

ORIGINAL

In the
Supreme Court of Ohio

14-0795

OHIO BUREAU OF WORKERS'
COMPENSATION

Plaintiff-Appellant,

v.

JEFFREY McKINLEY

and

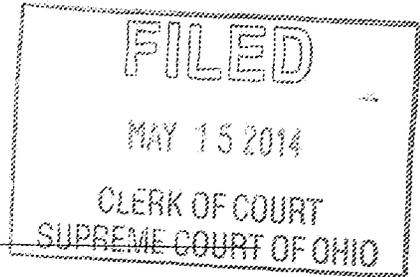
HERITAGE-WTI, INC.,

Defendants-Appellees.

Case No. _____

On Appeal from the
Columbiana County
Court of Appeals,
Seventh Appellate District

Court of Appeals
Case No. 12 CO 41



**MEMORANDUM IN SUPPORT OF JURISDICTION OF PLAINTIFF-APPELLANT
OHIO BUREAU OF WORKERS' COMPENSATION**

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INTRODUCTION

The decision below mistakenly created a significant loophole in an important part of Ohio's workers' compensation law—namely, the system by which the Bureau of Workers' Compensation should be reimbursed when it pays benefits to an injured worker and the worker also receives a settlement from a third party for the same injury. This loophole could affect thousands of cases each year, deny legitimate reimbursement to the Bureau (and ultimately to the employers that fund the workers' compensation system), and invite deliberate gaming of the system by allowing for claimants to seek double recovery. The case thus calls for review.

Ohio's statute for reimbursement, or "statutory subrogation," is based on the sensible principle that a worker injured on the job should have his medical expenses and lost wages paid once, but should not "double recover" for the same injury by collecting overlapping amounts from the workers' compensation system and separately from a tortfeasor. Thus, R.C. 4123.931 requires workers' compensation claimants to notify the Bureau of their related tort suits and recoveries, and it creates a cause of action for the Bureau to seek reimbursement from both claimants and tortfeasors following a settlement that does not include the Bureau. Defendant-Appellee Jeffrey McKinley's case is—or should have been—a textbook example of subrogation triggered by double recovery, because he received both a tort settlement and workers' compensation benefits after he was injured on the job. Under R.C. 4123.931(G), McKinley and the third party with whom he reached a tort settlement should be jointly and severally liable for the Bureau's subrogation interest, which was not included in that settlement.

The appeals court mistakenly eliminated the Bureau's right to recover from the tortfeasor, holding that Heritage-WTI, the third-party tortfeasor, was not jointly and severally liable—even though the settlement failed to include, or require payment to, the Bureau—because the settlement contract did not *expressly* include language that "specifically" and "clearly excludes

amounts owed” to the Bureau. *Bureau of Workers’ Comp. v. McKinley*, 2014-Ohio-1397 ¶ 25 (7th Dist.) (“App. Op.,” Ex. 2). That is, the court held that only a settlement that says “the Bureau should get none of these settlement funds” triggers *tortfeasor* liability. But if the tortfeasor and claimant are deliberately *silent* about the Bureau, that does not count as “excluding”, it and the tortfeasor escapes all liability. That rule imposes a new element on the Bureau’s right to recover, one that the Bureau routinely will be unable to satisfy, because settlement drafting is in the control of the parties who have an incentive to exclude the Bureau. The appeals court’s rule contradicts the statute’s plain meaning, and thus renders the recovery scheme worthless by allowing tortfeasors to cut out the Bureau at will.

The decision below warrants review for many reasons. *First*, the issue that it decided arises frequently, as the Bureau must pursue thousands of subrogation cases each year. The decision will affect the Bureau’s rights of recovery in these many cases, and, by doing so, will also affect the State’s many employers—whose premiums must be adjusted based on whether the Bureau recovers funds paid out. And it affects self-insured employers because they, too, are governed by the same statute as “statutory subrogees.” Under the Seventh District’s approach, all subrogees would lose the right to recover from tortfeasors when the tortfeasors’ settlement with claimants simply fails to provide for a subrogee’s interest. Now, when a claimant receives double recovery from workers’ compensation and from a third-party settlement that is silent on the Bureau’s interest, the Bureau may recover only from the *claimant*. But the General Assembly established joint and several liability in such circumstances to ensure that the Bureau has a fair chance to recover its interest from *any* party to the settlement.

Second, the ruling invites deliberate evasion of the Bureau’s subrogation interest. Under the Seventh District’s rule, joint and several liability may be avoided simply by saying nothing

about the statutory subrogation interest that is not included in the settlement. This outcome maximizes the chances that the Bureau collects from *neither* the claimant *nor* the third-party, as a claimant with medical bills might not have funds to pay. The claimant and tortfeasor share an interest in excluding the Bureau, since both parties stand to gain when the pie need not be split with the Bureau. Given how easily settling parties could game the system, the appeals court's rule makes the statute meaningless. Under no conceivable circumstances would a claimant and a third-party tortfeasor, settling between themselves but excluding the Bureau's statutory subrogation interest, include terms in their settlement agreement that would have no effect other than to make the two parties jointly and severally liable to the subrogation interest.

Third, the appeals court's ruling is wrong. The statute's plain language reimburses the Bureau when claimants receive double recoveries. The General Assembly included mechanisms for the Bureau's reimbursement after a claimant's tort-based judgment, settlement, or awards of any type. R.C. 4123.931(G)-(H). It provided for liability to be triggered by lack of notice *or* by a settlement that excludes the Bureau. *Id.* It is impossible to believe that the General Assembly provided so many mechanisms to allow the Bureau to recover, but intended to allow tortfeasors to evade the Bureau—harming Ohio's employers—by silently excluding the Bureau's subrogation interest from a settlement.

For all these reasons, the Court should review and reverse the decision below.

STATEMENT OF THE CASE AND FACTS

- A. **Ohio's statutory subrogation system reimburses the Bureau for funds spent on a workers' compensation claim when the claimant recovers from a third-party tortfeasor for the same injury.**

Under Ohio's workers' compensation system, certain employees receive no-fault compensation for injuries that occur while they are on the job. This case concerns what happens when those employees also seek *separate* compensation from third-party tortfeasors who

allegedly caused the work-related injuries, and, in particular, the manner for preventing those employees from obtaining double recovery under *both* the workers' compensation system *and* the tort system. R.C. 4123.93 and R.C. 4123.931 contain the workers' compensation system of "statutory subrogation" to prevent this double recovery.

R.C. 4123.93, the definitional provision, defines the three relevant actors: (1) the "claimant" (i.e., the employee) is the "person who is eligible to receive" workers' compensation benefits for work-related injuries; (2) the "statutory subrogee" is either the Bureau's Administrator or a self-insured employer who pays funds under the workers' compensation system; and (3) the "third party" is the tortfeasor or separate insurer who may be liable for the claimant's injuries regardless of the workers' compensation system. R.C. 4123.93(A)-(C).

R.C. 4123.931, the substantive subrogation provision, says that "[t]he payment of compensation or benefits [under the workers' compensation system to the claimant] creates a right of recovery in favor of [the] statutory subrogee against [the] third party, and the statutory subrogee is subrogated to the rights of a claimant against that third party." R.C. 4123.931(A). This right to recover is "automatic, regardless of whether a statutory subrogee is joined as a party in an action by a claimant against a third party." R.C. 4123.931(H). The Bureau may assert its right through informal correspondence with the claimant and tortfeasor or by suing the tortfeasor. *Id.* A statutory formula sets the amount of the Bureau's and claimant's respective shares of any recovery from a settlement among the three parties, *see* R.C. 4123.931(B), or from a damages award against the tortfeasor to the claimant after a trial, *see* R.C. 4123.931(D). The Court upheld the formula's constitutionality in *Groch v. GMC*, 117 Ohio St. 3d 192, 2008-Ohio-546 ¶¶ 91-93.

Critically, the substantive statutory subrogation provision recognizes that a claimant and tortfeasor might have an incentive in settling *without* the Bureau's participation—and thereby

require the Bureau to foot more of the final bill than the statutory formula would otherwise set. Accordingly, it requires claimants to notify the Bureau of all potential tortfeasors. *See* R.C. 4123.931(G). It also requires claimants to provide the Bureau with notice and a reasonable opportunity to assert its subrogation rights before any settlement or judgment can “be final.” *Id.* And it makes the claimant and the tortfeasor *jointly and severally* liable to the Bureau if: (1) the Bureau is not given the required notice of a settlement or award, *or* (2) the settlement “excludes any amount paid by the statutory subrogee.” *Id.* In full, subsection (G) 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.*

Id. (emphasis added). Thus, the law ensures that the right to recover exists in all cases of double recovery, and gives the Bureau several avenues to recover against third-party tortfeasors.

B. For the same work-related injury, McKinley received both workers’ compensation benefits and a tort settlement that did not include the Bureau’s subrogation interest.

McKinley was injured on July 13, 2003, while working for his employer, Safeway Services. App. Op. ¶ 7. While building scaffolding inside a furnace at Defendant-Appellant Heritage-WTI’s facility in East Liverpool, Ohio, he fell and was severely burned. *Id.*

McKinley filed a claim with the Bureau to recover compensation for his injuries, and the Bureau approved his claim. *Id.* He has now received at least \$398,303.17 from the Bureau for workers’ compensation and medical benefits. *McKinley v. Bureau of Workers’ Comp.*, 170 Ohio App. 3d 161, 2006-Ohio-5271 ¶ 3 (7th Dist.).

In addition to receiving workers' compensation benefits, McKinley filed a third-party, personal injury lawsuit against Heritage-WTI based on a theory of premises liability. On October, 24, 2004, the Bureau received notice that McKinley and Heritage-WTI were engaged in settlement negotiations. App. Op. ¶ 8. The Bureau asserted a statutory lien on any potential settlement in the amount of \$885,808.56, representing what the Bureau calculated would be its past and future benefits paid to McKinley. *McKinley*, 2006-Ohio-5271 ¶ 3. The Bureau joined the settlement negotiations, and, although its claim was for almost \$900,000, it offered to compromise its statutory interest and reach a complete settlement for \$338,856.08. App. Op. ¶ 10. Despite the Bureau's good-faith settlement negotiations, McKinley and Heritage-WTI reached a separate settlement agreement without the Bureau on December 10, 2004.

That two-party settlement (which, again, did not include the Bureau) called for Heritage-WTI to pay McKinley over \$2 million in two components. First, Heritage-WTI paid McKinley a lump sum of \$1.1 million. *Id.* Second, Heritage-WTI agreed to make periodic payments to McKinley totaling \$972,892.80 over 30 years. Release and Settlement Agreement ¶ III(A), Brief of Appellee Heritage-WTI, at App'x. B-3.

C. After the Bureau's statutory subrogation interest was not included in the settlement, McKinley sought to eliminate the Bureau's ability to obtain any recovery for the amounts that it had paid him.

After the settlement, McKinley, Heritage-WTI, and the Bureau attended a conference with the Administrator's Designee, where the "designee decided that the amount of \$338,856.08 asked by [the Bureau] was reasonable and should be remitted to [the Bureau]." App. Op. ¶ 10.

Rather than paying the amount owed based on the Bureau's subrogation interest, McKinley sought to defeat the entire interest. He filed a declaratory judgment action in the Washington County Court of Common Pleas "challenging the constitutionality of the subrogation statutes and the amount of the BWC subrogation lien." *Id.* ¶ 11. The trial court

stayed the Bureau's attempts to collect on its interest, delaying recovery of the Bureau's \$338,856.08 statutory subrogation interest. *Id.* The trial court agreed with McKinley, and held that the subrogation interest was unconstitutional. *Id.* The Fourth District reversed, and this Court affirmed the Fourth District, holding the statutory subrogation scheme to be constitutional. *Id.*; see *McKinley v. Bureau of Workers' Comp.*, 117 Ohio St. 3d 538, 2008-Ohio-1736.

D. The Bureau sought to hold McKinley and Heritage-WTI jointly and severally liable for the statutory subrogation interest, but the lower courts held that it could not recover from Heritage-WTI because the Bureau's subrogation interest was not "clearly excluded from the settlement."

The Bureau filed this case in the Columbiana County Court of Common Pleas on November 4, 2008, seeking to hold both McKinley and Heritage-WTI jointly and severally liable for the statutory subrogation interest. App. Op. ¶ 12. The common pleas court initially dismissed the complaint against Heritage-WTI only "on the grounds that the two-year statute of limitations for personal injury claims had run" against it. *Id.* The Fourth District reversed, holding that the Bureau's claim asserting its statutory subrogation interest was a statutory right with a six-year statute of limitations. *Id.* This Court affirmed the Fourth District and remanded to the trial court to proceed on the merits. *Id.*; see *Bureau of Workers' Comp. v. McKinley*, 130 Ohio St. 3d 156, 2011-Ohio-4432.

On remand, the court of common pleas again said that the Bureau could not recover from Heritage-WTI. "On August 30, 2012, the Columbiana County Court of Common Pleas granted Heritage-WTI's motion for summary judgment, finding that [the Bureau] had notice of the settlement talks and that there was no evidence that the payments made by [the Bureau] to McKinley were excluded from settlement." App. Op. ¶ 14; see also Opinion and Judgment Entry, Aug. 30, 2012 (Ex. 4); Nunc Pro Tunc Entry, Nov. 9, 2012 (Ex. 3).

The Seventh District affirmed, holding that “[s]ince [the Bureau] was given notice of the settlement and a reasonable opportunity to present its claim, and because its lien amount was clearly not excluded from the settlement, Heritage-WTI is not liable under R.C. 4123.931(G).” App. Op. ¶ 33. The Seventh District rested this holding on its interpretation of the term “excluded” in R.C. 4123.931(G). It said that exclusion meant more than a failure to include the Bureau’s interest in the settlement, but required instead an express exclusion: “Pursuant to R.C. 4123.931(G), a court is not required to ensure that a dollar amount paid by the statutory subrogee is specifically included in the settlement; rather, courts are required to determine whether such a settlement specifically *excludes* the amount paid by the statutory subrogee. If this sum is clearly excluded from the settlement, then the third party is liable.” App. Op. ¶ 25. In the Seventh District’s view, the exclusion must be “clear.” “The statute merely directs that if the settlement *clearly* excludes amounts owed to [the Bureau], [the Bureau] has other recourse to collect. But the language is written clearly in the negative and at no time are the parties required to specifically include subrogation amounts so long as it remains apparent that these amounts have not been *deliberately* excluded.” *Id.* (emphases added).

THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

The Court should review this case. It affects thousands of statutory subrogation cases yearly and threatens the integrity of the statutory subrogation system for workers’ compensation.

- A. The Seventh District’s requirement that a claimant’s settlement with a third-party tortfeasor include express language specifically excluding the Bureau’s statutory interest will affect thousands of cases each year.**

The Court should review the decision below because it affects many future settlements in which the Bureau has a statutory subrogation interest, not just the settlement here. The appeals court’s ruling is indisputably a bright-line rule; it is not tied to anything unique about this case. The court said that a settlement resulting in a double recovery for a workers’ compensation

claimant does not lead to joint and several liability for the tortfeasor unless the settling parties decide that they want it to, and include language expressly excluding the Bureau's interest. The ruling applies to all statutory subrogees, so self-insured employers, like the Bureau, will face more difficulty recovering money that they are owed following a claimant's double recovery.

As a practical matter, this rule could severely limit the Bureau's ability to collect on its statutory subrogation right. As of May 9, 2014, the Bureau had 3,698 open subrogation claims. The Bureau collected almost \$20 million in subrogation claims in 2013. Until now, no one evaded the right to recover by drafting a contract to do so, and other courts have agreed with the Bureau that the right to recover cannot be evaded, and that "exclude" means failure to include. See App. Op. ¶¶ 30-32 (citing *Bureau of Workers' Comp. v. Smith*, Lake C.P. No. 12CV000250 at 3-4 (Dec. 26, 2012) (holding a third party jointly and severally liable for the statutory subrogation interest both because the Bureau was excluded from settlement and because the parties did not notify the Bureau), and *Bureau of Workers' Comp. v. Williams*, 180 Ohio App. 3d 239, 2008-Ohio-6685 ¶ 14 (10th Dist.) (applying joint and several liability where the settling parties did not notify Bureau and Bureau's interest was excluded)).

In many of these cases, the Bureau collected from the third-party tortfeasor. This is often the only path to recovery because the claimant may no longer have the money to pay the Bureau's statutory subrogation interest, or because collection from an individual claimant is more difficult than from a third-party tortfeasor. For example, in this case, the tortfeasor is a large, commercial entity. This case demonstrates a special difficulty in collecting only from a claimant. Though the settlement amount is significantly greater than the statutory interest on which the Bureau seeks to collect, much of it is to be paid over 30 years. It is possible that at no point during that 30-year period will the claimant be financially able to satisfy the Bureau's

interest. This likelihood that the Bureau (or a self-insured private employer) will never be able to collect on its statutory subrogation interest is the possibility that R.C. 4123.931 seeks to avoid.

Further, because parties will structure their settlements in light of the decision below, this is the type of case that warrants review right away, without waiting for additional cases to crop up, as delay harms everyone involved. If future courts agree with the Seventh District, the Bureau and businesses will be harmed. And if courts agree with the Bureau instead, but a claimant and tortfeasor settled in mistaken reliance on the Seventh District's view, then either of those parties could be harmed if left holding the bag for joint and several liability alone after designing a settlement based on different calculations. Finally, even if the Seventh District is somehow right—which seems impossible on the plain text here—it is better for the General Assembly to know as soon as possible, so it could fix the statute before the Bureau and businesses lose more money from the evasion of their right to recover.

B. The decision below provides a roadmap for tortfeasors and claimants to evade what would otherwise be their joint and several liability obligations without satisfying the statutory subrogation interest.

The decision's broad effects will not arise randomly, but instead turn on events that are controlled by the parties to the settlement—a claimant standing to make a double recovery and a third-party tortfeasor seeking to settle a lawsuit with the claimant. Because the decision eliminates the Bureau's right to joint and several liability and prevents recovery of the statutory subrogation interest altogether, it establishes a financial incentive and an easy-to-follow roadmap for parties that wish to evade subrogation.

Tortfeasors and claimants will have a strong incentive to settle while excluding the Bureau's statutory subrogation interest from the terms of the settlement. R.C. 4123.931 requires that the statutory subrogee be meaningfully included in any settlement negotiations. Yet the decision below provides an incentive to meet the notice requirements in form only. By settling

without accounting for the Bureau's statutory subrogation interest, the claimant and tortfeasor may split available settlement money between themselves, without sharing it with a third party—the Bureau. The decision below makes this simple. The settling parties need only to avoid citing the Bureau's specific interest. And if, as here, settlement is structured in a way that makes it difficult or impossible for the Bureau to recover from the claimant who has received a double-recovery, the Bureau's interest may be defeated by the settling parties altogether.

View the situation from the perspective of the settling tortfeasor—the party most likely to draw up the settlement contract. The tortfeasor has the most to gain from avoiding joint and several liability, because the claimant is liable for the statutory subrogation interest regardless of the tortfeasor's liability. The Seventh District's decision gives a roadmap to third-party tortfeasors for how to avoid liability for the statutory subrogation interest, and it is hard to imagine any third party taking the step of expressly putting language into a contract that would explicitly invoke joint and several liability. The Seventh District's outcome not only is an unreasonable interpretation of the statute, but also is unfair to settling claimants. It sets up those injured parties, who often face medical bills and a loss of income, to accept a settlement only to then be surprised by their *sole* liability for what may be a statutory subrogation interest. The law establishes joint and several liability if the statutory subrogation interest is not satisfied by the settlement to protect not just the Bureau or self-insured employers, but also the claimants.

By making it so easy for parties to a settlement to potentially defeat joint and several liability, the decision below will, as a practical matter, nullify R.C. 4123.931(G). The law makes the claimant and the third-party tortfeasor jointly and severally liable for the statutory subrogation interest if the settlement “excludes any amount paid by the statutory subrogee.” R.C. 4123.931(G). The General Assembly intended that the Bureau and self-insured employers

recover either from the claimant or the tortfeasor in *some* instances of double recovery. Indeed, R.C. 4123.931 is largely focused on recovery of the statutory subrogation interest from the claimant *or* the third-party. The purpose of the section is to establish the process for recovering that interest, and for ensuring that the interest is included in settlement discussions. Bringing the statutory subrogee to the negotiating table is not a matter of formality, but a way to ensure that the interest is satisfied when the claimant receives double recovery. Part of ensuring that result is joint and several liability when the statutory subrogation interest is excluded from a settlement.

But if settling parties can *both* decline to account for the Bureau's interest in the terms of the settlement *and* avoid joint and several liability, they will. Settling tortfeasors have no reason to include terms in the settlement agreement declaring an intent to exclude the Bureau's interest, as, under the appeals court's rule, that declaration would have the opposite effect—it would establish joint and several liability. Silence, instead, gets them a free pass.

Nor is the Seventh District's interpretation defensible on the theory that the workers' compensation claimant alone is still liable to the statutory subrogee. For starters, the plain language is indisputable: The General Assembly meant to make *both* parties liable, so leaving only one available does not adhere to that language. Further, this plain language reflects the common-sense reality that if the statutory subrogation interest is to be recovered, in most cases it will be from the tortfeasor who tried to exclude the Bureau, not the claimant who likely faces substantial bills and may not have the money down the road. And even if the claimant does have the money, it is unfair to leave the injured worker holding the bag, where, as here, the parties together exclude the statutory subrogation interest from the settlement.

C. The Seventh District's mistaken decision harms all Ohio employers.

Finally, the Court should hear this case because the Seventh District's mistake affects all Ohio employers. By limiting the Bureau's ability to collect on its subrogation rights when those

rights are excluded from a settlement, the Seventh District’s decision threatens the integrity of the subrogation system. That harms not only the Bureau, but also all employers in Ohio, whether they are self-insured or pay into the Bureau’s state fund. Self-insured employers are “statutory subrogees,” and their rights are governed by the same statute, so their reimbursement rights are also eliminated in such cases. State-fund employers are also affected. That is so because when the Bureau is reimbursed on a claim, the reimbursement lowers the premiums charged to that employer. (An employer’s premium depends on the benefits paid on claims against it, so when those benefits are reduced by reimbursement, the employer’s premiums come down, too.) So when the Bureau is not reimbursed, the harm falls on Ohio’s businesses, not just on the Bureau.

The Bureau’s and employers’ claims here are fair. Reimbursement does not mean that an injured worker must turn over an entire settlement or award; instead, injured workers pay only the portion that represents a double recovery, under a formula that this Court upheld in *Groch*.

For all these reasons, the Court should hear this case.

ARGUMENT

Appellant Bureau’s Proposition of Law:

When a workers’ compensation claimant settles a lawsuit with a third party for the same injury underlying the workers’ compensation claim, the claimant and the third party are jointly and severally liable for the interest of the statutory subrogee if the settlement does not include the required payment to the subrogee. The settlement “excludes” an amount paid by the subrogee, for purposes of R.C. 4123.931(G), if it fails to include that interest, and no express mention of the subrogee is needed to count as exclusion.

The General Assembly designed the statutory subrogation law to reach all cases of “double recovery”—that is, all cases in which an injured worker collects both workers’ compensation benefits and a tort recovery from a third party for the same injury. The law seeks to ensure recovery of the statutory subrogation interest by mandating that the subrogee have a chance to meaningfully participate in settlement negotiations. Further, if the other parties—the

claimant and the third-party—reach a settlement that excludes the statutory subrogee, they are jointly and severally liable for the statutory subrogation interest. R.C. 4123.931(G).

Here, McKinley is not entitled to keep a double recovery, and, equally important, the Bureau should not be limited to trying to recover from McKinley alone. Because McKinley and Heritage-WTI entered into a settlement of McKinley’s claims that excluded the Bureau’s statutory subrogation interest, the two are jointly and severally liable for that interest.

To begin with, the statute’s plain language imposes joint and several liability on McKinley and Heritage-WTI. The law imposes such liability when the settlement “excludes” the Bureau’s interest. The plain meaning of “exclude” is “not to include.” A settlement may resolve some or all disputes between two or more parties. Any specific interest is either included or excluded. Here, the settlement did not resolve the amount due the Bureau, nor did it mention the Bureau specifically. Thus, it was excluded.¹

In addition, the statute must be construed in this way, not only because the plain language dictates this interpretation, but also in order to make the entire statute effective, *see* R.C. 1.47, and to read it in light of its intended purpose, *see* R.C. 1.49. Ohio’s subrogation law was designed to prevent double recoveries, and to ensure that the Bureau will recover overlapping outlays. That principle is so rooted in common sense that 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*, 2008-Ohio-546

¹ While the settlement did not mention the Bureau by name or provide an amount payable to the Bureau, an indemnification provision purported to release Heritage-WTI from any “subrogation claims” by “anyone” regarding the “incident,” and it said McKinley would indemnify Heritage-WTI. That provision should satisfy even the appeals court’s mistaken requirement of an express reference, so reversal is also justified on that basis. However, the decision below, by characterizing the settlement as silent, apparently requires an express mention of the Bureau by name. More important, any failure to pay the Bureau counts as “excluding” it.

¶ 41. The Seventh District’s decision would make the statute’s clear establishment of this common-sense principle a nullity. It makes no sense for the General Assembly to create joint and several liability, but then ensure that it is triggered only by an easily avoidable choice of the parties to the settlement. Under the decision below, R.C. 4123.931(G) would never serve any practical function because no tortfeasors would ever include a provision expressly indicating that the payment excludes amounts paid by the Bureau.

The Seventh District’s interpretation, by contrast, is unmoored from the text of the statute. To establish joint and several liability following a settlement, the Seventh District’s decision requires the settlement to “specifically,” “deliberately,” and “clearly” exclude the statutory subrogation interest (App. Op. ¶¶ 25, 33) even though there is no such requirement in the statute. R.C. 4123.931(G) has no *mens rea* requirement that the settling parties exclude the statutory interest “deliberately,” nor does it require any special linguistic formula that would “specifically” or “clearly” exclude that interest. Under the statute, joint and several liability is triggered if the settlement simply *excludes* the Bureau’s or the self-insured employer’s interest. The settlement here excluded the Bureau’s interest by settling all other interests related to the claim, but not settling the statutory subrogation interest—an interest that the statute requires be meaningfully included in settlement negotiations.

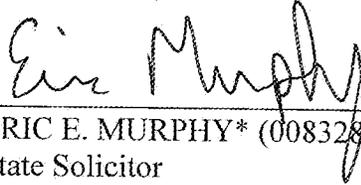
In sum, McKinley and Heritage-WTI settled in a way that improperly lets Heritage-WTI walk away from its liability. Because the settlement does not include an amount for the Bureau, the settlement has “excluded” those amounts under that term’s plain meaning. McKinley and Heritage-WTI are thus jointly and severally liable for that interest. The Court should reverse the Seventh District erroneous interpretation of the statute and remand to the trial court.

CONCLUSION

For the above reasons, the Court should grant review and reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

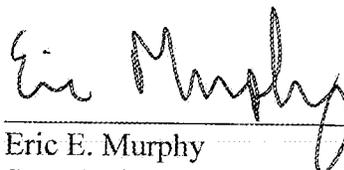
I certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Plaintiff-Appellant Ohio Bureau of Workers' Compensation was served by U.S. mail this 15th day of May, 2014 upon the following counsel:

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APPENDIX

EXHIBIT 1

STATE OF OHIO)
)
COLUMBIANA COUNTY)

IN THE COURT OF APPEALS OF OHIO
SS: SEVENTH DISTRICT

OHIO BUREAU OF)
WORKERS' COMPENSATION)
)
PLAINTIFF-APPELLANT)
)
VS.)
)
JEFFREY MCKINLEY)
)
AND)
)
HERITAGE-WTI, INC., et al.)
)
DEFENDANTS-APPELLEES)

CASE NO. 12 CO 41

JUDGMENT ENTRY



For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs to be taxed against Appellant.

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JUDGES.

EXHIBIT 2

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

OHIO BUREAU OF)
WORKERS' COMPENSATION)
)
PLAINTIFF-APPELLANT)
)
VS.)
)
JEFFREY McKINLEY)
)
AND)
)
HERITAGE-WTI, INC., et al.)
)
DEFENDANTS-APPELLEES)

CASE NO. 12 CO 41

OPINION



CHARACTER OF PROCEEDINGS:

Civil Appeal from the Court of Common
Pleas of Columbiana County, Ohio
Case No. 08 CV 1143

JUDGMENT:

Affirmed.

APPEARANCES:

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JUDGES:

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

Dated: March 31, 2014

EXHIBIT 2

WAITE, J.

{¶1} This case arises from a lawsuit filed by Appellant Ohio Bureau of Workers' Compensation ("BWC") to recover a statutory BWC subrogation lien from Jeffrey McKinley ("McKinley") and Appellee Heritage-Waste Technology Industries ("Heritage-WTI") in East Liverpool. The incident giving rise to this appeal occurred in 2003, when McKinley was injured on the premises of former Von Roll America, Inc. (now Heritage-WTI). Although the injury occurred at Heritage-WTI, McKinley was actually employed by Safway Services, Inc. ("Safway") at the time. McKinley applied for and received benefits from BWC, while at the same time filing lawsuits against Safway and Heritage-WTI. McKinley dismissed Safway from the suit and eventually entered into a settlement and release with Heritage-WTI.

{¶2} BWC then filed a lawsuit asserting that the settlement violated BWC's subrogation rights under R.C. 4123.931(G), and that it was not notified of the settlement talks. The case was dismissed on statute of limitations grounds, but was reinstated on appeal. *Ohio Bur. of Workers' Comp. v. McKinley*, 130 Ohio St.3d 156, 2011-Ohio-4432, 956 N.E.2d 814 (hereinafter, "*McKinley II*"). On remand, the trial court found that BWC had been given proper notice of the settlement talks and that the settlement did not exclude payments made by BWC. Pursuant to R.C. 4123.931(G), if either of these two requirements are not met, BWC can enforce its subrogation rights against a third party regardless of the terms of the settlement. Because BWC could not show that Heritage-WTI's settlement violated either of the

two requirements of R.C. 4123.931(G), the court granted summary judgment to Heritage-WTI. This timely appeal followed.

{¶3} On appeal, BWC argues that the trial court erred in granting Heritage-WTI's motion for summary judgment because (1) Heritage-WTI's evidence in support of summary judgment did not comply with Civ.R. 56(C); (2) failure to mention BWC's rights in the settlement release is the functional equivalent of excluding those rights according to the statute; and (3) the trial court erred in relying on Justice Pfeifer's concurring opinion in *McKinley II*.

{¶4} BWC's first argument is contradicted by the record, which reflects that the evidence was properly attached to Heritage-WTI's reply to BWC's response to the motion for summary judgment.

{¶5} BWC's second argument misinterprets R.C. 4123.931(G) by reading into it an affirmative requirement that the parties must include a discussion of BWC's lien in the settlement agreement. The statute only imposes liability on the claimant and third party "if a settlement or compromise excludes any amount paid by the statutory subrogee," and there is no such exclusion in the settlement. The statute presumes that BWC has certain rights to collect on its lien from any settlement and provides the mechanism so that BWC can collect a portion of any settlement. In addition, the settlement was well in excess of the BWC lien. We do not interpret the settlement to exclude the amounts paid by BWC. Therefore, there is no merit to this argument.

{¶6} Third, BWC takes issue with the trial court's reliance on Justice Pfeifer's concurring opinion in *McKinley II* regarding the manner in which BWC should proceed on its R.C. 4123.931(G) claim. A trial court may rely on persuasive authority from any source, including an Ohio Supreme Court's concurring opinion, particularly when the persuasive authority is directly on point. Hence, the third assignment of error is also without merit. As Appellant's assignments of error are not persuasive, the judgment of the trial court is affirmed.

Background

{¶7} On July 13, 2003, McKinley was injured while working at the former Von Roll America, Inc. waste incinerator site (now called Heritage-WTI) in East Liverpool, Ohio. McKinley was building scaffolding inside of an incinerator when he fell and suffered severe burns. He was employed by Safway at the time. Because of the injuries he sustained, he filed a claim for compensation benefits with BWC. His claim was allowed and BWC paid medical bills and compensation on his behalf. Additionally, McKinley also filed an intentional tort suit against his employer, Safway, which was later dropped, and a premises liability lawsuit against Heritage-WTI for personal injury. The suit was filed on August 20, 2003 in the Franklin County Court of Common Pleas.

{¶8} On October 25, 2004, McKinley's counsel informed BWC that McKinley had entered into settlement negotiations with Heritage-WTI. On November 1, 2004, McKinley gave notice to the Ohio Attorney General that counsel was trying to reach a settlement with Heritage-WTI. On the same day, McKinley's counsel informed BWC

that he believed that a settlement could be reached and asked BWC to accept a reduced amount for its lien. On November 3, 2004, BWC advised McKinley that it was willing to compromise its subrogated interest for \$338,856.08 as a full and final settlement. BWC requested a conference before the Administrator's Designee to resolve the issue regarding allocation of recovery pursuant to R.C. 4123.931(B). McKinley accepted this proposal and a conference was scheduled.

{¶9} On December 10, 2004, McKinley signed a release and settlement agreement with Heritage-WTI. The document does not mention the BWC lien. The release was in exchange for payment of \$1,100,000 from Heritage-WTI, to be paid in monthly installments over 30 years. Heritage-WTI did not sign the document.

{¶10} The parties for BWC, Heritage-WTI and McKinley all attended a conference with the Administrator's Designee on January 10, 2005. All parties had a chance to submit their estimates for the valuation of benefits already paid as well as future benefits to be paid by BWC. The Administrator's Designee decided that the amount of \$338,856.08 asked by BWC was reasonable and should be remitted to BWC.

{¶11} The next day, January 11, 2005, McKinley filed a notice of dismissal of the case pending in the Franklin County Court of Common Pleas against Heritage-WTI. BWC had not intervened as a party in the case. After dismissal, instead of remitting funds to BWC to repay the lien, McKinley subsequently filed a declaratory judgment action in Washington County challenging the constitutionality of the subrogation statutes and the amount of the BWC subrogation lien. BWC's collection

efforts were stayed. The trial court held the statute unconstitutional, but on appeal to the Fourth District Court of Appeals, the judgment was reversed and the statute was held to be facially constitutional. *McKinley v. Ohio Bur. of Workers' Comp.*, 170 Ohio App.3d 161, 2006-Ohio-5271, 866 N.E.2d 527. McKinley appealed that decision to the Ohio Supreme Court, which summarily affirmed the judgment of the court of appeals on authority of *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377. *McKinley v. Ohio Bur. of Workers' Comp.*, 117 Ohio St.3d 538, 2008-Ohio-1736, 885 N.E.2d 242 (hereinafter, "*McKinley I*"). Upon remand to the trial court, McKinley voluntarily dismissed his complaint under Civ.R. 41(A).

{¶12} On November 4, 2008, BWC filed suit in the Columbiana County Court of Common Pleas against Heritage-WTI and McKinley to hold them jointly and severally liable for the full amount of the lien for failure to include BWC in the settlement process, pursuant to R.C. 4123.931(G). The Columbiana County Court of Common Pleas dismissed BWC's complaint on the grounds that the two-year statute of limitations for personal injury claims had run. BWC appealed, and we held that a R.C. 4123.931(G) claim was a statutory right with a 6-year statute of limitations, and the case was remanded to the trial court. Our decision was upheld by the Ohio Supreme Court. *McKinley II, supra*, 130 Ohio St.3d 156, 2011-Ohio-4432, 956 N.E.2d 814. The Supreme Court remanded the matter to the trial court to be decided on the merits.

{¶13} In a concurring opinion in *McKinley II*, Justice Pfeifer noted that it was never contested that BWC had notice of the settlement negotiations and therefore,

according to R.C. 4123.931(G), BWC could prevail against Heritage-WTI only if the settlement agreement between Heritage-WTI and McKinley had specifically excluded payments made by BWC.

{¶14} On August 30, 2012, the Columbiana County Court of Common Pleas granted Heritage-WTI's motion for summary judgment, finding that BWC had notice of the settlement talks and that there was no evidence that the payments made by BWC to McKinley were excluded from settlement. BWC appealed this decision. On November 9, 2012, the court issued a corrected judgment entry that conformed with Civ.R. 54(B) allowing the judgment to be reviewed as a final appealable order.

Standard of Review

{¶15} An appellate court conducts a *de novo* review of a trial court's decision to grant summary judgment, using the same standards as the trial court set forth in Civ.R. 56(C). *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E. 241 (1996). Before summary judgment can be granted, the trial court must determine that: (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364, N.E.2d 267 (1977). When a court considers a motion for summary judgment, the facts must be taken in the light most favorable to the nonmoving party. *Id.*

{¶16} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." (Emphasis deleted.) *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E. 2d 264 (1996). If the moving party carries its burden, the nonmoving party has a reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. *Id.* at 293. In other words, when presented with a properly supported motion for summary judgment, the nonmoving party must produce some evidence that suggests that a reasonable factfinder could rule in that party's favor. *Brewer v. Cleveland Bd. of Edn.*, 122 Ohio App.3d 378, 386, 701 N.E.2d 1023 (8th Dist.1997).

ASSIGNMENT OF ERROR NO. 1

The Common Pleas Court, Columbiana County, Ohio, erred in granting Heritage-Waste Technologies Industries' (hereinafter "Heritage-WTI"), Motion For Summary Judgment as Heritage-WTI failed to meet the burden of proof pursuant to Ohio Civ. R. 56 (C) as Heritage-WTI's attached documents to its motion are insufficient to support the summary judgment motion.

{¶17} This appeal involves the interpretation of part of the BWC subrogation statute that sets forth BWC's rights regarding settlements between claimants and third parties. The statutory subsection is R.C. 4123.931(G), which states:

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.* (Emphasis added.)

{¶18} In this case, Heritage-WTI filed a motion for summary judgment arguing that it was not liable under R.C. 4123.931(G) because BWC was given notice of the settlement talks and because the settlement release does not exclude any amount paid by BWC. In support of its motion, it included various correspondence to and from BWC giving notice of and discussing the settlement and release. It also attached a copy of the release that was signed by the McKinleys. Both parties refer to this release as the agreement that was reached between Heritage-WTI and McKinley.

{¶19} Appellant argues that the documents submitted by Heritage-WTI fail to meet Civ.R. 56(C) standards. Therefore, it claims there was no real evidence that it had received notice of the settlement talks and reasonable opportunity to defend its subrogation rights, or that the settlement did not exclude amounts paid by BWC. The documents at issue include a letter dated October 25, 2004, which put BWC on notice of settlement negotiations; a letter dated November 1, 2004, which put the Ohio Attorney General on notice of settlement negotiations; and the release and settlement agreement.

{¶20} The question of whether BWC received notice of the settlement negotiations is *res judicata*, because it was addressed and ruled on by the Ohio Supreme Court in *McKinley II*: "After McKinley provided notice to the bureau and to the Ohio attorney general in 2004 that he was in settlement negotiations with Heritage, he and Heritage settled for an undisclosed amount." *McKinley II* at ¶5. The documents in question, though, are relevant to the other elements of a R.C. 4123.931(G) claim.

{¶21} Appellant contends that these documents do not fall within the accepted documents listed in Civ.R. 56(C), which allows for pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact. However, materials not referenced in Civ.R. 56(C) may be properly considered if they are incorporated by reference in a properly framed affidavit. *Spagnola v. Spagnola*, 7th Dist. No. 07 MA 178, 2008-Ohio-3087, ¶37.

{¶22} Admittedly, Heritage-WTI did not initially incorporate the letters and the settlement agreement into an affidavit, but Heritage-WTI resubmitted the documents in its reply to BWC's response to the motion for summary judgment. The documents were attached to and referenced in the affidavit of Melvin J. Davis, legal counsel for Heritage-WTI. Thus, they were properly part of the record before the trial court and may be considered in support of summary judgment. We overrule Appellant's first assignment of error and find that Heritage-WTI's evidence was properly submitted.

ASSIGNMENT OF ERROR NO. 2

The Common Pleas Court, Columbiana County, Ohio erred in concluding that because the settlement agreement between Heritage-WTI and Jeffrey McKinley, (hereinafter "McKinley"), contains no provision specifically excluding payments by the BWC, that this equates to the BWC being included in the settlement.

{¶23} Under this assignment of error, Appellant argues that it was not given a reasonable opportunity to assert its subrogation claim and that its claim was excluded from the settlement agreement. Regarding whether BWC was given a reasonable opportunity to assert its subrogation rights, this argument is baseless, given that BWC was informed of the settlement talks on October 25, 2004; participated in the settlement negotiations by various letters exchanged between counsel prior to settlement being reached; asked for and received an Administrator's Designee Conference in January of 2005; and had the opportunity to intervene in McKinley's

lawsuit until January 11, 2005, but did not intervene. This record reflects that BWC was substantially involved in the settlement process and did assert its claim.

{¶24} Appellant also argues that the trial court misinterpreted the following portion of R.C. 41213.931(G): "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." (Emphasis added.) Appellant contends that this phrase means that a settlement agreement must specifically mention and deal with the terms of reimbursement of any amounts paid by BWC. BWC further concludes that the exclusion of its rights from the settlement allows it to recover the full amount of the benefits it has paid out from either McKinley or Heritage-WTI. Appellant's argument is not persuasive.

{¶25} Pursuant to R.C. 4123.931(G), a court is not required to ensure that a dollar amount paid by the statutory subrogee is specifically included in the settlement; rather, courts are required to determine whether such a settlement specifically *excludes* the amount paid by the statutory subrogee. If this sum is clearly excluded from the settlement, then the third party is liable. The statute does not require the parties to identify the agreement, the extent of BWC's participation in the settlement, how BWC is to be paid from the settlement, the timing of the settlement payments, or any of a dozen other terms that BWC might prefer to have included in the final settlement. The statute merely directs that if the settlement clearly excludes amounts owed to BWC, BWC has other recourse to collect. But the language is written clearly

in the negative and at no time are the parties required to specifically include subrogation amounts so long as it remains apparent that these amounts have not been deliberately excluded.

{¶26} In this case, the settlement was for \$1,100,000.00. The amount of the BWC's subrogation lien was determined to be \$338,856.08 by the Administrator's Designee. Therefore, the settlement cannot be interpreted to exclude the BWC lien. Although the settlement does not mention BWC's lien by name, there is nothing in the settlement that can be interpreted to exclude this lien or BWC's rights to collect on the lien as permitted by the subrogation statute. The settlement is well in excess of BWC's lien, more than three times the amount of the lien in fact, so there is no argument to be made that McKinley and Heritage-WTI kept the settlement purposely low to avoid paying back this BWC lien.

{¶27} The statute is written to address an exclusion of the subrogation lien from the settlement, rather than in terms of a failure to include it, because there is a statutory presumption that BWC will be able to recover its lien from the settlement via the proportional collection procedure set forth in R.C. 4123.931(B). This recovery formula applies "[i]f a claimant, statutory subrogee, and third party *settle or attempt to settle* a claimant's claim against a third party * * *." (Emphasis added.) R.C. 4123.931(B). If the parties try to avoid or negate that statutory presumption by carving out the amount owed to BWC from the settlement, the consequences of R.C. 4123.931(G) apply, but that does not negate the collection formula and procedure set forth in subsection (B).

{¶28} The proportional recovery formula in R.C. 4123.931(B) was created in the statutory revisions of 2002 S.B. 227, effective April 9, 2003. Prior to S.B. 227, the statute simply allowed BWC to recover its entire lien, including possible future benefits, before any settlement funds were distributed to the claimant regardless of whether the claimant's losses had been compensated, or even if the settlement was for damages that could not be covered through workers' compensation benefits. This was a rather harsh result from the injured worker's perspective, and was eventually held to be unconstitutional for a variety of reasons. *Holeton v. Crouse Cartage Co.*, 92 Ohio St.3d 115, 748 N.E.2d 1111 (2001). When the law was revised in 2003, BWC's right to full reimbursement from a settlement was converted to a proportional formula based on the amount of BWC's lien in comparison to the claimant's total demonstrable damages from all sources, multiplied by the net amount recovered in settlement. These terms are defined in R.C. 4123.93, and the formula takes into account such things as attorney fees and costs involved in the settlement. The effect of the formula is that BWC does not have the right to be paid in full before the claimant can collect any amount in a settlement. BWC may take only a proportional amount of the settlement based on the ratio of its payments compared to the total damages in the case.

{¶29} Thus, pursuant to R.C. 4123.931, BWC retains the right to recover the amounts paid to a claimant, but only in the proportion set by the statute. If it were otherwise, BWC would likely be entering unconstitutional territory once again, at least as interpreted by *Holeton*. The settlement in this case does not deny the amount of

the BWC lien, and the settlement is well in excess of that lien, so it is difficult to understand in what practical or material way the BWC lien can be interpreted as having been excluded from settlement. BWC participated in the settlement, had the amount of its lien determined by the Administrator's Designee Conference, and is able to exercise its rights under the statutory collection formula.

{¶30} Appellant cites to a common pleas court case, *Ohio Bureau of Workers' Comp. v. Scott G. Smith*, Lake C.P. No 12 CV 000250 (December 26, 2012), for the proposition that BWC can hold a third party and a claimant jointly and severally liable when the parties settle without first reimbursing BWC's subrogation interest. The reasoning in *Smith* is not persuasive or even applicable in this appeal. First, the trial court in *Smith* based its judgment on the parties' failure to give notice to BWC of the settlement proceedings, and we have already determined that BWC did receive the appropriate notice. Second, the trial judge incorrectly read into the statute a requirement that BWC be reimbursed first and in full as part of any settlement. This is not what the current version of R.C. 4123.931(G) says or implies. The statute does not require that BWC be paid first or in full prior to the claimant receiving any funds. "[W]here the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom." *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543, ¶14.

{¶31} The trial court judge in *Smith* stated that the "common-sense" interpretation of the word "exclude" means a failure to include, which is the same

argument BWC makes in this appeal. In reviewing a statutory presumption, however, the common sense definition of "exclude" means that the amounts paid by BWC cannot be recovered from the settlement, whether through an express provision in the settlement or as a practical matter based on the terms of the settlement. There would be no meaningful effect on BWC's statutory rights if Heritage-WTI had included a line in the settlement release that said "this settlement includes the amounts paid by BWC to the claimant, and BWC may collect on its lien as permitted by law." Such additional verbage would have merely restated what is already true under the terms of the statute.

{¶132} Appellant also cites to *Ohio Bureau of Workers' Comp. v. Williams*, 180 Ohio App.3d 239, 2008-Ohio-6685, 905 N.E.2d 201 (10th Dist.), for the proposition that parties who settle without first reimbursing BWC's subrogation interest should be held jointly and severally liable. *Id.* at ¶13. Appellant completely misstates the holding of *Williams*. *Williams* turned on the fact that BWC had not been given notice of the settlement as required by R.C. 4123.931(G), not on whether BWC's lien was excluded from the settlement. Further, in *Williams* the parties settled for \$6,200 even though BWC had already paid out \$7,751. It was immediately apparent that at least part of BWC's lien was not recoverable from the settlement. On the other hand, when the settlement amount is three times the amount of the BWC lien, as it is in this appeal, BWC cannot reasonably make the argument that recovery of its lien has been excluded from the total amount of the settlement.

{¶33} Since BWC was given notice of the settlement and a reasonable opportunity to present its claim, and because its lien amount was clearly not excluded from the settlement, Heritage-WTI is not liable under R.C. 4123.931(G). Appellant's second assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 3

The Common Pleas Court, Columbiana County, Ohio, erred by relying solely upon Heritage-WTI's incorrect reference to dicta from a concurring opinion by Justice Pfeifer on issues that were not even before the Court for consideration, when discussing the requirements pursuant to R.C. 4123.931(G).

{¶34} Appellant contends that the trial court erred by relying on Justice Pfeifer's analysis in his concurrence in *McKinley II*. Appellant argues that Justice Pfeifer's comments in his concurrence are *dicta* as they do not deal with the issue that was before the Ohio Supreme Court and therefore are not the law of the case. See *Gissiner v. Cincinnati*, 1st Dist. No. C-070536, 2008-Ohio-3161, ¶15.

{¶35} The relevant portion of Justice Pfeifer's concurrence is as follows:

A claim brought under R.C. 4123.931(G) is not a subrogation claim. It is a unique claim created by statute that punishes claimants and third parties for failing to include statutory subrogees in settlement negotiations. As "an action * * * upon a liability created by statute," an R.C. 4123.931(G) action has a six-year statute of limitations pursuant to R.C. 2305.07.

This appeal concerns only Heritage. Any battles between McKinley and the BWC over the distribution of the settlement amount subject to the BWC's rights under R.C. 4123.931(B) do not concern Heritage. Any claim that the BWC might have brought under R.C. 4123.931(H) was subject to the two-year statute of limitations. A claim brought under R.C. 4123.931(G) against Heritage does have a six-year statute of limitations. Whether such a claim under R.C. 4123.931(G) has any basis in fact is up to the trial court. The BWC has not alleged that it did not receive notice of settlement negotiations. The BWC's only hope for recovery from Heritage would be a provision in the settlement agreement that specifically excludes payments made by the BWC. The trial court should proceed on the BWC's case against Heritage on that limited basis.

McKinley II, 130 Ohio St.3d 156, 2011-Ohio-4432, 956 N.E.2d 814, ¶¶47-48.

{¶36} Although Appellant is correct that Justice Pfeifer's comments are *dicta* in *McKinley II*, there is no reason to avoid considering them if they apply to the instant appeal. Just as in *McKinley II*, the instant appeal only involves BWC's claim against Heritage-WTI. Justice Pfeifer correctly stated that the distribution of settlement funds is a matter between the claimant and BWC as governed by the proportional formula in R.C. 4123.931(B). Justice Pfeifer correctly noted that the two issues in a R.C. 4123.931(G) claim are whether BWC had notice of the settlement talks and whether the settlement excluded any amounts paid by BWC. Justice Pfeifer was

correct in stating that there is no question that BWC received notice of the settlement talks, and when he explained that the remaining controversy centers around whether the settlement excludes the amounts already paid by BWC. Justice Pfeifer's analysis is consistent with the actual wording of R.C. 4123.931(G) and with the facts of this case, and there was no reason for the trial court to avoid using his comments as persuasive authority. Even absent Justice Pfeifer's discussion, we would reach the identical conclusion. If the legal analysis is correct, it does not matter where it originates as long as it does not conflict with applicable binding precedent. *Daniel E. Terreri & Sons, Inc. v. Mahoning Cty. Bd. of Commrs.*, 152 Ohio App.3d 95, 2003-Ohio-1227, 786 N.E.2d 921, ¶79 ("The fact that Ohio law is binding in this case does not prohibit a trial court or this court from considering, as persuasive authority, federal common law when Ohio case law is silent on the subject."). Therefore, we overrule Appellant's third assignment of error.

Conclusion

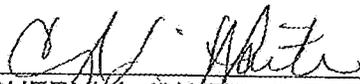
{¶137} The trial court did not err in granting Appellee's motion for summary judgment. First, the documents provided by Appellee in support of its motion for summary judgment were correctly submitted and can be used in support of its motion. Second, the amount paid by BWC was not excluded from the settlement. The settlement amount is more than three times the amount owed to BWC, and BWC is able to collect its lien through the appropriate statutory mechanisms. Finally, the trial court did not err in relying on the analysis of Justice Pfeifer in his concurring opinion in *McKinley II* as persuasive authority in granting summary judgment to

Appellee. For the reasons stated above, we overrule all three of Appellant's assignments of error and affirm the trial court's judgment in favor of Heritage-WTI.

Donofrio, J., concurs.

Vukovich, J., concurs.

APPROVED:



CHERYL L. WAITE, JUDGE

EXHIBIT 3

IN THE COURT OF COMMON PLEAS
COLUMBIANA COUNTY, OHIO
CASE NO. 2008-CV-1143
JUDGE C. ASHLEY PIKE

FILED
COLUMBIANA COUNTY
COURT OF COMMON PLEAS

NOV 9 2012

ANTHONY J. DATTILIO
CLERK (RMH)

OHIO BUREAU OF WORKERS' }
COMPENSATION }

Plaintiff }

-VS- }

JEFFREY McKINLEY }

AND }

HERITAGE-WTI, INC. }

Defendants }

NUNC PRO TUNC
OPINION & JUDGMENT ENTRY

I. Status of the Matter

By Entry of July 30, 2012, the Court granted leave to Defendant Heritage-WTI, Inc. to make further filings in accordance with Rule 56(C). The Court finds that Heritage availed itself of that opportunity.

II. Criteria for Summary Judgment

Summary judgment under Civ.R. 56(C) is properly granted where the moving party demonstrates the following:

"(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds could come to but one conclusion, and viewing such evidence most strongly in favor of the party

against whom the motion for summary judgment is made, that conclusion is adverse to that party."¹

In the event the moving party meets this initial burden, the opposing party bears a reciprocal burden in responding to the motion.² Under Civ. R. 56(E), "a nonmovant may not rest on the mere allegations or denials of his pleading but must set forth specific facts showing there is a genuine issue for trial."³ The nonmoving party must produce evidence on any issue for which that party bears the burden at trial.⁴

Because it is a fairly drastic means of terminating litigation, a court must grant summary judgment with caution, resolving all doubts against the moving party.⁵ Nevertheless, summary judgment is appropriate if, after construing the evidence in a light most favorable to the opposing party, there exists no genuine issue of material fact and reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law.⁶ The evidentiary materials listed in Civ.R. 56(C) include "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any."

¹ *Welco Industries, Inc. v. Applied Cos.* (1993), 67 Ohio St.3d 344, 346, quoting *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327

² *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112

³ *Chaney v. Clark Cty. Agricultural Soc., Inc.* (1993), 90 Ohio App.3d 421, 424

⁴ *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293; and *Celotex v. Catrett* (1986), 477 U.S. 317, 322

⁵ *Osborne v. Lyles* (1992), 63 Ohio St.3d 326, 333

⁶ *State ex rel. The V. Cos. V. Marshall* (1998), 81 Ohio St.3d 467, 473

III. De Novo Review by Appellate Court

In reviewing a summary judgment, trial and appellate courts use the same standard. Ohio Civil Rule 56. In fact, the appellate court's analysis is conducted under a de novo standard.⁷

IV. Discussion and Analysis

The Court cites with approval and adopts as its own the following language from Defendant Heritage's Memorandum in Support of its Motion for Summary Judgment:

"Since the inception of this case, the central issue has been whether the BWC's right to recover its subrogation interest under R.C. 4123.931(G) was barred by the same two-year statute of limitations that governed Jeff McKinley's underlying personal injury claim. This Court initially held that the BWC's claim was time-barred because it was filed more than five years after the date of Mr. McKinley's injury. The BWC appealed this Court's decision and the case was eventually heard by the Supreme Court of Ohio.

The Supreme Court reversed this Court's decision and held that the BWC's claim under R.C. 4123.931(G) was an action created by statute and therefore, governed by a six-year statute of limitations. *Ohio Bureau of Workers' Compensation v. McKinley* (2011), 130 Ohio St.3d 156, 2011 Ohio 4432, 956 N.E.2d 814. Justice Pfiefer, however, in his concurring opinion, narrowed the issue left to be decided by this Court. Namely, Justice Pfiefer properly noted that the one issue that has never been in dispute is that the BWC was given notice of the settlement negotiations between Mr. McKinley and Heritage. *Id.* At ¶46. Justice Pfiefer

⁷ *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. *Reali et al v. Society National Bank* (1999), 133 Ohio App.3d 844, 846 (Seventh District)

further stated that under R.C. 4123.931(G) the BWC only has a right to recover against a third-party, such as Heritage, if it was "not given notice of settlement negotiations --- which has not been alleged in this case --- or if a settlement or compromise excludes any amount paid by the [BWC]." *Id.*

Since the BWC has never alleged that it did not receive notice of McKinley's settlement negotiations, Justice Pfeifer concluded that the "BWC's only hope for recovery from Heritage would be a provision in the settlement agreement that specifically excludes payments made by the BWC." *Id.* at ¶148.

It is clear to the Court that the settlement agreement between Heritage and Jeffrey McKinley contains no provision specifically excluding payments made by the Plaintiff, Ohio Bureau of Workers' Compensation, to McKinley. The Court finds that the Office of the Ohio Attorney General was notified of the settlement negotiations between McKinley and Heritage-WTI, Inc. formerly known as Von Roll America, Inc.

V. The Ruling

The Court finds that there is no genuine issue of material fact concerning the right of the Plaintiff to recover from Heritage-WTI, Inc. Defendant Heritage's Motion for Summary Judgment is hereby **granted** and the Complaint with regard to Heritage only is **dismissed**.

This matter shall come on for a Telephone/Scheduling Conference with remaining counsel only on **Monday, October 1, 2012 at 3:00 P.M.** with the Court to initiate the call.

At the request of the Plaintiff, who is the Appellant in Case No. 12-CO-41 in the Ohio Seventh District Court of Appeals, the Court makes the following finding: This ruling, which makes a determination with respect to fewer than all the claims or parties, is subject to appeal for the reason that the Court finds there is no just reason for delay.

Costs in this case will be assessed by further order.


JUDGE C. ASHLEY PIKE

DATED: November 8, 2012/kam

cc: File
Lisa Miller, Esq./Benjamin W. Crider, Esq./Lee M. Smith, Esq./
Natalie J. Tackett-Eby, Esq.
T. Jeffrey Beausay, Esq.
Patrick Kasson, Esq./Gregory D. Brunton, Esq./Melvin J. Davis, Esq.

EXHIBIT 4

IN THE COURT OF COMMON PLEAS
COLUMBIANA COUNTY, OHIO
CASE NO. 2008-CV-1143
JUDGE C. ASHLEY PIKE

FILED
COLUMBIANA COUNTY
COURT OF COMMON PLEAS

AUG 30 2012

ANTHONY J. DATTILIO
CLERK
(TRB)

OHIO BUREAU OF WORKERS' }
COMPENSATION }
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Plaintiff }
 }
-VS- }
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JEFFREY McKINLEY }
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AND }
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HERITAGE-WTI, INC. }
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Defendants }

OPINION & JUDGMENT ENTRY

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Costs in this case will be assessed by further order.


JUDGE C. ASHLEY PIKE

DATED: August 30, 2012/kam

cc: File
Benjamin W. Crider, Esq./Lee M. Smith, Esq./Natalie J. Tackett-Eby,
Esq.
T. Jeffrey Beausay, Esq.
Patrick Kasson, Esq./Gregory D. Brunton, Esq./Melvin J. Davis, Esq.