

IN THE SUPREME COURT OF OHIO

OHIO BUREAU OF WORKERS' COMPENSATION

Plaintiff-Appellee

vs.

JEFFREY MCKINLEY, ET. AL.

Defendants-Appellants

Supreme Court Case No. 2010-0720

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

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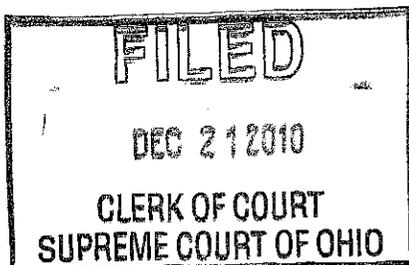


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I. INTRODUCTION.

At a time when Ohio faces its most dire economic uncertainty in decades, the Bureau of Workers' Compensation ("BWC") seeks to impose yet another burden on current and potential Ohio businesses – an unlimited statute of limitation for Workers' Compensation subrogation claims. Despite never raising the argument before the trial court, the BWC now argues that it could have waited hundreds of years before filing its subrogation claim. If the BWC's argument is adopted, Ohio businesses will need to retain records of accidents forever. Reserves, on company books, will likewise need to be maintained forever. The burden upon Ohio employers cannot be understated. A governmental agency should not be allowed to sit on a claim it knew it had for five years, and not pursue it. Rather, because the claim is wholly-dependent upon McKinley having a claim, the BWC has no greater rights than McKinley – a two year statute of limitations.

II. ARGUMENTS IN RESPONSE TO APPELLEE OHIO BUREAU OF WORKERS' COMPENSATION'S PROPOSITION OF LAW NO. 1.

The rights provided to the BWC under R.C. 4123.931 are the same as a typical subrogee and those rights are limited to the rights possessed by the underlying claimant, which includes the applicable statute of limitations.

A. The BWC Never Argued To The Trial Court That Its Subrogation Rights Under R.C. 4123.931 Were Exempted From All Statutes Of Limitations And Therefore, The Argument Is Waived

The BWC has asserted the new argument that its subrogation rights under R.C. 4123.931 are not governed by any statute of limitations. Specifically, the BWC contends that it is exempted from all statutes of limitations under *Ohio Dept. of Transportation v. Sullivan* (1988), 38 Ohio St.3d 137, 527 N.E.2d 798. The BWC, however, never raised this argument with the trial court. (See BWC Resp. Opp. Civil Rec. No. 18). Instead, the BWC's only argument at the

trial court level was that R.C. 4123.931 created an independent right of recovery and was therefore governed by the six-year statute of limitations set forth in R.C. 2305.07. (*Id.* at pg. 2). The BWC is not permitted to change its position and has waived this argument.

Indeed, “[i]t is axiomatic that a party cannot raise new legal theories for the first time on appeal. Failure to raise an issue before the trial court results in waiver of that issue for appellate purposes.” *Estate Planing Legal Services, P.C. v. Cox* (Ohio App. 12 Dist.), 2008-Ohio-2258, ¶ 17; see also *State v. Awan* (1986), 22 Ohio St.3d 120, 489 N.E.2d 277, at syllabus. Well-settled common law dictates that issues not initially raised in the trial court may not be raised for the first time on appeal. *Ohio Civ. Rights Comm. v. Triangle Real Estate Servs., Inc.* (Ohio App. 10 Dist.), 2007-Ohio-1809, ¶11 citing *Porter Drywall, Inc. v. Olentangy Building & Dev. Co.* (Feb. 24, 2000), Franklin App. No. 99AP-306 (citations omitted).

By failing to argue at the trial court level that it was exempt from all statutes of limitations, the BWC has waived this argument and may not assert it on appeal to this Court. *Id.*

B. The *Sullivan* Decision Does Not Apply Because It Did Not Involve A Subrogation Claim.

Even if this Court considers the BWC’s argument that its subrogation claim is not subject to any statute of limitations, the argument must fail as a matter of law. *Sullivan* involved a negligence claim for damage done to state property. Thus, ODOT had its own independent right of recovery for damage to ODOT property—its rights were in no way dependent upon the right of a third party to recover damages.

This Court has previously held that the longstanding principle that a subrogee cannot succeed to a right not possessed by its subrogor applies equally to subrogation actions that are brought by the State. *Galonos v. Cleveland* (1994), 70 Ohio St.3d 220, 222, 638 N.E.2d 530 citing *Chemtrol Adhesive Inc. v. Am. Mfrs. Mut. Ins. Co.* (1982), 42 Ohio St.3d 40, 42, 537

N.E.2d 624. Therefore, despite the general rule set forth in *Sullivan*, a State's claim is subject to the applicable statute of limitations when the cause of action is based on rights attained through subrogation. *Montgomery v. Doe* (Ohio App. 10 Dist. 2000), 141 Ohio App.3d 242, 248, 750 N.E.2d 1149, 1153

Significantly, there is no case law in Ohio holding that the State's subrogation actions are exempt from the statute of limitations governing the underlying cause of action. Rather, every court addressing statutes providing the State with statutory subrogation rights has held that the statute of limitations runs against the State if the cause of action is based solely on the typical theory of subrogation, as it is in this case. *Montgomery v. Doe* (Ohio App. 10 Dist. 2000), 141 Ohio App.3d 242, 248, 750 N.E.2d 1149, 1153-1154 citing *Ohio Department of Human Services v. Kozar* (Ohio App. 8 Dist. 1995), 99 Ohio App.3d 713, 651 N.E.2d 1039; *United States v. York* (C.A.6, 1968), 398 F.2d 582; *United States v. Fort Benning Rifle & Pistol Club* (C.A.5, 1967), 387 F2d 884, 885

Allowing the BWC to expand the holding of *Sullivan* to a subrogation action after the statute of limitations has passed would violate the holding of this Court that a subrogee is not entitled to more rights than its subrogor. Since the BWC, as a subrogee, stood in the shoes of McKinley, its subrogor, the BWC's subrogation action is bound by the same two-year statute of limitations that governed McKinley's personal injury claim.

C. Application of *Sullivan* To Subrogation Claims Would Lead To An Absurd Result, And Therefore Should Not Be Applied Here Or Should Be Expressly Overruled.

If this Court were to find *Sullivan* applicable, then this Court should revisit the holding in *Sullivan* because as Justice Brown properly noted in his dissenting opinion, the General Assembly by enacting R.C. 2305.03 has made it clear that a civil action brought by the State is

governed by the applicable statute of limitations. *Sullivan*, 38 Ohio St.3d at 141 (J.Brown dissenting opinion, J.Sweeney concurring in dissenting opinion.). Specifically, R.C. 2305.03 provides that the statute of limitations applies to “a civil action,” which on its face would include civil actions brought by the State. *Id.* at 142.

Moreover, *Sullivan* was a 5 to 2 decision, but even Justice Wright, in his concurring opinion with the majority, expressed extreme reservations about the wisdom of the holding in *Sullivan*:

“However, I must express my personal reservations concerning the public policy considerations underlying this particular rule of law. I view this doctrine as an anachronism that has long since outlived its usefulness and propriety. The plain truth of the matter is that we are living in an age of instant communications and highly organized, compartmentalized government. I regard rewarding sloth by a public agency or its employees as anathema. Likewise, I am not enamored with the notion that the state may sue at its leisure while some tax payer’s records draw dust and his or her witness’ memories fade. I would hope the general assembly would give this issue the sympathetic attention it richly deserves.”

(See Justice Wright’s concurrence)(emphasis added).

In *Sullivan*, Justice Brown properly noted in his dissenting opinion that exempting the State from all statutes of limitations would produce an absurd result because “[w]here *no* statute of limitations is applied against the State, a defendant remains vulnerable for years, even unto succeeding generations....” *Sullivan*, supra at 141 (emphasis in original). This is the exact scenario that will be present for businesses and insurers conducting business in Ohio if this Court accepts the BWC’s position that its subrogation rights are not governed by *any* statute of limitations.

In short, while the Heritage believes that the *Sullivan* decision has no application because it does not involve a subrogation claim, if this Court were to find the *Sullivan* decision

applicable, Heritage urges this Court to reconsider the law articulated in that case as one that has “long since outlived its usefulness and propriety.”

Regardless, *Sullivan* should not be extended to apply to subrogation actions. If the BWC’s subrogation rights were excluded from all statutes of limitations it would prevent businesses and insurers from ever having finality on personal injury claims. This is the exact type of uncertainty that was imposed upon businesses and insurers in the *Scott-Pontzer* days. Under the BWC’s theory, an employer or insurer operating in Ohio would have to keep their claim files open indefinitely because the BWC could bring a subrogation action even 100 years after the injury occurred. In fact, the BWC could bring its subrogation action after all the parties and counsel involved in the underlying personal injury action are no longer available.

The dramatic affect on businesses cannot be understated. For all injury actions, general accounting principals require businesses to reserve cash for potential claims. By allowing the State to have an unlimited statute of limitations, businesses would be required to reserve cash for decade after decade that could be utilized to build facilities, hire employees, etc. Allowing the bureaucratic inefficiencies at the BWC—which resulted in the BWC waiting years to bring this claim—to hold Ohio businesses hostage makes no sense when the statute at issue clearly requires that “all civil actions” based on a personal injury be brought within two years.

Moreover, the record keeping burdens on Ohio businesses would be vast. As this Court is well aware, regulation of businesses through various acts requires that businesses devote substantial resources simply to record keeping. Records of accidents would need to be kept hundreds of years, if the BWC has no statute of limitations. In an era where other States clearly recognize the need to present attractive business environments in order to combat double digit

unemployment, it is simply absurd for Ohio—solely due to bureaucratic inefficiencies at the BWC—to propose additional burdens on current and potential employers.

Additionally, this Court must consider that subrogation actions brought under R.C. 4123.931 apply to all statutory subrogees, which include non-governmental entities such as self-insuring employers. R.C. 4123.931. As such, the BWC's position would create further uncertainty because an injured employee would be required to bring his claim within two years, while a self-insured employer would be required to bring a subrogation claim in two years, and the BWC could bring a claim in 100 years if it chooses. Thus, Ohio's businesses would be subject to a lawsuit being filed within two different time frames all stemming from the same injury.

Moreover, granting the BWC the power to bring its subrogation claim without any time limitations would violate the very purpose of having statutes of limitations, which is to prevent plaintiff's from sleeping on their rights. *Barker v. Strunk* (Ohio App.9 Dist.), 2007-Ohio-884, at ¶9; see also *Crown, Cork & Seal Co., Inc. v. Parker* (1982), 462 U.S. 345, 352, 103 S.Ct. 2392. There is no logical reason that the BWC should be permitted to sit on its subrogation rights indefinitely simply because it is an entity of the State. This is especially true in cases such as this where the BWC had actual notice of McKinley's injury in 2003, when he filed a claim for workers' compensation benefits. The BWC also had notice of the potential settlement by November 1, 2004. (See Heritage Merit Br. Appx. E). Thus, the BWC was fully aware of its subrogation rights and could have pursued them in a timely fashion.

Yet, the BWC did not file the instant subrogation action until five years after McKinley's injury and four years after it had notice of the settlement. The BWC simply chose to sit on its rights and is now asking this Court to excuse its bureaucratic neglect by exempting its

subrogation action from all statutes of limitations. The BWC's request comes at the peril of Ohio's businesses and insurers who depend upon the statutes of limitations to set their reserves for personal injury claims. This Court should not subject businesses and insurers to extended liability exposure simply because a claim is being pursued by a State entity.

All Ohio businesses ask is that a reasonable playing field be set where the State of Ohio is required to behave responsibly—like other businesses and plaintiffs in Ohio—and bring a claim within a reasonable two year time frame like every other subrogation plaintiff in the State is required to follow.

III. REPLY IN SUPPORT OF APPELLANT HERITAGE'S PROPOSITION OF LAW NO. 1.

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.

A. The Six-Year Statute Of Limitations Does Not Apply Because R.C. 4123.931 Does Not Create A *New Cause Of Action* But Merely Provides The BWC With Subrogation Rights That Existed At Common Law.

The six-year statute of limitations set forth in R.C. 2305.07 is not applicable to this matter because the BWC's complaint is based solely upon the typical theory of subrogation and not a newly created cause of action. In deciding whether an action is based "upon a liability created by statute," and therefore governed by R.C. 2305.07, the court must determine "whether the statute created a *cause of action* not available at common law." *McAuliffe v. W. States Import Co., Inc.* (2001), 72 Ohio St.3d 534, 537, 651 N.E.2d 957, 1995-Ohio-201 (emphasis in original). The court should not focus on whether the statute creates a "new concept of liability." *Id.*

Importantly, any statutory “modification, alteration or conditioning” of a common-law cause of action is not “an action...upon a liability created by statute.” *Id.* at syllabus. Additionally, “where a statute merely limits or expands the remedies available for a breach of duty existing at common law, the *liability* is not created by statute.” *Lehman v. Zamora* (Cal.App. 2d Dist. 2006), 145 Cal. App. 4th 109, 119, 51 Cal.Rptr.3d 411, 417 (Applying *McAulliffe* to interpret the phrase “liability created by statute” as used in Code Civ. Proc., §359).

Here, the BWC’s argument that R.C. 4123.931 is an action “upon a liability created by statute,” presupposes that the statute provides more than typical subrogation rights. The right of subrogation has long been recognized in common law. *Bogan v. Progressive Cas. Ins. Co.* (1988), 36 Ohio St.3d 22, 29, 521 N.E.2d 447, 454 (overruled on other grounds); *Federal Union Life Ins. Co. v. Deitsch* (1934), 127 Ohio St. 505, 189 N.E. 440; *Ohio Ins. Co. v. Faulds* (1997), 118 Ohio App. 3d 351, 354.

The fact the BWC’s claim arises from a statutory right of subrogation does not alter the claim into a new cause of action. Statutory subrogation, as its name suggests, arises by an act of the legislature that vests the right of subrogation with a party or category of parties. *Ohio Crime Victim’s Fund v. Gray* (Nov. 9, 2000), Franklin App. No. 00AP-218, unreported, 2000 WL 1678027, *2 citing *Roberts v. total Health Care, Inc.* (Md.App.1996), 675 A.2d 995, 1001, 109 Md.App. 635. The General Assembly in enacting R.C. 4123.931 has merely vested the right of subrogation with the BWC— it did not create a *new* cause of action.

The BWC’s reliance upon *Gregory v. Bureau of Workers’ Comp.* (1996), 115 Ohio App.3d 798, 686 N.E.2d 347, in support of its argument that R.C. 4123.931 creates a new cause of action is misplaced. In *Gregory*, the Tenth District held that the former R.C. 4123.93 did not provide subrogation rights when the underlying claimant settled his personal injury claim

without filing a complaint. *Id.* The basis for the court's decision was that the language of former R.C. 4123.93 (D) allowed a right of subrogation only if the employee was "a party to an action involving a third-party tortfeasor." *Id.* at 801 *quoting* R.C. 4123.93 (D). The court determined that an out-of-court settlement reached without initiating court proceedings did not constitute "an action" as required by former R.C. 4123.93(D). *Id.* at 802.

The Tenth District's decision in *Gregory* did not contain any discussion of whether R.C. 4123.93 or R.C. 4123.931 provided the BWC with more than conventional subrogation rights. To the contrary, the court in *Gregory* repeatedly referred to the BWC's rights under the statute as "subrogation rights." *Id.* Moreover, the court compared former R.C. 4123.93 to "comparable legislation allowing subrogation rights" such as R.C. 5101.58, which the court in *Kozar* determined did not create an independent right of recovery. *Id.*; see also *Kozar*, *supra*, 99 Ohio App.3d 713.

Although the current version of R.C. 4123.931 now provides the BWC with subrogation rights when the underlying claimant settles his personal injury claim, the BWC's rights are still grounded in the typical theory of subrogation. The statute does not provide the BWC with any rights or remedies that were not available under a common law subrogation action. Identical to an insurer asserting a common law right of subrogation, the BWC, under R.C. 4123.931, only has a right to recover the benefits it has paid to its claimant and nothing more. The plain language of the statute ("**subrogated to the rights of a claimant**") also makes it clear that the BWC's rights are limited to those of its claimant the same as a common law subrogation action. See R.C. 4123.931(A). If McKinley is not injured, the BWC has no claim. If McKinley has no lost wages, the BWC has no claim for wage loss. Every claim for relief the BWC can make requires that McKinley first have a right to make that claim. This is classic subrogation and the

statute only extends the subrogation cause of action to the BWC. The limitation of the BWC's rights under R.C. 4123.931 includes the statute of limitations.

Since R.C. 4123.931 does not create a new cause of action but merely provides the BWC with a right of subrogation, the BWC must be bound by this Court's holding that a subrogee can only succeed to the rights and benefits of its subrogor. *Chemtrol*, 42 Ohio St.3d at 42.

1. This Court Must Reject The BWC's Request To Be Provided With Greater Rights Than Any Other Subrogee Seeking To Enforce Subrogation Rights In Ohio.

In this case, McKinley's injury occurred on July 13, 2003. Therefore, he was required to file his personal injury claim by July 13, 2005. More importantly, under this Court's holding in *Chemtrol*, any subrogation action based on McKinley's personal injury was also required to be filed by July 13, 2005. *Chemtrol*, supra at 42. The BWC, however, waited **more than three-and-a-half years** after the statute of limitations on McKinley's personal injury claim expired and **five-and-a-half years** after the date of injury. To avoid the consequences of its own neglect, the BWC is now requesting that this Court grant it more rights than its underlying claimant (McKinley) and more rights than any other subrogee seeking to enforce subrogation rights in Ohio.

The BWC should be treated the same as any other subrogee in Ohio. Moreover, Ohio's businesses and insurance companies should not be forced to re-litigate a personal injury claim three years after the statute of limitations passed simply because the BWC chose to sit on its rights. This is especially true in cases such as the matter *sub judice* when the BWC had notice of its subrogation rights in 2003 when McKinley's injury occurred. (See Heritage Merit Br. Appx. D at ¶¶2,4). In addition, the BWC also had notice of the settlement discussions between

McKinley and Heritage by November 1, 2004—eight months before the statute of limitations passed on McKinley’s personal injury claim. (See Heritage Merit Br. Appx. E, F).

Significantly, under R.C. 4123.931 (G), the parties were required to provide the BWC with “a reasonable opportunity to assert its subrogation rights.” There is no dispute that the BWC had knowledge of its rights by November 1, 2004, at the latest, which provided the BWC with a reasonable opportunity to pursue its subrogation action. Indeed, as the BWC acknowledges in its Brief, it had the opportunity to intervene in the underlying lawsuit or settlement discussions. (See BWC Merit Br. pg. 15). Yet, the BWC waited four years after it had notice of the settlement before it chose to file its complaint.

Further, the BWC’s argument that requiring it to bring its subrogation action within two-years of the underlying injury is somehow unworkable is nonsensical and should be rejected by this Court. First, the statute requires notice be given to the BWC if a settlement is reached between parties. Next, under Civ. R. 24(A)(2), a subrogee’s motion to intervene relates back to the subrogor’s institution of an action against the tortfeasor even if the motion was filed after the statute of limitations expired. *Marion v. Baker* (1987), 42 Ohio App. 3d 151, 537 N.E.2d 232. As such, the BWC has the ability to intervene and timely file its Complaint to pursue its subrogation rights while the underlying personal injury claim is pending. It bears repeating that in this case, the BWC had actual notice of the underlying lawsuit four year before it chose to file its subrogation action.

The BWC’s concerns with respect to the workability of a two year statute can easily be resolved through a “date of discovery” rule which provides the BWC two years from the date that it learns: (1) that the injury occurred; or (2) of the settlement. In this case, obviously, the

BWC waited nearly four years after it knew of the settlement to file suit which is simply inexcusable.

There is no hardship imposed on the BWC by holding them accountable to the same laws that apply to every other subrogee in Ohio. On the other hand, if this Court adopts the BWC's position that it can file a subrogation action years after the underlying claim is resolved, it would significantly chill settlements. This is because a business or insurer could provide the BWC with notice of its subrogation rights; settle the underlying personal injury action; and still be subject to pay the entire amount of the BWC's claim. Under this scenario it would defy logic for businesses and insurers to promptly settle personal injury claims. Such a result is undesirable because the parties would have to sit and wait for six years to see if the BWC is going to file a subrogation action before they can resolve the personal injury claim with any sense of certainty.

There is no reason the BWC should be afforded greater rights than any other subrogee simply because its right to subrogation is provided by statute. The BWC certainly should not be granted additional rights solely because it is an entity of the State. Therefore, because McKinley's personal injury claim would be barred by the statute of limitations, the BWC's instant subrogation action is likewise time-barred.

B. The Plain Language of R.C. 4123.931 Makes It Clear That The Statute Provides Typical Subrogation Rights That Are Limited To Those Of The Underlying Claimant.

The BWC, like the Seventh District, continues to focus on the language in the statute that provides that R.C. 4123.931 "creates a right of recovery." (BWC Merit Br. pg. 14). Reliance upon this phrase is misplaced as there is always a "right of recovery" in subrogation actions. The right to recover, however, is always dependent upon the rights of the claimant. To determine the limitations of rights that are provided to the BWC under R.C. 4123.931, this Court does not need

to look any further than the plain language of the statute. Indeed, R.C. 4123.931 (A) explicitly states that “the statutory subrogee is **subrogated to the rights of a claimant** against a third-party.” R.C. 4123.931 (A) (emphasis added).

Thus, it is clear from the express and unambiguous language of the statute that while the BWC has a “right of recovery,” its rights are subrogated to those of its claimant (McKinley). This reading of the R.C. 4123.931 is consistent with the analysis employed in *Kozar* and *Montgomery* in which the courts analyzed statutes containing language similar to R.C. 4123.931 and held that the statutes did not create an independent right of recovery. See *Kozar*, 99 Ohio App.3d 713, 651 N.E.2d 1039; see also *Montgomery*, 141 Ohio App.3d 242, 250, 750 N.E.2d 1149. Therefore, the BWC’s subrogation claims in *Kozar* and *Montgomery*, were governed by the same statute of limitations as the underlying claimant.

The BWC fails to distinguish the statutes at issue in *Kozar* and *Montgomery* and further fails to identify any reason that the analysis in *Kozar* and *Montgomery* should not be followed in this case. Instead, the BWC incorrectly argues that the statutes at issue in *Kozar* and *Montgomery* were held to provide typical subrogation rights because they did not contain the phrase “right of recovery.” A review of *Kozar* and *Montgomery* reveals that the BWC’s argument is simply not true.

In *Kozar*, the statute at issue, R.C. 5101.58, provided that “[t]he acceptance of aid...gives a right of subrogation to the department of human services.” *Kozar*, supra at 715. The court held that under R.C. 5101.58, the BWC was subrogated to the rights of its claimant and therefore the rights of the BWC, as a subrogee, could not be greater than its claimant, the subrogor. *Id.* citing *Chemtrol*, 42 Ohio St.3d at 42. Contrary to the BWC’s assertion, the court’s decision in *Kozar* did not contain any discussion of whether the phrase “right of recovery” would have

created an independent as opposed to a subrogation right. Instead, the court held that R.C. 5101.58 used the term “subrogation” in its conventional sense because the acceptance of aid gave a right of subrogation. *Id.* at 717.

Likewise, the court in *Montgomery* held that R.C. 2743.72, which stated that “the state, upon payment of the award or part of the award, is **subrogated to all the claimant’s rights,**” provided conventional subrogation rights and not an independent right of recovery. *Montgomery*, 141 Ohio App.3d 242 at 247 (emphasis added). The court in *Montgomery* found it significant that the statute referred to the claimant’s rights that the BWC acquired through subrogation. *Id.* at 250. Like the statute at issue in *Montgomery*, R.C. 4123.931 also references the claimant’s rights that give rise to the BWC’s subrogation action (“**is subrogated to the rights of a claimant**”).

The BWC simply reads too much into the phrase “right of recovery.” There is no language in the statute indicating that this right is independent of the claimant. Quite the opposite, the statute provides that the BWC’s rights are limited to subrogation rights obtained from its claimant. Consequently, R.C. 4123.931 does not create an independent right of recovery and the BWC’s rights may not exceed those of McKinley, which includes the statute of limitations.

1. The BWC Fails To Dispute That Its Right To Recover Is Derivative And Wholly-Dependent Upon The Rights Of McKinley.

In addition to the statutory language of R.C. 4123.931, it is clear from the derivative nature of the BWC’s subrogation claim that the BWC’s rights cannot exceed those of McKinley. To be sure, the BWC can only bring a subrogation claim under the statute if McKinley had a valid personal injury claim. As the BWC recognizes in its Brief, “**when the claimant has received nothing from the tortfeasor, the Bureau has no right.**” (See BWC Merit Br. pg. 17)

(emphasis added). The BWC's admission is significant because it concedes that the right to recover under the statute is dependent upon McKinley. For example, if summary judgment would have been granted on McKinley's personal injury claim, the BWC would not have a right to subrogation. **It is undisputed that McKinley must first suffer a damage before the BWC can seek subrogation.** Therefore, it is clear that the BWC's "right to recover" is wholly-dependent upon McKinley first having a right to recover from the tortfeasor. This is classic subrogation.

The BWC, however, argues that that its damages are not limited to those of McKinley's because the BWC may seek reimbursement of benefits based upon the statutory formula set forth in R.C. 4123.931 (B). (See BWC Merit Br. pg. 20-21). In fact, the statutory formula proves the opposite point. The BWC's argument fails to recognize that under the statutory formula, the BWC may never recover *more* than what the claimant could recover in the underlying personal injury action. The BWC's argument further ignores that the claimant has to have a measure of damages (wage loss, etc.) before the BWC can make a claim under the statute.

The BWC can only recover medical expenses that were incurred by McKinley for injuries related to his personal injury claim. Likewise, the BWC can only recover future medical expenses if McKinley had a right to future medical expenses. The BWC is not entitled to a single right that is not available to McKinley. Instead, the BWC's right to recover is dependent in every way upon the rights of McKinley. This is far from an independent right of recovery. To the contrary, the BWC's rights under R.C. 4123.931 are identical to the rights provided under a conventional subrogation claim.

The derivative nature of the BWC's subrogation claim is not changed by the fact that it can file an action without the claimant. Insurance companies frequently and routinely file

subrogation actions in their own name without including its insured as a party. See generally, *Erie Ins. Co. v. Delmazo* (Ohio App. 11 Dist.), 2010-Ohio-1274 (Insurer brought subrogation action in its own name against automobile driver to recover amounts paid as a result of insured's death); *Grange Mut. Cas. Co. v. Reynolds* (Ohio App. 2 Dist.), 2010-Ohio-114 (Automobile insurer brought action in its own name to recover amount paid to insured in motor vehicle accident); *Ohio Cas. Ins. Co. v. Robinson* (Ohio App. 8 Dist.), 2008-Ohio-5116 (Insurer brought subrogation action in its own name against two individuals who negligently caused a fire).

There is simply nothing independent about the BWC's right to recover in a subrogation action. The BWC has no right to recover under the statute unless the claimant has a right to recover. As such, the BWC's subrogation rights are wholly-dependent upon the claimant's personal injury. Every right afforded to the BWC under statute is limited to the rights of its claimant. This limitation of rights includes the statute of limitations. It would be illogical for the BWC's rights be limited in every way to those of its claimant except the statute of limitations.

The BWC should not be permitted to sit back and wait to file a subrogation action when they had notice of the underlying personal injury claim and had the opportunity to timely intervene in the action. Allowing the BWC to file a subrogation claim three-and-a-half years after the statute of limitations on McKinley's personal injury claim expired, would excuse the BWC from its own dilatory conduct. Consistent with this Court's holding that subrogation actions must be brought within the statute of limitations governing the underlying claim, the BWC's complaint should be time-barred. Any other outcome provides the BWC with more rights than its claimant, which is not permitted by the express language of the statute or the law established by this Court.

C. The BWC Misinterprets The Legislative History Of R.C. 4123.931 And Fails To Recognize That The General Assembly Chose Not To Create An Independent Right Of Recovery.

The BWC contends that the statute's creation of an independent right is confirmed by the legislative history of R.C. 4123.931. (BWC Merit Br. pg. 16). Specifically, the former version of R.C. 4123.931 provided "a right of subrogation in favor of a statutory subrogee against a third party." R.C. 4123.931(A)(2002) (emphasis added). The current version provides a "right of recovery in favor of a statutory subrogee against a third party." R.C. 4123.931(A) (emphasis added). Thus, the BWC argues the legislative history shows an intent to change the substantive nature of its subrogation rights.

The BWC's argument wholly violates the most basic rules of statutory construction. The BWC is simply, under the guise of legislative history, inserting words into the statute that do not exist ("independent right") and deleting words that do exist ("subrogated to the rights of the claimant"). This Court should reject the BWC's attempt to re-write the statute.

The BWC fails to recognize that although the General Assembly chose to amend R.C. 4123.931, it chose not to delete the language conditioning the BWC's rights as "subrogated to the rights of a claimant." R.C. 4123.931 (emphasis added). The General Assembly could have amended the statute to provide an independent right of recovery but chose not to do so. The General Assembly has demonstrated that it is capable of amending subrogation statutes to provide an independent right of recovery. For instance, R.C. 2743.72, which was at issue in *Montgomery*, was amended to create an independent cause of action. *Montgomery*, 141 Ohio App.3d 242, 251, 750 N.E.2d 1149. The former version of R.C. 2743.72(A) provided that the BWC was "subrogated to all of the claimant's rights." The General Assembly amended the

statute by excluding the language that referred to the BWC's subrogation rights. *See* R.C.2743.72 (A).

Although the General Assembly amended R.C. 4123.931 by inserting language that the statute creates a "right of recovery," the legislature did not make this right independent. Moreover, the BWC is incorrect that the statute was amended to create an independent right of recovery. The Bill Analysis of 2002 S.B. 227, which amended R.C. 4123.931, provides that the statute was amended in response to *Holeton v. Crouse Cartage Co.* (2001), 92 Ohio St.3d 115, 748 N.E.2d, in which this Court held that the statute violated the Ohio's Constitution's guarantee of equal protection. Significantly, this Court in *Holeton* did not discuss whether R.C. 4123.931 created an independent right of recovery. Therefore, the General Assembly's purpose in amending the statute did not have anything to do with creating an independent right of recovery.

This Court must follow the express language of R.C. 4123.931, which clearly limits the rights of the BWC to those of its claimant. Accordingly, this Court should overturn the Seventh District's opinion and hold that the BWC's complaint is time-barred as a matter of law.

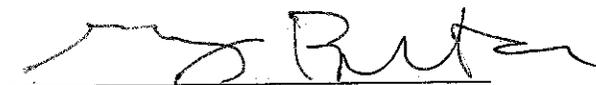
IV. CONCLUSION.

Each party to this appeal can parse the subrogation statute but there is no dispute as to the affect of the statute—the damages the BWC can seek are limited to the damages the claimant suffers. This is a classic subrogation claim no different than when an insurance carrier files a subrogation action for damages incurred by its insured. In every other subrogation situation in Ohio, the party entitled to seek subrogation never has rights greater than the injured party. The BWC should be no different.

This case is just an example of the BWC's bureaucratic inefficiency resulting in a five year delay in pursuing a subrogation claim. The BWC, not Ohio businesses, should bear the

responsibility for bureaucratic delays. As such, this Court should decline the BWC's request for an unlimited statute of limitation and impose the same statute of limitation (two years) that every other party who seeks subrogation in Ohio as a result of an underlying personal injury claim has imposed upon them.

Respectfully submitted,



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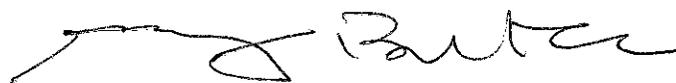
CERTIFICATE OF SERVICE

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 21st day of December, 2010, upon:

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