

RECEIVED
OCT 12 2010
CLERK OF COURT
SUPREME COURT OF OHIO

ORIGINAL

IN THE SUPREME COURT OF OHIO

OHIO BUREAU OF WORKERS'
COMPENSATION,

Appellee,

v.

JEFFREY MCKINLEY, et al.,

Appellants.

- * Case No. 2010-0720
- * On Appeal from the Seventh District
Court of Appeals Case No. 09CO3
(To Columbiana C.P.C. No. 08CV1143)
- *

**MERIT BRIEF OF AMICUS CURIAE
OHIO ASSOCIATION FOR JUSTICE**

Gregory Brunton (0061722)
D. Patrick Kasson (0055570)
REMINGER CO. L.P.A.
65 East State Street, 4th Floor
Columbus, OH 43215
Phone: (614) 228-1311
Fax: (514) 232-2410
*Counsel for Appellant
Heritage WTI, Inc.*

T. Jeffrey Beausay (0039436)
TWYFORD & DONAHEY
495 S. High Street, Suite 100
Columbus, OH 43215
Phone: (614) 224-8166
Fax: (614) 849-0475
*Counsel for Claimant
Jeffrey McKinley*

Russell Gerney (0080186)
LAW OFFICE OF RUSSELL GERNEY
142 23rd Street, Suite 204
Toledo, OH 43604
Phone: (419) 244-7885
Fax: (419) 244-7886
Email: gerneylaw@yahoo.com
*Counsel for Amicus Curiae
Ohio Association for Justice*

- * Richard Cordray (0038034)
Attorney General of Ohio
- * Benjamin C. Mizer (0083089)
Solicitor General
- * *Lead Counsel*
Stephen P. Carney (0063460)
Deputy Solicitor
- * Mia M. Yaniko (0083822)
Assistant Solicitor
30 East Broad Street, 17th Floor
Columbus, OH 43215
Phone: (614) 466-8980
Fax: (614) 466-5087
*Counsel for Appellee
Ohio Bureau of Workers' Compensation*
- * Benjamin W. Crider (0074175)
Lee M. Smith (0020861)
LEE M. SMITH & ASSOCIATES
929 Harrison Avenue, Suite 300
Columbus, OH 43215
Phone: (614) 464-1626
Fax: (614) 464-9280
*Special Counsel for Appellee
Ohio Bureau of Workers' Compensation*

FILED
OCT 12 2010
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

TABLE OF CONTENTS..... p. ii.

TABLE OF AUTHORITIES..... p. iii.

STATEMENT OF INTEREST..... p. 1.

STATEMENT OF THE CASE..... p. 1.

STATEMENT OF FACTS..... p. 1.

ARGUMENT..... p. 1.

Proposition of Law No. 1

Where a third-party tortfeasor has caused an injury to an Ohio worker which arises out of and is as a result of that worker's employment, R.C. 4123.931 makes the BWC a statutory subrogee, it gives the BWC standing to pursue an action against the third-party to recover subrogated funds and it creates a cause of action for the BWC to sue both claimants and third-parties where there has been a settlement and the BWC has not received proper notification or payment.

Introduction..... p. 1.

BWC'S Right of Subrogation..... p. 3.

BWC'S Standing to Bring Direct Action Against Third-Party Tortfeasor..... p. 4.

BWC'S Cause of Action Against Claimant and Third-Party Tortfeasor..... p. 5.

The Time During Which the BWC Must Assert Its Subrogation Interest... p. 7.

CONCLUSION..... p. 10.

CERTIFICATE OF SERVICE..... p. 12.

TABLE OF AUTHORITIES

CASES

<u>Chemtrol Adhesives v. American Manufacturers Mutual Insurance Co.,</u> (1989) 42 Ohio St.3d 40.....	pp. 8-9.
<u>Galanos v. City of Cleveland,</u> (1994) 70 Ohio St. 3d 220.....	pp. 8-9.
<u>Lake Hospital System, Inc. v. Ohio Insurance Guaranty Association,</u> (1994) 69 Ohio St. 3d 521.....	p. 10.
<u>Sears v. Weimer,</u> (1944) 143 Ohio St. 312.....	p. 10.
<u>Slingluff v. Weaver,</u> (1902) 66 Ohio St. 621.....	p. 10.
<u>State ex rel Foster v. Evatt,</u> (1944) 144 Ohio St. 65.....	p. 10.

STATUTES

R.C. 2305.07.....	p. 5.
R.C. 4123.931.....	pp. 3-5.

OTHER

Rule of Professional Conduct 1.15.....	pp. 6-7.
Black's Law Dictionary (7 th ed.).....	pp. 4, 6.

STATEMENT OF INTEREST

The Ohio Association for Justice (OAJ) is comprised of approximately two thousand (2000) attorneys primarily practicing on behalf of claimants and plaintiffs in the state of Ohio. The members of OAJ are dedicated to preserving the rights of private litigants and to the promotion of public confidence in the legal system.

Many members of OAJ represent injured workers in both administrative and legal proceedings. The decision below effects the rights of both injured workers and will have a chilling effect on efforts to settlement workers' compensation cases.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Amicus Curiae Ohio Association for Justice concurs in the recitation of the case and recitation of the facts as set forth in the Merit Brief of Appellant, Heritage WTI, Inc. (Heritage).

ARGUMENT

Proposition of Law

Where a third-party tortfeasor has caused an injury to an Ohio worker which is in the course of and arises out of that worker's employment, R.C. 4123.931 makes the BWC a statutory subrogee, it gives the BWC standing to pursue an action against the third-party to recover subrogated funds and it creates a cause of action for the BWC to sue both claimants and third-parties where there has been a settlement and the BWC has not received proper notification or payment.

1. Introduction

R.C. 4123.931 gives the Ohio Bureau of Workers Compensation (BWC) three distinct ways in which it can recoup money paid out in workers' compensation benefits where the injury is as a result of a third-party's tortious conduct.

The first way in which the BWC can recoup is by means of traditional subrogation. When recouping in this manner, the BWC must assert its subrogation interest within the two-year statute of limitations for personal injury actions.

The second way is via a direct action against the third-party tortfeasor. When recouping in this manner the BWC again must adhere to the two-year statute of limitations for personal injury actions.

The final way is by means of an action against either the third-party tortfeasor or the claimant as a result of new liability created in R.C. 4123.931. When recouping pursuant to this new cause of action, the six-year statute of limitations found in R.C. 2305.07 applies.

In the matter *sub judice*, the BWC filed an action against Claimant, Jeffrey McKinley and the third-party, Appellant Heritage. There is no question that the BWC received proper notification of its subrogation rights. Moreover, it is undisputed that the BWC failed to act upon that notification in a timely fashion—i.e. within the two year statute of limitations for a personal injury.

Thus, the trial court was correct to dismiss the action pursuant to Civ.R. 12(B)(6). The statute of limitations had run for the assertion of the BWC's subrogation interests. Additionally, because there had been a proper notification and no assertion by the BWC of its subrogation interests, the new cause of action created in R.C. 4123.931 was not available as a remedy.

Moreover, the BWC does not have the six-year statute of limitations found in R.C. 2305.07 because the cause of action governed by that statute of limitations is only available where there has been a failure to notify or a failure to pay where the subrogation interest

has been timely asserted. The right to be a subrogee is automatic under the statute, but that does not relieve the BWC of the duty to assert its interest. So long as there has been proper notification, the BWC must assert its subrogation interest within the statute of limitations for a personal injury—i.e. two years.

Thus, the decision of the appellate court reversing the trial court is incorrect. The BWC does not have six years to assert its interests where it has received proper notice—it has only two years. As a result, because it is undisputed that the BWC did not assert its subrogation interest until well after the two year limit had passed, a dismissal under Civ.R. 12(B)(6) is correct. Therefore, the decision of the appellate court must be reversed and the dismissal of the cause of action pursuant to Civ.R. 12(B)(6) must be reinstated.

2. BWC’S Right of Subrogation

R.C. 4123.931 grants the BWC traditional subrogation rights against a third-party tortfeasor. R.C. 4123.931 provides, in pertinent part, “[t]he payment of compensation or benefits pursuant to this chapter or Chapter 1421., 4127., or 4131., of the Revised Code creates a right of recovery in favor of the 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). Because there is no dispute regarding these traditional subrogation rights, there is no need for further analysis of this point.

It is, however, worthwhile to remember that while the BWC’s subrogation **rights** are automatic (meaning that there is no need for there to be any sort of privity between the parties) the BWC’s **legal interest** in monies which it has paid out in the form of benefits must be asserted like any other legal interest.

3. BWC's Standing to Bring a Direct Action Against a Third-Party Tortfeasor

In addition to granting the BWC traditional subrogation rights, R.C. 4123.931 also gives the BWC standing to pursue an action directly against a third-party tortfeasor regardless of whether the claimant is pursuing such an action. This grant of standing is found in parts "A" and "H" of the statute. The pertinent parts provide "[t]he payment of compensation or benefits pursuant to this chapter or Chapter 1421., 4127., or 4131., of the Revised Code creates a right of recovery in favor of the statutory subrogee against a third-party, and the statutory subrogee is subrogated to the rights of a claimant against that third party," additionally, "[a] statutory subrogee may institute and pursue legal proceedings against a third party, *either by itself* or in conjunction with a claimant." R.C. 4123.931(A, H) [emphasis added].

Normally, the only person who can pursue a personal injury claim is the injured person himself or herself.¹ The ability to pursue a claim is known as "standing." "Standing" is defined as "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." BLACK'S LAW DICTIONARY (7th ed.)

R.C. 4123.931 has simply extended standing to the BWC to pursue a personal injury action against a tortfeasor. However, R.C. 4123.931 has not extended the statute of limitations for a personal injury claim vis-à-vis the BWC. The statute of limitations found at R.C. 2305.10 controls all actions for personal injury whether brought by the claimant or by the BWC. There is nothing in R.C. 4123.931 which can be construed as extending the statute of limitations for a personal injury action or of providing an exception for the BWC. The section of the statute upon which the appellate court relied for its decision only

¹ The obvious exception is when the injured person dies and the claim is pursued by the estate of that decedent.

pertains to the third way in which the BWC can recoup monies paid to a claimant who has been injured by a third-party tortfeasor.

4. BWC's Cause of Action Against a Claimant and a Third-Party Tortfeasor

The final manner in which the BWC can recoup monies paid to a claimant who has been injured by a third-party tortfeasor is as a result of a new liability which was created by the General Assembly and is now codified in R.C. 4123.931(G). That section of the statute provides,

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.

R.C. 4123.931(G).

The six year statute of limitations found in R.C. 2305.07 upon which the appellate court relied applies only to this final way for the BWC to recoup the money it has paid to a claimant in benefits.

R.C. 2305.07 provides, “[e]xcept as provided in sections 126.301 and 1302.98 of the Revised Code, an action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued.” For purposes of this discussion, the key phrase in this statute is “a liability created by statute.”

R.C. 4123.931 has created a new liability. A “liability” is defined as “[t]he quality or state of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment.” BLACK’S LAW DICTIONARY (7th ed.) The new legal responsibilities which fall to both the claimant and the third-party tortfeasor are (1) to provide notice to the BWC so that it can assert its subrogation interests and, once those interests are properly asserted, (2) to pay to subrogated amount back to the BWC.

The first duty is automatic. The BWC has a right to be subrogated to the claimant’s recovery against the third-party tortfeasor. Thus, the claimant or the third-party tortfeasor must provide notice to the BWC. Where there has been failure to provide such notice, the BWC has six years, pursuant to R.C. 2305.07 to bring an action against either or both the claimant and the third-party to recover the subrogated amount. This action, however, is only available where the BWC has not received notice.

The second duty, to pay the subrogated amounts, is triggered only after the BWC has asserted its subrogation interest. In other words, there is a condition precedent to the duty to pay—that condition is the assertion by the statutory subrogee of its subrogation interest. If there has been no assertion of subrogation rights then the condition precedent has not been satisfied and the duty to pay has not been triggered.

The concept that a legal duty pursuant to subrogated amounts must be triggered by a condition precedent is not unique to this statute. In fact, the Official Comment to Rule of Professional Conduct 1.15 provides:

Divisions (d) and (e) address situations in which third persons may claim a lawful interest in specific funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect third-person interests of which the lawyer has actual knowledge against wrongful

interference by the client. When there is no dispute regarding the funds or property in the lawyer's possession, the lawyer's ethical duty is to promptly notify and deliver the funds or property to which the client or third person is entitled. When the lawyer has actual knowledge of a dispute between the client and a third person who has a lawful interest in the funds or property in the lawyer's possession, the lawyer's ethical duty is to notify both the client and the third person, hold the disputed funds in accordance with division (a) of this rule until the dispute is resolved, and consider whether it is necessary to file an action to have a court resolve the dispute. The lawyer should not unilaterally assume to resolve the dispute between the client and the third person. When the lawyer knows a third person's claimed interest is not a lawful one, a lawyer's ethical duty is to notify the client of the interest claimed and promptly deliver the funds or property to the client.

Prof. Cond. Rule 1.15, Official Comment 4 (2010).

The key to understanding the Official Comment to Rule 1.15 is the fact that the duty to protect funds and property in which a third-party has legal interest is only triggered by the lawyer's actual knowledge of such legal interest. In other words, unless the third-party, pursuant to its legal rights whether contractual or otherwise, has asserted its interest (the condition precedent), the attorney has no legal obligation to protect the funds in which that third-party has a legal interest.

In the instant matter, there is no question that the BWC received proper notice. Thus, the duty to pay became dependent upon the BWC's assertion of its subrogation interest. Because the BWC never asserted its interest, the duty to pay was not triggered. As such, neither Appellant (Heritage), nor Claimant (Mr. McKinley) owe the BWC anything.

5. The Time During Which the BWC Must Assert Its Subrogation Interest

As seen above, R.C. 4123.931 has given the BWC three different ways in which to recoup monies paid out in the form of workers' compensation benefits. Although R.C. 4123.931 is silent regarding statute of limitations for those three ways, other sections of the Revised Code provide the proper statutes of limitations.

In Section 3, above, it was shown that the BWC was granted standing to pursue an action by itself against a third-party tortfeasor. Because the BWC only pays benefits to claimants who have suffered an injury (i.e. a personal injury) any such action by the BWC against a third-party tortfeasor must be governed by the two-year statute of limitations provided in R.C. 2305.10.

Additionally, it was seen in Section 4, above, that the six-year statute of limitations found in R.C. 2305.07 applies to the new liability which the General Assembly created. However, that statute of limitations does not apply to the instant matter because the BWC was given proper notice and it failed to assert its subrogation interest. Thus, the new liability created in R.C. 4123.931 is not applicable.

Thus, the only question remaining is the time which the BWC has to assert its subrogation rights. Long-standing decisions of this Court provide the answer.

It is well understood that a “subrogee cannot succeed to a right not possessed by the subrogor.” *Galanos v. City of Cleveland*, (1994) 70 Ohio St. 3d 220, 222. This principle was initially explained by this Court in *Chemtrol Adhesives v. American Manufacturers Mutual Insurance Co.* One of the primary issues in that case was whether “the subrogee of a commercial consumer may maintain an action keyed to negligence and strict liability theories for solely economic damages.” *Chemtrol Adhesives v. American Manufacturers Mutual Insurance Co.* (1989) 42 Ohio St.3d 40, 41. The resolved that issue by finding that the remedies of the subrogor were limited to those available pursuant to the contract between the subrogor and the manufacturer and thus the subrogee was also limited to those same remedies. *Chemtrol*, 42 Ohio St.3d, 51. The overriding principle of *Chemtrol* was

announced in the Syllabus of the Court wherein it was held “[a]n insurer-subrogee cannot succeed to or acquire any right or remedy not possessed by its insured-subrogor.” *Id.* at 40.

Five years later this basic principle was extended to statutory subrogees as well as contractual subrogees in *Galanos*. In that case this Court held the Ohio Department of Human Services had no rights greater than those possessed by the subrogor. *Galanos*, 70 Ohio St.3d, 222.

The error of the appellate court was the failure to understand that the six year statute of limitations only applies *where there has been a failure to provide notice or a failure to pay after proper notice has been given*. As a result, the appellate court has granted the BWC greater rights as a statutory subrogee than those of the subrogor. The decisions of this Court clearly contradict that outcome and necessitate that the appellate court’s decision be reversed.

As a subrogee, the BWC cannot have rights greater than those possessed by the subrogor. The subrogor has two-years from the date of injury to bring his claim for personal injury. Based on that fact, the subrogee has only two years from the date of injury to assert its subrogation claim.

The concern that the BWC might not receive notice until after the two-year statute of limitations has run is addressed by R.C. 4123.931 itself. If there is a failure to provide timely notice, the BWC then has the option of bringing an action pursuant to the new liability created in R.C. 4123.931. The statute of limitations for that action is six years. As such, the BWC’s interests are well protected.

CONCLUSION

Ohio jurisprudence and this Court have a long history of applying the laws as written. For at least one hundred years, this Court has consistently held that, “the intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation.” Slingluff v. Weaver, (1902) 66 Ohio St. 621, SYLLABUS ¶ 2. Put another way, “[a]n unambiguous statute is to be applied, not interpreted.” Sears v. Weimer, (1944) 143 Ohio St. 312, SYLLABUS, ¶ 5. Building on these holdings, this Court has “stated on numerous occasions that if the meaning of a statute is clear on its face, then it must be applied as it is written.” Lake Hospital System, Inc. v. Ohio Insurance Guaranty Association, (1994) 69 Ohio St. 3d 521, 524. .

Finally, “[i]t has been held, too often to need any citation of authority, that in seeking legislative intention courts are to be guided by what the legislative body said rather than what we think they ought to have said.” State ex rel Foster v. Evatt, (1944) 144 Ohio St. 65, 104. In the matter *sub judice*, the statute is clear. There is no ambiguity requiring judicial interpretation. When all the words of the statute of given their proper meaning and effect there can only be one result--viz. that the BWC must receive notice where there is third-party tortfeasor and that the BWC must assert its subrogation interest in order for the claimant and the third-party tortfeasor to be liable for failure to pay the subrogation interest.

In this matter, the claimant provided the BWC with proper notice. The BWC then failed to assert its subrogation interest. Based on that failure, the decision of the trial court

to dismiss the BWC's claim pursuant to Civ.R. 12(B)(6) was correct. The decision of the appellate court reversing the trial court is incorrect. That decision must be reversed and the dismissal pursuant to Civ.R. 12(B)(6) reinstated.

Respectfully submitted

LAW OFFICE OF RUSSELL GERNEY

A handwritten signature in black ink, appearing to read "Russell Gerney", written over a horizontal line.

Russell Gerney
Attorney for Amicus Ohio Association for Justice

CERTIFICATION

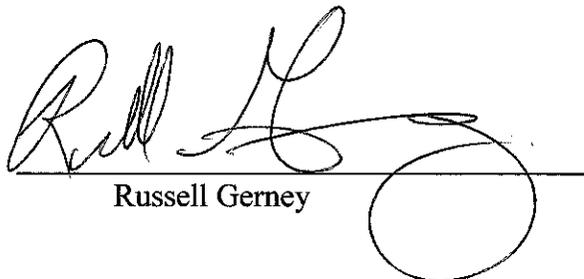
This is to certify that a copy of the foregoing **Merit Brief of Amicus Curiae Ohio Association for Justice** was sent this 12th day of October, 2010, via ordinary U.S. mail, postage pre-paid, to:

Gregory Brunton (0061722)
D. Patrick Kasson (0055570)
REMINGER CO. L.P.A.
65 East State Street, 4th Floor
Columbus, OH 43215
Phone: (614) 228-1311
Fax: (514) 232-2410
*Counsel for Appellant
Heritage WTI, Inc.*

T. Jeffrey Beusay (0039436)
TWYFORD & DONAHEY
495 S. High Street, Suite 100
Columbus, OH 43215
Phone: (614) 224-8166
Fax: (614) 849-0475
*Counsel for Claimant
Jeffrey McKinley*

Benjamin C. Mizer (0083089)
Stephen P. Carney (0063460)
Mia M. Yaniko (0083822)
30 East Broad Street, 17th Floor
Columbus, OH 43215
Phone: (614) 466-8980
Fax: (614) 466-5087
*Counsel for Appellee
Ohio Bureau of Workers' Compensation*

Benjamin W. Crider (0074175)
Lee M. Smith (0020861)
LEE M. SMITH & ASSOCIATES
929 Harrison Avenue, Suite 300
Columbus, OH 43215
Phone: (614) 464-1626
Fax: (614) 464-9280
*Special Counsel for Appellee
Ohio Bureau of Workers' Compensation*



Russell Gerney