York*. The pertinent language of that legislation was "the United States * * * a **right to recover** from * * * (a) Third person (who was liable in tort for injuries to person treated by the United States) * * * the reasonable value of the care and treatment so furnished or to be furnished * * * and shall, **as to this right be subrogated** * * * [to the right of the injured party.]" 42 U.S.C. § 2651(a). (Emphasis Added). The *Montgomery* court recognized this ambiguity problem and found that a review of the legislative history overwhelmingly supported the conclusion that the intent was to create an independent right of recovery for the subrogee. *Montgomery*, 141 Ohio App.3d at 249-250.

¶{38} Similarly, we now examine the legislative history of R.C. 4123.931. Said statute was enacted pursuant to S.B. 227 of the 124th General Assembly. The Legislative Service Commission's analysis of the proposal stated:

¶{39} "The bill revises the existing subrogation provision by eliminating all of the foregoing provisions and establishing the new provision described below. The bill states more specifically than the existing statute that payment of compensation or benefits **creates right of recovery, as opposed to existing law's 'right of subrogation,'** of a statutory subrogee against a third party, and the statutory subrogee is subrogated to the rights of a claimant against that third party." (Emphasis Added).

¶{40} The emphasized phrase is clearly an intention on the part of the legislature to create an independent right, not a typical derivative subrogation right. However, admittedly, the next phrase of the analysis makes a statement that the statutory subrogee is subrogated to the right of the claimant against the third party, which is language that is found in a typical derivative subrogation statute.

¶{41} Given the simultaneous use of the two phrases, this statute can be classified as a hybrid subrogation statute. As the *York* court explained when viewing these two clauses, the right of the subrogee to recover is an independent right, but it is subrogated in the sole sense that the subrogee (OBWC) can only recover from the claimant (McKinley) and/or third party (Heritage-WTI), if the third party (Heritage-WTI) is liable to the claimant (McKinley) in tort. Thus, even though R.C. 4123.931 can be classified as a hybrid subrogation statute, from the statutory language in section (A) and the legislative analysis, it is clear that the statute creates an independent right of subrogation.

¶{42} Other sections in R.C. 4123.931 equally support the conclusion that the statute creates an independent right of recovery. For instance, section (G) of R.C. 4123.931 states:

¶{43} "A claimant shall notify a statutory subrogee and the attorney general of the identity of all third parties against whom the claimant has or may have a right of recovery, except that when the statutory subrogee is a self-insuring employer, the claimant need not notify the attorney general. 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 and, when required, the attorney general, with prior notice and a reasonable opportunity to assert its subrogation rights. If a statutory subrogee and, when required, the attorney general are not given that notice, or if a settlement or compromise excludes any amount paid by the statutory subrogee, the third party and the claimant shall be jointly and severally liable to pay the statutory subrogee the full amount of the subrogation interest."

¶{44} OBWC maintains that the last sentence of this section, the joint and several liability clause, supports the conclusion that it has an independent right of recovery. We agree. While there is no direct case law on the issue of whether the joint and several liability clause indicates that an independent right of recovery was created, it is observed that typical subrogation statutes do not contain a clause allowing for joint and several liability against the claimant and the third party. The addition of this language in R.C. 4123.931(G) suggests that R.C. 4123.931 is not a typical subrogation statute.

¶{45} In response to OBWC's argument that subsection (G) supports the conclusion that R.C. 4123.931 creates an independent right of recovery, Heritage-WTI and McKinley argue that if (G) does create an independent right, it is not applicable here because OBWC admits that it had notice of the settlement. They seem to be under the impression that joint and several liability is only possible when notice is given. The last sentence of section (G), which contains an "or," clearly indicates that there are two instances when the third party and the claimant can be jointly and severally liable. The first is if the attorney general is not given notice when there was a requirement for it to be notified. The second is if a settlement excludes any amount paid by the statutory subrogee. It is alleged here that the settlement excluded any amount paid by OBWC, thus joint and several liability appears to be an option. Consequently, as can be seen, the premise of Heritage-WTI and McKinley's argument that notice of the settlement forecloses an independent cause of action is incorrect.

¶{46} Furthermore, in addition to section (G), section (H) may also provide an indication that the subrogation right in R.C. 4123.931 is an independent right. That section provides:

¶{47} "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 statutory subrogee institutes legal proceedings against a third party, the statutory subrogee shall provide notice of that fact to the claimant. If the statutory subrogee joins the claimant as a necessary party, or if the claimant elects to participate in the proceedings as a party, the claimant may present the claimant's case first if the matter proceeds to trial. 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." R.C. 4123.931(H).

¶{48} This section is not typical of a traditional subrogation statute because it provides that the statutory subrogee's right is automatic and that the statutory subrogee can bring the action on its own without the claimant. Thus, section (H) of R.C. 4123.931 lends support for the conclusion that R.C. 4123.931 creates an independent right of recovery.

¶{49} Furthermore, in addition to the above analysis, a recent decision out of the Second Appellate District supports our conclusion that R.C. 4123.931 creates an independent right of subrogation. *Corn v. Whitmere*, 2d Dist. No. 2008CA96, 2009-Ohio-2737. In *Corn*, an employee of AT&T was injured in the course of his employment when a vehicle collision occurred between him and Whitmere. Corn filed a complaint for personal injuries against Whitmere and Erie Insurance (insurer of Corn's vehicle). Later Corn amended his complaint and joined AT&T. AT&T was joined because, as a self-insuring employer, it provided Workers' Compensation benefits to Corn. AT&T filed a motion for partial summary judgment claiming it was "entitled to judgment as a matter of law that its statutory right to recover the amounts that it has paid to, or on behalf of, Joseph Corn is enforceable against Whitmere and/or any recovery that the Corns may obtain from Whitmere in this action." Whitmere moved to dismiss all claims against him because they were commenced

outside the applicable statute of limitations. The trial court granted the motion by concluding that AT&T's counterclaim could not stand alone, thus, it was a derivative right not an independent right. It found that a two year statute of limitations was applicable and as the claim was brought outside that time period, the claim was barred by the statute of limitations.

¶{50} The appellate court disagreed and determined that a six year statute of limitations in R.C. 2305.07 applied. It doing so it did not discuss the language of R.C. 4123.931. Rather, it explained the workers' compensation system in Ohio and then discussed subrogation in the workers' compensation system versus subrogation in the insurance context. It explained that in the insurance context a subrogated insurer stands in the shoes of the insured-subrogor and has no greater rights than those of its insured-subrogor. *Id.* at ¶35. It stated that where an insured's tort claim is subject to a statute of limitations, so to is the insurer's subrogation claim. *Id.* It then summed up its conclusion by stating:

¶{51} "In sum, in the Worker's Compensation context, AT&T has accepted liability without fault to Corn, Corn's recovery from AT&T is limited to the benefits under R.C. 4123.931 et seq., AT&T has relinquished its common-law defenses, and the subrogation statute is meant to encourage Corn to seek reimbursement for his damages from the party responsible so that AT&T may be reimbursed out of any recovery made by Corn. Far from a modification of a common-law cause of action, AT&T's right to reimbursement from Whitmere is nonexistent but for the statute. Accordingly, AT&T's claims are governed by the six-year statute of limitation." *Id.* at ¶41.¹

¶{52} We agree with the *Corn* reasoning and find that it supports our determination that the language of R.C. 4123.931 creates an independent right of subrogation.

¶{53} However, prior to concluding our analysis of R.C. 4123.931, we recognize that Heritage-WTI's makes a public policy argument for why R.C. 4123.931 does not create an independent right. It argues that to allow the cause of action to be

¹It is noted that *Corn* did not deal with the OBWC as the statutory subrogee, rather the self-insured employer was the statutory subrogee. However, this is a distinction without difference because the definition of statutory subrogee includes a self-insuring employer.

an independent right of recovery will cause a hardship to Ohio businesses because the longer statute of limitations will allow a subrogee to delay action and it will not “encourage prompt prosecution” claims.

¶{54} Determinations of public policy remain with the general assembly, not the courts. *William v. Spitzer Autoworld Canton, L.L.C.*, 122 Ohio St.3d 546, 2009-Ohio-3554, ¶21. Thus, we can only interpret the statute as written and look to the intention of the general assembly when the statute is ambiguous. If the statute purportedly goes against public policy, that argument must be taken to the general assembly to change the statute, not to the courts. Hence, Heritage-WTI’s argument regarding public policy does not impact our determination of whether R.C. 4123.931 creates an independent or derivative right of subrogation for the statutory subrogee; our focus is solely on the language of the statute.

¶{55} Consequently, in conclusion, considering all the above, we find that R.C. 4123.931 creates an independent right of recovery for the statutory subrogee. This conclusion is supported by the language of R.C. 4123.931(A), (G) and (H), the *Kozar*, *York* and *Montgomery* cases, which dealt with whether the language of various statutes were typical subrogation statutes or whether those statutes created an independent right of subrogation, and the *Corn* case which dealt directly with R.C. 4123.931. Thus, OBWC’s argument that R.C. 4123.931 creates an independent right of recovery has merit. Accordingly, R.C. 2305.07’s six year statute of limitations for liability created by statute is applicable and the statute of limitations does not bar OBWC’s complaint.

¶{56} In their appellate brief, Heritage-WTI and McKinley argue that even if we reach the conclusion that R.C. 4123.931 creates an independent right of recovery, which we did, this court is not required to reverse the trial court’s dismissal of the complaint. Heritage-WTI argues that we can still affirm the trial court’s dismissal because “summary judgment” could have been granted on the basis that the claim is barred by *res judicata*. Thus, it contends that the trial court’s error is harmless.

¶{57} McKinley presents three alternative arguments. First, he contends that R.C. 4123.931 does not authorize OBWC to bring a direct action against him. Next, he

argues that the complaint is barred by the compulsory counterclaim rule. Finally, he argues that res judicata bars the claim.

¶{58} For purposes of this appeal, none of the above arguments provide an alternative basis for affirming the trial court's decision. The trial court granted the motion to dismiss specifically on the basis of the statute of limitations; it did not rule on any of these other arguments.

¶{59} Moreover, both the res judicata and compulsory counterclaim rule arguments rely on McKinley's previous suit against Heritage-WTI and/or McKinley's declaratory judgment action in Washington County. Thus, in order to review those arguments, one must look beyond the complaint to determine whether they have any merit. As aforementioned, this court reviews a trial court's decision to dismiss a case pursuant to Civ.R. 12(B)(6) de novo. *Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶5. In considering a Civ.R. 12(B)(6) motion to dismiss, the trial court must review only the complaint, accepting all factual allegations as true and making every reasonable inference in favor of the nonmoving party. *Mitchell v. Milk Lawson Co.* (1988), 40 Ohio St.3d 190, 193. The trial court may not, however, rely upon any materials or evidence outside the complaint in considering a motion to dismiss. *State ex rel. Fuqua v. Alexander* (1997), 79 Ohio St.3d 206, 207. Where the trial court chooses to consider evidence or materials outside the complaint, the court must convert the motion to dismiss into a motion for summary judgment and give the parties notice and a reasonable opportunity to present all materials made pertinent to such motion by Civ.R. 56. *State ex rel. The V. Cos. v. Marshall* (1998), 81 Ohio St.3d 467, 470.

¶{60} The trial court here did not convert the motion to dismiss into a motion for summary judgment. As such, we will not determine whether these facts justify a grant of summary judgment. This court would be overstepping its review, even under a de novo standard of review, to now convert the motion to dismiss to a motion for summary judgment so that we could determine whether res judicata or the compulsory counterclaim rule require dismissal of the claim.

¶{61} Furthermore, as to McKinley's argument that OBWC cannot bring a direct action against him, this argument has no merit. R.C. 4123.931(G) controls this issue. As explained earlier, that section provides that the claimant and the third party

can be jointly and severally liable when the attorney general (when required) is not given notice or when a settlement excludes any amount paid by the statutory subrogee. Since in this case it is alleged that the settlement excluded any amount paid by OBWC, it appears an action can be brought against the claimant.

¶{62} Consequently, Heritage-WTI and McKinley's alternative arguments for purposes of this appeal do not provide a basis for affirming the trial court's decision.

CONCLUSION

¶{63} In conclusion, OBWC's assignment of error has merit. R.C. 4123.931 provides an independent right of recovery and the six year statute of limitations in R.C. 2305.07 is applicable. Thus, the trial court's Civ.R. 12(B)(6) dismissal of the claim on the basis that the statute of limitations had expired is hereby reversed, and this cause is remanded to the trial court for further proceedings according to law and consistent with this Court's opinion.

Donofrio, J., concurs.

Waite, J., concurs.