

In the
Supreme Court of Ohio

OHIO BUREAU OF WORKERS'
COMPENSATION,

Plaintiff-Appellee,

v.

JEFFREY McKINLEY, et al.,

Defendants-Appellants.

Case No. 2010-0720

On Appeal from the
Seventh District
Court of Appeals

Court of Appeals Case
No. 09C03

**MERIT BRIEF OF PLAINTIFF-APPELLEE
OHIO BUREAU OF WORKERS' COMPENSATION**

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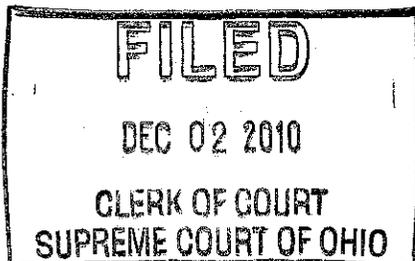


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INTRODUCTION

This case asks what statute of limitations, if any, applies when the Bureau of Workers' Compensation sues, under R.C. 4123.931(G), to be reimbursed when it has paid benefits to an injured worker and the worker later receives a settlement from a third party for the same injury. In such cases, no statute of limitations applies at all, or if one does, it is the six-year period that applies to "a liability created by statute." R.C. 2305.07.

This procedural issue arises in the broader context of the Bureau's right to recover in such cases. When an Ohio worker is injured on the job, workers' compensation is there to help, providing benefits to cover medical expenses, lost wages, and so on. Separately, when anyone not on the job is injured by another's negligence, the tort system is there to force a tortfeasor to pay the injured victim for his losses. And when those two systems overlap—namely, when a worker is injured on the job by a third party's negligence—the injured worker may claim workers' compensation benefits *and* sue his tortfeasor for recovery. If a worker collects by both mechanisms, he might end up with a double recovery, and the workers' compensation system might end up paying for losses for which a tortfeasor has also paid. Consequently, Ohio's workers' compensation system sensibly requires a claimant to reimburse the Bureau for benefits when the claimant recovers from another. This common sense idea is near-universal: This Court has "recognized that 'virtually every jurisdiction provides some statutory mechanism enabling the employer or fund to recover its workers' compensation outlay from a third-party tortfeasor.'" *Groch v. GMC*, 117 Ohio St. 3d 192, 2008-Ohio-546, ¶ 41 (quoting *Holeton v. Crouse Cartage Co.* (2001), 92 Ohio St. 3d 115, 120).

Specifically, Ohio law provides that when a claimant recovers from a tortfeasor, the Bureau may join the tort suit or the settlement negotiations to receive its share of recovery. R.C. 4123.931(G). And if the claimant and tortfeasor settle between themselves and exclude the

Bureau, as happened here, Ohio law grants the Bureau a right of recovery against the claimant and the tortfeasor. *Id.* The provision itself does not supply a statute of limitations stating when the Bureau must sue the claimant and tortfeasor, and it is that absence that leads to the question presented here.

First, the Court should hold that no statute of limitations applies when the Bureau seeks recovery. The Court has held firm to the traditional rule that the State is exempt from generally applicable statutes of limitations, so that such limitations apply only when the General Assembly expressly provides that the State is subject to a limitations period. *Ohio Dep't of Transp. v. Sullivan* (1988), 38 Ohio St. 3d 137. Here, the recovery statute does not provide any statute of limitations at all, let alone one that the State is subject to, so the *Sullivan* rule applies.

Second, if any statute of limitations applies, it is the six-year period that applies to actions created by statute, not the two-year period that applies to torts, because the right of recovery here is a statutory creation, not a common-law right of subrogation. To be sure, the recovery statute does borrow the term “subrogation” from common law, because the right here is similar to the subrogation rights typically available to private insurers—based on equity or contract—when such insurers stand in their insured’s shoes to sue tortfeasors. But the Bureau’s right of recovery exists *only* because of this statute, and the Court has already said as much, both in invalidating prior recovery statutes and in upholding the current one. Moreover, the Bureau’s right accrued only when it learned that the claimant and tortfeasor had settled and excluded the Bureau, as it is that exclusionary settlement that triggered the Bureau’s right to recover under R.C. 4123.931(G).

Defendant-Appellee Heritage-WTI (“Heritage”), in seeking to impose a two-year period—and worse yet, a two-year period starting from the date of the injury, not from the Bureau’s discovery of the tort settlement—stands against the statute, case law, and ultimately, the entire

recovery scheme. After all, the Bureau can hardly be expected to recover if claimants routinely wait until the end of their own two-year periods to file a tort suit—or even to file a workers’ compensation claim—leaving the Bureau’s clock already expired, or all-but-expired, before it even learns of its right to recover.

Indeed, this case is a textbook example of why the Bureau’s right to recover is independent, and why its rights—even if based on its payments to a claimant—should not be held captive to a claimant/tort-plaintiff’s procedural choices in litigation. Here, Jeffrey McKinley, the injured worker, delayed the Bureau’s collection efforts in several ways. After the Bureau asserted, in 2004, its interest in any future tort recovery, McKinley not only settled with Heritage and excluded the Bureau, but he preemptively sued the Bureau in an attempt to preclude the Bureau’s later recovery. See *McKinley v. Bureau of Workers’ Compensation* (4th App. Dist.) (“4th App. Op.”), 170 Ohio App. 3d 161, 2006-Ohio-5271, ¶¶ 3-4. In fact, McKinley brought his attempt to this Court, and his case was held as a companion case to *Groch*, in which the Court upheld the validity of the statute establishing the Bureau’s recovery rights. *McKinley v. Bureau of Workers’ Compensation*, 2008-Ohio-1736. On remand, McKinley voluntarily dismissed that preemptive case against the Bureau, and only then did the Bureau formally file this collection action against McKinley and Heritage in November 2008. Holding McKinley’s delaying tactics against the Bureau would violate common sense as well as the statute’s plain terms.

For all these reasons, the Court should hold that the Bureau faces no statute of limitations in seeking to recover from McKinley and Heritage. In the alternative, if any limitations period applies, it is the six-year period that applies to “a liability created by statute,” R.C. 2305.07, as the right of recovery here exists only by virtue of R.C. 4123.931.

STATEMENT OF THE CASE AND FACTS

This case turns not just on the facts and procedure in this, the Bureau's collection case against McKinley and Heritage, but also on the legal background of the Bureau's right to recover, which McKinley litigated in a previous case against the Bureau concerning this same injury. See *Ohio Bureau of Workers' Compensation v. McKinley* (7th App. Dist.), 2010-Ohio-1006 ("App. Op.," i.e., the case below), and *McKinley v. Bureau of Workers' Compensation* (4th App. Dist.) ("4th App. Op."), 170 Ohio App. 3d 161, 2006-Ohio-5271. Consequently, this factual statement includes that background and the previous litigation.

The statute at issue here, R.C. 4123.931, was upheld as constitutional by this Court, but only after two previous statutory schemes were invalidated. See *Groch*, 2008-Ohio-546 at ¶ 1 (upholding current law); *Holeton*, 92 Ohio St. 3d at 130, 133, 135 (invalidating law enacted in 1995); *Modzelewski v. Yellow Freight Sys. Inc.*, 102 Ohio St. 3d 192, 2004-Ohio-2365, ¶¶ 1, 15, 20 (invalidating 1993 law that was revived post-*Holeton*). The current version became effective on April 9, 2003, so it applies here. The Court upheld the statute in *Groch* in February 2008, and as the *Groch* case worked its way through the courts, McKinley's own challenge to the statute's constitutionality proceeded, too, as explained below.

A. McKinley collected workers compensation benefits for an injury, settled with Heritage for the same injury without including the Bureau, and sued the Bureau to block any collection efforts or to determine the amount owed.

Jeffrey McKinley was injured on July 13, 2003, while on the job. See App. Op. ¶ 2. His employer was Safway Services, Inc., and he was injured on the premises of Defendant-Appellant Heritage-WTI's facility in East Liverpool, Ohio. *Id.* Heritage was then known as Von Roll America, Inc., and its facility was known as Waste Technologies, a trash incinerator. 4th App. Op. ¶ 2. McKinley fell while working inside a furnace and was severely burned. *Id.*

McKinley filed a claim with the Bureau to recover compensation for his injuries, and the Bureau approved his claim. The Bureau has paid medical bills and compensation on his behalf, and it will continue to make payments into the future as necessary and approved per Bureau guidelines and regulations. “As of November 22, 2005, the [Bureau] had paid [McKinley] compensation in the amount of \$398,303.17.” 4th App. Op. ¶ 3.

McKinley filed a third-party, personal injury lawsuit against Heritage, the alleged tortfeasor, based on premises liability, and he recovered a settlement for an undisclosed amount. App. Op. ¶ 3; 4th App. Op. ¶ 3. McKinley notified the Bureau of the pending case before the settlement. See Appx. E and F to Heritage Br. But when McKinley settled with Heritage, the Bureau was not included in the settlement. The Bureau had, however, asserted its interest administratively; it had “claim[ed] a statutory lien upon the settlement proceeds in the amount of \$885,808.56,” representing an amount including estimated future benefits. 4th App. Op. ¶ 3.

In response to the Bureau’s demand for payment, McKinley sued the Bureau on April 11, 2005, in the Washington County Court of Common Pleas. App. Op. ¶ 3; 4th App. Op. ¶ 4. He sought a declaratory judgment stating that R.C. 4123.93 and 4123.931 were unconstitutional. App. Op. ¶ 3; 4th App. Op. ¶ 4. “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 [the Bureau] under R.C. 4123.931.” App. Op. ¶ 3. The Washington County Common Pleas Court found the statutes unconstitutional, so it did not reach the issue of the amount. *Id.* The Fourth District reversed in September 2006, upholding the statute, and remanded the rest. *Id.* That remand was delayed while McKinley appealed to this Court.

McKinley filed a jurisdictional memorandum in this Court on November 13, 2006. See McKinley Mem. in Support of Jurisdiction (“McKinley Jur. Mem.”), Case 2006-2095, available

at <http://www.sconet.state.oh.us/tempx/582686.pdf>. By that time, a federal district court had already certified the *Groch* case to this Court, raising the same constitutional challenges, so the Bureau urged the Court to hold McKinley's case for *Groch*. See Bureau's Mem. in Response, available at <http://www.sconet.state.oh.us/tempx/585117.pdf>. The Court agreed. See Order of Feb. 28, 2007, available at <http://www.sconet.state.oh.us/tempx/168606.pdf>.

In his jurisdictional appeal to this Court, McKinley objected that "the BWC requested reimbursement from Jeff McKinley in the amount of \$885,808.56," and he said that the request was invalid because the statute was unconstitutional. McKinley Jur. Mem. at 3, 4. He noted that he had attended an "'administrative conference' as contemplated by R.C. 4123.931(B)," where the Bureau sought to settle its recovery claim, but McKinley considered the conference "worthless." Jur. Mem. at 3. In a motion filed in September 2007 after the *Groch* argument, McKinley sought leave to file a post-hearing brief in his case or in *Groch*, urging that "Jeff McKinley has a huge stake in the outcome of this issue; the BWC is seeking reimbursement from him in excess of \$500,000." See Motion filed Sept. 26, 2007, available at <http://www.sconet.state.oh.us/tempx/605611.pdf>. The Court denied the Motion. See Order of Nov. 21, 2007, available at <http://www.sconet.state.oh.us/tempx/172210.pdf>.

The Court decided *Groch* on February 21, 2008, upholding the right-to-recover statute as constitutional, and on April 16, 2008, it affirmed the Fourth District's decision in *McKinley* on authority of *Groch*. *McKinley v. Bureau of Workers' Compensation*, 2008-Ohio-1736, ¶ 1. That ruling triggered the Fourth District's long-delayed remand to the Washington County Common Pleas Court, which presumably would have reached the issue of the amount that the Bureau was entitled to recover. See App. Op. at ¶ 3; 4th App. Op. at ¶ 39. But McKinley voluntarily dismissed his Washington County case, under Rule 41(A), on April 30, 2008. See Notice of

Dismissal, attached as Ex. B to Reply Brief of Bureau, filed below in this appeal in the Seventh Dist.

B. The Bureau sued both McKinley and Heritage in November 2008 in the Columbiana County Court of Common Pleas, seeking to recover from both, but the common pleas court dismissed the Bureau's action as untimely, finding that a two-year statute of limitations had expired.

After McKinley dismissed his Washington County case in April 2008, and after the Bureau's further attempts to negotiate with McKinley failed again, the Bureau filed its own lawsuit on November 4, 2008. See Complaint, Appx. D to Heritage Br. The Bureau filed in the Columbiana County Court of Common Pleas, naming McKinley and Heritage as defendants jointly and severally. The lawsuit was filed in accordance with R.C. 4123.931(G), which provides that "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." (The statute's reference to a "statutory subrogee" includes both the Bureau and any self-insured employer, which likewise may recover if it has paid benefits to a claimant who also recovers from a tortfeasor or alleged tortfeasor. See R.C. 4123.93.).

The common pleas court dismissed the case, on Heritage's motion to dismiss, as it agreed with Heritage that the Bureau had filed too late. Com. Pl. Op., Appx. G to Heritage Br., at 1. The common pleas court held that the Bureau's right to recovery was derivative of McKinley's right to recover from Heritage, so in its view, McKinley's own statute of limitations—two years from the injury—applied to the Bureau's claim as well. *Id.* at 2.

C. The Seventh District Court of Appeals reversed, holding that R.C. 4123.931 creates an independent right of recovery, triggering R.C. 2305.07's six-year statute of limitations for "a liability created by statute."

On appeal, the Seventh District reversed the common pleas court's decision, holding that the Bureau's filing was timely. The Seventh District held that R.C. 4123.931 "creates an independent right of recovery," App. Op. at ¶ 42, 55, and that this statutory creation triggered R.C. 2305.07, which applies a six-year statute of limitations to "a liability created by statute," App. Op. at ¶ 55. The Seventh District rejected Heritage's and McKinley's arguments in favor of a two-year limit, reasoning that the "independent right" conclusion was inconsistent with calling the right of recovery a purely "derivative right of subrogation." *Id.* at ¶ 15.

The Seventh District did not address the Bureau's first argument, which it had briefed to the court, that no statute of limitations applied at all. The Seventh District noted that the Bureau's filing fell within a six-year period, App. Op. at ¶ 11, so it presumably found it unnecessary to address the other argument.

Heritage appealed to this Court, which accepted jurisdiction. See Order of July 26, 2010. McKinley, who participated in the trial court and appeals court below, has not participated here.

ARGUMENT

Heritage urges, in a sole proposition of law, that a two-year statute of limitations applies, starting with McKinley's injury, rendering the Bureau's complaint below untimely. The Bureau first urges that no statute of limitations applies. Second, the Bureau alternatively urges that the limitations period, if any, is six years, accruing when the Bureau learns that parties have excluded it from a settlement. Either proposition supports the judgment below, which properly reversed the trial court's dismissal and reinstated the Bureau's lawsuit to proceed.

Plaintiff-Appellee Ohio Bureau of Workers' Compensation's Proposition of Law No. 1:

No statute of limitations attaches when the Bureau sues under R.C. 4123.931 to recover workers' compensation benefits paid on behalf of a claimant for an injury, when that claimant settles with an alleged tortfeasor for the same injury and the settlement excludes the Bureau.

The Court can and should avoid the debate between the six-year and two-year statutes of limitations by holding that the Bureau is not subject to any statute of limitations at all. That result flows from settled precedent and the statute's plain text, and it leaves it to the General Assembly to respond to Heritage's policy-based arguments for a statute of limitations of any length.

This Court has long maintained the well-established general rule that statutes of limitations do not run against the State, unless the General Assembly specifies expressly that a given statute applies to the State. *Ohio Dep't. of Transp. v. Sullivan* (1988), 38 Ohio St. 3d 137 ("the state of Ohio, absent express statutory provision to the contrary, is exempt from the operation of a generally worded statute of limitations"). In *Sullivan*, the Court explained that courts throughout the country had long held that neither state nor federal governments are bound by generally worded statutes of limitations. *Id.* at 139. The rule, traditionally stated in Latin as "nulle tempus occurit regi" (time does not run against the king), comes from the idea that the taxpaying

public, which ultimately “owns” the State’s right to recover, should not lose that right because of any inaction or delay by public officers. *Id.* (citing *In re Decker’s Estate* (1945), 76 Ohio App. 39). The Court also explained that, although the State’s general immunity from statutes of limitations is an “attribute of sovereignty,” it is distinct from sovereign immunity, so it survives any waiver or abolition of sovereign immunity. *Sullivan*, 38 Ohio St. 3d at 139-40.

The Court acknowledged the policy arguments against this rule, *id.* at 139, but it held that only the General Assembly should address those arguments and decide when, if ever, to hold the State to a statute of limitations, *id.* at 140. Specifically, the Court noted the seeming unfairness of the rule, and it noted that modern computer technology and other changes in government made it less plausible that a case could be sensibly lost in the shuffle. *Id.* at 139. Nevertheless, the Court reiterated that “[a]s statutes of limitations are determined in the first instance by the General Assembly, we believe the applicability of a given statute of limitations to the state is also best left to that body.” *Id.*

Applying the *Sullivan* rule here is straightforward. First, the Bureau is undoubtedly an arm of the State. Second, the statute of limitations that would otherwise apply to the right of recovery here, whatever it is, is a “general” one that applies to private entities as plaintiffs. That is so because the right of recovery belongs not just to the Bureau, but also to any employer that is self-insured and pays benefits directly. Such employers are defined as “statutory subrogees,” R.C. 4123.93, and they, like the Bureau, may recover if they pay benefits to a claimant who also obtains a tort recovery, R.C. 4123.931. (The limitations period that applies to those private statutory subrogees is not before the Court, but it seems that their limit should be the six-year statute of limitations, for the reasons in Proposition No. 2 below.) Finally, the recovery statute itself does not expressly tie the State to any statute of limitations, triggering *Sullivan*’s rule that

the “state of Ohio, *absent express statutory provision to the contrary*, is exempt from the operation of a generally worded statute of limitations.” *Id.* (emphasis added).

This no-limitations result is not only mandated by *Sullivan*, but it is also reasonable. First, the Bureau has every incentive to pursue claims quickly, even without a statute of limitations. Common sense and the Bureau’s experience suggest that an injured worker may not have the full amount available years later. In particular, a large claim, such as the one here (for over \$800,000), might not be recoverable for long. Likewise, a claim against a company is urgent, too, as many small and medium businesses, not to mention large banks and corporations, can and do go bankrupt.

Finally, the question in this case should be *how* to apply the *Sullivan* rule here—that is, whether this case falls under *Sullivan* on its own terms—unless Heritage could somehow show that *Sullivan* itself should be overruled in favor of a different governing principle. But Heritage cannot justify overruling *Sullivan*, as it cannot show that the rule itself is unworkable, nor can it satisfy the other *Galatis* factors that must be met before precedent is overruled. See *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, ¶ 48.

In sum, no statute of limitations applies under R.C. 4123.931 as written, and it is up to the General Assembly to decide whether any change is needed.

Plaintiff-Appellee Ohio Bureau of Workers' Compensation's Proposition of Law No. 2:

If any statute of limitations attaches to the Bureau's lawsuits enforcing its right, under R.C. 4123.931(G), to recover workers' compensation benefits paid on behalf of a claimant who has settled a tort claim for the same injury while excluding the Bureau, the applicable statute of limitations is R.C. 2305.07's six-year period for "a liability created by statute."

The Bureau sued Heritage and McKinley under R.C. 4123.931, which allows the Bureau to recover when it has paid workers' compensation to a claimant (McKinley) who has also received compensation from an alleged tortfeasor (Heritage). No one disputes that the Bureau paid McKinley benefits, that McKinley settled with Heritage, and that both the Bureau's payments and Heritage's settlement are rooted in the same injury. McKinley once disputed whether the Bureau could collect at all, and he disputed the amount, see App. Op. at ¶ 3, but those disputes are no longer at issue. The sole issue is whether the Bureau, in seeking to recover *after* Heritage and McKinley settled, filed its collection suit in time. The answer is yes.

The governing statute here is R.C. 4123.931, which, along with definitions provided in R.C. 4123.93, allows the Bureau (or self-insured employers) to recover in such situations. The basic right of recovery for all Bureau recoveries is established in R.C. 4123.931(A), which provides that "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." The term "statutory subrogee" includes both the Bureau and self-insured employers. Because Heritage settled with McKinley, without going to trial, the particular cause of action at issue is specified in the final clause R.C. 4123.931(G), which provides that "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." The Bureau, in suing McKinley and Heritage under that provision, filed in time.

A. R.C. 4123.931 creates an independent right of recovery, so its statutory basis triggers R.C. 2305.07's six-year statute of limitations for "a liability created by statute."

If any statute of limitations applies here, it should be the six-year period contained in R.C. 2305.07, which provides that "an action . . . upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued." Heritage's contrary view, urging a two-year statute of limitations, is mistaken for several reasons.

First, the plain text of R.C. 4123.931 triggers R.C. 2305.07. As this Court has held, a cause of action is considered an "action upon a liability created by statute," thus triggering R.C. 2305.07's six-year period, when the action would not exist but for the statute. *McAuliffe v. W. States Import Company Inc.* (1995), 72 Ohio St. 3d 534, 538. Here, the Bureau would have no cause of action against Heritage or McKinley without the statutory creation of a cause of action in R.C. 4123.931. Heritage would be right if, and only if, it could say that the Bureau has a right of recovery *without* the statute here—and it cannot say that.

Indeed, this Court's and other courts' decisions confirm that the Bureau—unlike insurers claiming subrogation rights by common law, contract, or equity—needs this statute as a basis for recovery in cases like this. After the Court struck down the 1995 statute in *Holeton*, a self-insured employer seeking recovery post-*Holeton* was forced to rely on the earlier 1993 provision as the sole source of recovery rights, not on any common-law rights. See *Modzelewski*, 2004-Ohio-2365 at ¶¶ 7. So when the Court also invalidated the 1993 statute, the employer had no alternate grounds to seek recovery. *Id.* at ¶¶ 20-21. And the Bureau, having collected funds for years on the basis of statute, had to pay back funds it had collected; it could not turn to alternate non-statutory grounds for keeping the money. See *Santos v. Ohio Bureau of Workers' Comp.*,

101 Ohio St. 3d 74, 2004-Ohio-28, ¶¶ 1-7. No case supports any non-statutory basis for a right of recovery by the Bureau or a self-insured employer.

In fact, the Tenth District specifically rejected the Bureau's attempt to recover when, in the court's view, the then-applicable statute did not extend to the situation at issue. *Gregory v. Bureau of Workers' Comp.* (1996), 115 Ohio App. 3d 798, 801-02. In *Gregory*, the 1993 version of the statute—not yet invalidated by this Court—was at issue, and the Bureau sought to collect from parties who settled without the Bureau, as Heritage and McKinley did here. But the appeals court in *Gregory* held that the statute as it then existed provided for the Bureau to recover only when claimants achieved *judgments*, not *settlements*, so without that statutory grounding, the Bureau could not proceed. *Id.* Likewise, the Bureau's current right to recover is based wholly on statute, so this is an "action upon a liability created by statute," R.C. 2305.07, and the six-year period (if any) applies. See *McAuliffe*, 72 Ohio St. 3d at 538.

Second, the nature of the Bureau's right to recovery shows that it is an independent right of recovery, not a purely derivative right piggybacking on McKinley's claim against Heritage. As the appeals court properly noted, the provision that first creates the right of recovery says that 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). App. Op. at ¶ 13. Thus, while this text does adopt the terms "subrogee" and "subrogated," it first *creates a right of recovery*. That independent creation separates this right from common-law subrogation rights. *Id.* at ¶ 35.

In addition, the remainder of the statutory scheme shows how the Bureau's (or a self-insured employer's) right to recovery is a freestanding right of recovery, not derived solely from McKinley's right to sue Heritage. The statute requires claimants to notify a "statutory

subrogee”—the Bureau or a self-insured employer, though this case refers only to the Bureau—of any settlement, compromise, judgment, award or other recovery that the claimant will receive from a third party. R.C. 4123.931(G). The idea is that the Bureau *may* intervene in such a lawsuit or settlement discussion where possible, and the parties and the Bureau may achieve a three-way settlement that covers everyone. The statute instructs that no judgment or settlement should be considered final until the Bureau has had a chance to join in. *Id.*

But if the tort plaintiff and defendant purport to reach finality and settle, with the Bureau excluded from the settlement, a newly created cause of action arises in the Bureau—*regardless of whether the exclusion arose from lack of notification to the Bureau.* R.C. 4123.931(G) concludes with a sentence providing that

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.

Id. (emphasis added). That last emphasized clause renders both the third party (Heritage) and the claimant (McKinley) liable to the Bureau. And notably, the “or” in the middle demonstrates that the Bureau’s liability is created whenever a settlement excludes it, regardless of the Bureau’s notification. That makes sense, because otherwise two parties could notify the Bureau, negotiate to an impasse, and then settle and exclude the Bureau. Notification alone cannot discharge the parties’ duty to the Bureau. If they settle without the Bureau’s inclusion, the Bureau may then sue both to recover, as it did here.

Consequently, any issue about the notice to the Bureau here is a red herring, whether that notice is raised as a policy argument, as Heritage does, Heritage Br. at 19, or as a conclusive

distinction altering the statute of limitations, as an *amicus* argues, see Amicus Br. of Ohio Association of Justice at 2, 8. The Bureau's right to recover is based solely on the fact that McKinley and Heritage settled without the Bureau, not upon any lack of notice.

The statute's creation of an independent right, not a derivative one, is confirmed by the legislative history, which also speaks in terms of an independent right of recovery. See Ohio Legislative Service Commission's Bill Analysis for Sub. S.B. 227 (the act creating the current R.C. 4123.93 and 4123.931 after *Holeton*). That analysis explains that "[t]he act states more specifically than the previous statute that payment of compensation or benefits creates a right of recovery, as opposed to the prior 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 the third party." *Id.* In sum, the General Assembly understood that its statute "creates" an independent "right of recovery," and the words it enacted do precisely that.

In addition, the text, and the overall structure of the statute, demonstrate that the Bureau's right of recovery is not only subject to a six-year statute of limitations (if any), but also that the period begins to run when the Bureau learns that it was excluded from a settlement, not when an injury occurs. That is so because R.C. 2305.07 specifies that a statutorily created action "shall be brought within six years after the cause thereof *accrued*." (Emphasis added). The action here, for recovery after exclusion from a settlement, does not "accrue" when an injury occurs. When an injury occurs, the injured person might choose not to apply for workers' compensation, or might be denied; he also might not be a tort plaintiff. So the Bureau, at that point, has not yet accrued the type of "right of recovery" at issue here. (It may, upon awarding benefits, have the right to file a direct action against a tortfeasor, see R.C. 4123.931(H), but that type of case is not at issue, as this case is based upon McKinley's settlement with Heritage.)

Further, notice to the Bureau of a *potential* tort claim is not enough to start the clock running for a case based upon a settlement excluding the Bureau, as the Bureau in such cases has no right to recover until the claimant settles. That is, when the claimant has received nothing from the tortfeasor, the Bureau has no right, at least of the type covered in the final sentence of R.C. 4123.931(G). The Bureau's sole right, once a claimant has a potential tort recovery, is the right to demand notification, and upon notice, it has the right to try, under R.C. 4123.931(G), to participate in a case before it reaches judgment or settlement. It is only after the parties settle, excluding the Bureau, that the last sentence in R.C. 4123.931(G) is triggered.

Conversely, while the actual settlement is a *necessary* element to trigger the Bureau's right, the settlement alone is not *sufficient* for the right to accrue, if the Bureau has no knowledge of it yet. Otherwise, parties would have an incentive to keep their settlement secret and run out the clock, defeating the purpose of the entire scheme. Consequently, the six-year period, as to cases falling under the last clause of R.C. 4123.931(G), begins to run when the Bureau learns that it has been excluded from a settlement that has been reached.

B. None of Heritage's arguments in favor of a two-year statute of limitations overcomes the statute's plain text and the independent nature of the Bureau's right of recovery.

Heritage urges the Court to adopt a two-year statute of limitations, based on its fundamental claim that the Bureau's right to recover is a "typical" subrogation claim, such that the Bureau stands in McKinley's shoes and inherits his own statute of limitations that applied to his case against Heritage. Heritage offers various cases and arguments in favor of his view, but all fail. The plain-language discussion above, and the creation of the Bureau's right of recovery "by statute," is enough to end the matter. Beyond that, Heritage's arguments fail on their own terms.

1. Heritage's reliance on lower-court cases concerning other statutory schemes is misplaced.

Heritage cites several cases that concern the government's right to recover under other statutory schemes, and it says that cases addressing those schemes support its view of the Bureau's right to recover here. Heritage's reliance on those cases is misplaced.

As an initial matter, none of the cases that Heritage cites, in the context of government-as-plaintiff, are cases from this Court, so their precedential value is limited for that reason alone. While those cases are all distinguishable, as explained below, such cases are also, to the extent they may be read to support Heritage here, simply wrong.

For example, Heritage cites an Eighth District case concerning a former version of R.C. 5101.58, which granted the Ohio Department of Job and Family Services a subrogation right to recover Medicaid payments in certain situations. *Ohio Dep't of Human Serv. v. Kozar* (1995), 99 Ohio App. 3d 713. In *Kozar*, the Eighth District found the Medicaid statute to be a typical subrogation statute that did not create an independent right of recovery. The provision at issue provided that the "acceptance of aid pursuant to [various Medicaid provisions] gives a right of subrogation to the Department of Human Services . . . against the liability of the third party for the cost of medical services and care arising out of injury, disease, or disability of the recipient." *Id.* at 715 (citing former R.C. 5101.58).

Notably, in *Kozar*, the Eighth District contrasted the phrase "right of subrogation" in the provision at issue with the phrase "right of recovery," which had been held to create an independent right for the federal government to recover under the federal Medical Care Recovery Act. See *Kozar*, 99 Ohio App. 3d at 717 (citing *United States v. York* (6th Cir. 1968), 398 F.2d 582, 584). In *York*, the Sixth Circuit had explained how an earlier draft of the federal law had referred to a "mere right of subrogation," but Congress's enactment of the term "right to

recover” instead created an independent right, in the Sixth Circuit’s view. *York*, 398 F.2d at 584. Following *York*’s reliance on the phrase “right to recover” as dispositive, the *Kozar* court held that the contrasting use of “right of subrogation” in the Ohio provision, without the phrase “right of recovery,” led to the conclusion that the Ohio law created a derivative right, not an independent one. *Kozar*, 99 Ohio App. 3d at 717. Here, of course, the phrase “right of recovery” aligns our case with the statute in *York*, not that in *Kozar*, and as a result, not only does *York* itself support the Bureau here, but so, too, does the reasoning in *Kozar*. In addition, the General Assembly has since amended the provision at issue in *Kozar* to provide for an independent, “automatic right of recovery,” without providing for any specific statute of limitations. See current R.C. 5101.58.

Heritage is equally mistaken in its reliance on *Montgomery v. John Doe* 26 (2000), 141 Ohio App. 3d 242, in which the Tenth District found that a statute providing for recovery by the Crime Victims Fund was a “typical” subrogation statute as opposed to one that creates an independent right of recovery. The statute at issue in *Montgomery*, former R.C. 2743.72, authorized the Ohio Crime Victim’s Fund to recover from criminal defendants money paid from the fund under R.C. 2743.56 to crime victims and their families. As in *Kozar*, the provision at issue said that the “state, upon the payment of the award or part of the award, is subrogated to all of the claimant’s rights to receive or recover benefits or damages.” *Montgomery*, 141 Ohio App. 3d at 247. Thus, the text referred to subrogation without any reference to “creating” a “right to recovery,” and it referred to the “claimant’s rights” as the basis. *Id.* The *Montgomery* court specifically relied on *Kozar*’s contrast with *York*, and on the absence of “right of recovery” language in the statute at issue in *Montgomery*. Thus, *Montgomery*, like *Kozar*, supports the

conclusion that the Bureau's right here is an independent one, because R.C. 4123.931 "creates a right of recovery."

In addition, the statute at issue in *Montgomery* had already been amended by the time the appeals court decided the case, and the new statute provides both that it "creates a right of reimbursement, repayment, and subrogation in favor of the reparations fund," and it also expressly imposes a six-year statute of limitations. R.C. 2743.72. As noted above, that language shows the Assembly's ability to impose a statute of limitations, even when it declares an independent right to recover.

In addition to relying on these inapposite cases, Heritage argues generally regarding characteristics that, in its view, demonstrate how the nature of the Bureau's recovery right is derivative, not independent, but Heritage is wrong. For instance, Heritage argues that the Bureau's right must be derivative because the Bureau, it says, may *not sue a tortfeasor directly* if the claimant does not sue first. Heritage Br. at 19. But that is wrong. The statute expressly provides that a "statutory subrogee may institute and pursue legal proceedings against a third party *either by itself* or in conjunction with a claimant." (Emphasis added). Thus, the Bureau may proceed "by itself," and both the Bureau and self-insured employers have filed such cases. See, e.g., *Corn v. Whitmere* (2d Dist.), 183 Ohio App. 3d 204, 2009-Ohio-2737 (allowing company to pursue independent claim and allowing six years to do so). *Corn* supports the Bureau in all respects, from the general nature of the right here, to the analysis of the statute's text, to the ultimate result regarding the statute of limitations (aside from the Bureau's argument for no limit).

Heritage is also mistaken in insisting that the Bureau can only collect for the precise type of damages that McKinley could seek from Heritage. Heritage Br. at 11. The Bureau may seek

reimbursement of its payments of benefits, based upon the statutory formula, and it is not limited in the way that Heritage claims. See *State v. Williams* (10th Dist.), 180 Ohio App. 3d 239, 2008-Ohio-6685, ¶ 16 (“We reject Motorists’ attempt to limit BWC’s rights under the statute as arising from a subrogation interest that allows BWC to recover only to the extent that Williams could have recovered against Motorists’ insured—that is, only if the expenses were directly related to the insured’s negligence, they were medically necessary or the amounts paid were reasonable.”)

Further, Heritage does not address the fact that this scheme allows the Bureau not only to pursue Heritage itself, but also to pursue McKinley to recover for benefits paid to him. That sets this unique right of recovery apart from all other schemes discussed above, and from the notion that the Bureau merely “stands in McKinley’s shoes.” Standing in McKinley’s shoes would at best explain the right to sue *Heritage*, but it would not explain the right to sue *McKinley*, as he could not sue himself. That shows that this is not a typical subrogation statute.

2. Other cases that concern typical subrogation do not govern here.

Heritage also cites case law concerning subrogation generally, such as traditional private-insurance subrogation, but those cases do not help its cause, either. For example, Heritage relies on a typical insurance case, *Chemtrol Adhesives, Inc. v. American Mfrs. Mut. Ins. Co.* (1989), 42 Ohio St. 3d 40. But, as explained above, subrogation in the insurance context is based on contract or equity, not on a free-standing statute, so it does not trigger the “liability created by a statute” analysis. Moreover, as noted above, the typical subrogation scheme allows a subrogee to stand in another’s shoes to sue a *third party*, just as that other could do directly; typical subrogation does not allow the subrogee to sue its own insured or payee to recover. Such rights, where they exist, are contractual; that is, the insured agrees to repay its insurer if it receives other compensation for the same occurrence. See *Blue Cross & Blue Shield Mut. v. Hrenko* (1995), 72 Ohio St. 3d 120, syllabus.

More broadly, this Court has long recognized that workers' compensation is a creature of statute. *Westenberger v. Industrial Commission of Ohio* (1939), 135 Ohio St. 211, 213. Thus, while it may be true that workers' compensation laws are "founded upon the principles of insurance" as a general matter, Heritage Br. at 18 (citing *State ex rel. Crawford v. Indus. Comm.* (1924), 110 Ohio St. 271, 274), the actual operation of the system turns upon the statute, not upon importing specific procedures from insurance law.

3. Heritage's policy arguments, whether based on notice or uncertainty, miss the mark, and it is Heritage's view that is unworkable as a policy matter.

Heritage also raises, in addition to its view of the statutory text and the case law, overlapping arguments regarding the need for finality, Heritage Br. at 3-4, and its allegation that the Bureau received notice but chose to "ignore its notice of settlement discussion and wait years to pursue a claim," *id.* at 19. Heritage is wrong on both the facts and the policy implications.

First, as the Bureau explained above in the Facts, the Bureau *immediately* informed McKinley of its claim for reimbursement. In fact, McKinley's own lawsuit against the Bureau was premised upon his accurate claim that the Bureau had already "requested reimbursement" and had "claimed a statutory lien." App. Op. at ¶ 3; see 4th App. Op. at ¶ 2; see McKinley Jur. Mem. at 3. McKinley even included a claim asking the courts, in his first case in Washington County, to "declare the amount" that he owed, if he could not strike the entire law as invalid. App. Op. at ¶ 3; see 4th App. Op. at ¶ 4. The Bureau was content to litigate the amount in that forum, as a defendant, up until McKinley voluntarily dismissed that case in 2008, after which the Bureau filed this case. Thus, to the extent that Heritage suggests the Bureau did *nothing*, it is wrong.

And if Heritage seeks to distinguish between the Bureau's administrative claim and its actual filing of a collection action—that is, if its statement that the Bureau "wait[ed] years to

“pursue a claim” refers to only a complaint as a “claim”—it is wrong on the law. R.C. 4123.931(H) expressly provides that the Bureau “may assert its subrogation rights through correspondence with the claimant and the third party or its legal representatives.” The Bureau did exactly that, and it was not required to file a complaint to preserve its rights, or to put the parties on notice that it would seek recovery.

That same point resolves not only Heritage’s arguments about McKinley’s notice to the Bureau, but also Heritage’s insistence that it, and similarly situated businesses, need a two-year period to provide certainty. Heritage knew—as a matter of fact, and by operation of law from the statute—that the Bureau’s right to recover existed. R.C. 4123.931 told Heritage that if it settled with McKinley, but without the Bureau, it did so at its peril, as the Bureau would then be able to seek recovery from both parties. The statute warns Heritage and others that such liability is “joint and several.” Thus, there is no late-breaking surprise here or in any similar case. And to the extent that Heritage argues not just against the State’s no-limitations view, but for two versus six years, it is hard-pressed to claim that businesses cannot handle planning around six-year limits, for the law is replete with periods of six years and even longer. See, e.g., R.C. 2305.07 (six-year period for claims based on statute or on unwritten contracts); R.C. 1303.16 (six-year period for claims based on various debt instruments); R.C. 2305.06 (fifteen-year period for claims based on written contracts). Heritage’s preference for a two-year period is not about certainty and planning, but for escaping early in the face of known liabilities.

Finally, not only are Heritage’s policy arguments flawed, but its own view is the one that suffers from unworkability as a matter of policy, and thus could not be what the General Assembly intended. Under Heritage’s view, the Bureau’s two-year clock started ticking the day McKinley was injured. Thus, while McKinley or any plaintiff is entitled to take the entire two

years to decide, until the last day, whether to file a tort suit—or whether to seek workers compensation—the Bureau needs to prepare to leap in and join a late-filed case. It is unrealistic to require the Bureau to join, prophylactically, every tort case filed by one of its claimants, even those with little hope of success. It is far more sensible for the Bureau’s role to begin once a claimant has recovery soon at hand or actually in hand. Heritage’s view is especially unworkable in light of its view (although a mistaken one) that the Bureau may not file a direct action against a third-party tortfeasor. Heritage Br. at 19. Were that true, the Bureau would have no incentive to explore a possible case against a tortfeasor until the claimant files, which, again, could occur on the last day.

In addition, Heritage’s view harms not only the Bureau, but also harms all employers who must fund workers compensation, whether they are self-insured or pay into the Bureau’s fund. The self-insured employers, as noted above, are included as “statutory subrogees” under the recovery statute. Although they are not exempt from having any statute of limitations, as the Bureau is under *Sullivan*, they need a six-year limit, not a two-year one—starting from notice of being excluded from a settlement, not from the injury—if their rights are to be meaningful. State fund employers are deeply affected as well, because when the Bureau recovers reimbursement on a given claim, that reimbursement directly lowers the premiums charged to that employer. That is so because the employer’s premium depends on the benefits paid on claims against it, so when those net benefits are reduced by recovery from a third party, the employer’s premiums come down, too. So if a claimant and a tortfeasor avoid their liability to the Bureau, the harm falls on Ohio’s businesses, not just on the Bureau itself.

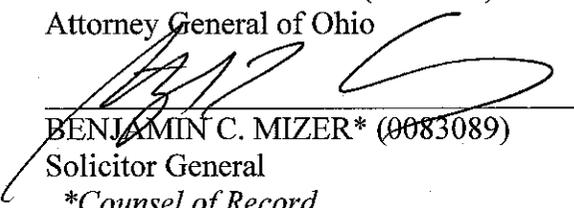
For all these reasons, Heritage's counter-arguments in favor of the short, two-year statute of limitations are mistaken, and the Bureau should be entitled to a six-year period, if any limitations period applies at all.

CONCLUSION

For the above reasons, the Court should affirm the Seventh District's decision reversing the trial court's dismissal of the case, and the Court should hold that the Bureau's complaint was filed timely, whether because no statute of limitations applies or because the Bureau filed within a six-year statute of limitations.

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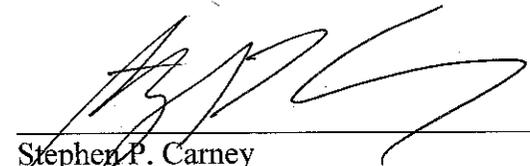
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