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I. PRELIMINARY STATEMENT

This case presents the ironic spectacle of the Ohio Bureau of Workers' Compensation ("BWC") first actively participating in a claimant's settlement, and now claiming that it knew nothing about the final settlement. Audaciously, the BWC represents to this Court that the claimant, Jeffrey McKinley ("McKinley"), and third party, Heritage-WTI, Inc. ("Heritage"), entered into a "secret settlement." But the truth is that the BWC knew of the settlement and conducted a hearing for the sole purpose of determining the amount of the settlement proceeds it would receive from McKinley after the settlement was final. (BWC Br., Supp. S-17). After the hearing, *McKinley*—not Heritage—was instructed by the BWC, in writing, to pay the BWC's lien and provide a copy of the executed settlement agreement *after* he received the proceeds from Heritage. (BWC Br., Supp. S-17; Appx. A). The settlement agreement that McKinley executed required him to "discharge" the BWC's lien. (BWC Br., Supp. S-23).

Despite this, the BWC contends that Heritage is liable under R.C. 4123.931(G), which imposes liability on a third-party tortfeasor when a settlement "excludes any amount paid" by the BWC. To reach this conclusion, the BWC urges this Court to interpret R.C. 4123.931(G) in a way that transforms the phrase "excludes any amount" to mean that the settlement "includes payment" to the BWC. (BWC Br., p. 1). Stated differently, the BWC argues that the only way to read the statute is to essentially rewrite it so that it imposes strict liability on third-party tortfeasors whenever the BWC is not paid its lien—even if the settlement amount was sufficient enough for the claimant to do so. The BWC's argument ignores firmly-rooted precedent that statutes, which change the common law, must be strictly construed and cannot be interpreted such that they are effectively rewritten.

The BWC's position is also shockingly hostile to the business community in Ohio. After McKinley failed to disburse the settlement proceeds as determined at the hearing, the BWC threatened to collect from McKinley. The BWC, however, sat on its right to recover from McKinley for four years after the settlement. The BWC now candidly admits that it would rather collect from a "large, commercial entity" like Heritage. (*See* Memo in Sup. Jur., p. 9). Although the BWC acknowledges that the legislature designed R.C. 4123.931(G) to prevent claimants from receiving a double recovery, the BWC advocates a statutory interpretation that would require Ohio businesses to make double payments while simultaneously allowing claimants—who received workers' compensation benefits and, in McKinley's case, a hefty settlement—to retain a double recovery.

The trial court, the Seventh District Court of Appeals, and Justice Pfeifer appropriately interpreted R.C. 4123.931(G) to only impose liability if the terms or amount of the settlement exclude the "amount paid" by the BWC. Because this is the proper interpretation of R.C. 4123.931(G) and the amount paid by the BWC was not excluded from McKinley's settlement, Heritage is not liable. (Amended Brief for Jeffrey McKinley as Amicus Curiae, pp. 1, 7, *Ohio Bureau of Workers' Compensation v. Heritage-WTI, Inc.*, 2014-Ohio-0795 (Dec. 18, 2014)).

II. STATEMENT OF CASE AND FACTS

A. The BWC Actively Participates In The Settlement Process And States That The Settlement Should Be Finalized Before McKinley Satisfies The BWC's Lien.

This case arises from Jeffrey McKinley's workplace accident that occurred in July 2003 while working at Heritage's facility. (Appx. B at ¶1). As a result of his injuries, McKinley filed for workers' compensation benefits with the BWC. (*Id.* at ¶2). The BWC allowed his claim and paid medical bills and compensation on his behalf. (*Id.*). In August 2003, McKinley filed a premises liability action against Heritage to recover for his personal injuries. (*Id.* at ¶3).

On October 25, 2004, McKinley's counsel notified the BWC that he entered into settlement negotiations with Heritage. (BWC Br., Supp. S-1). McKinley's counsel explained that McKinley was attempting to settle the personal injury claim before the court ruled on Heritage's motion for summary judgment, which McKinley feared would be granted. (*Id.*). The BWC responded to McKinley and his attorney the same day it received notice of the negotiations and advised that the BWC was entitled to receive payment from McKinley's settlement proceeds. (BWC Br., Supp. S-3). On November 1, 2004, McKinley's counsel informed the Ohio Attorney General that settlement negotiations were ongoing. (Appx. D). McKinley's counsel also informed the BWC that he believed the personal injury claim could settle for \$1.5M. (BWC Br., Supp. S-9).

On November 3, 2004, the BWC informed McKinley's counsel that the BWC would accept \$338,856.08 as full and final satisfaction of its subrogation interest. (BWC Br., Supp. S-10). The BWC expected McKinley's counsel to issue a check to the BWC, as well as a copy of the executed settlement agreement after the personal injury claim settled. (*Id.*). Thus, the BWC—prior to the settlement of the personal injury claim—indicated an agreement and expectation that the settlement agreement would be signed, outside its presence, before it received payment, and that the check would come from *McKinley*. (*Id.*). On November 3, 2004, McKinley's counsel responded to the BWC and agreed to the amount of the subrogation interest, but submitted a counteroffer of 30% of the lien amount, which the BWC declined. (BWC Br., Supp. S-13).

B. As Suggested By The BWC, McKinley And Heritage Entered Into A Settlement Agreement That Required McKinley To “Discharge” The BWC’s Lien.

McKinley and Heritage engaged in the exact settlement process contemplated by the BWC's November 3, 2004 correspondence. After the BWC's final lien amount was determined, McKinley and Heritage entered into a settlement agreement of roughly \$1.5M—the same

amount that McKinley's counsel had reported to the BWC¹. (BWC Br., Supp. S-23). The settlement agreement undeniably required McKinley to "discharge" all subrogation claims or liens with the settlement proceeds. (BWC Br., Supp. S-23. at Art. VII). "Discharge" means "the payment of a debt or satisfaction of some other obligation." *Black's Law Dictionary* (9th Ed.2009).

C. All Parties Participate In An Administrative Hearing To Determine How Much Of The Settlement Proceeds Will Be Paid To The BWC.

While the BWC asserts that the settlement agreement was "secret," the BWC's own documents demonstrate that this assertion is disingenuous. On January 10, 2005—within one month of the settlement agreement's execution—the BWC held a hearing to determine the amount the BWC would receive from McKinley's settlement proceeds as final satisfaction of its lien. (BWC Br., Supp. S-17). The BWC was represented by two lawyers. (*Id.*). Heritage was represented at the hearing by Gregory Brunton;² McKinley's counsel was also present. (*Id.*).

Following the hearing, the Administrator's Designee determined that the subrogation offer of \$338,856.08 was reasonable. (*Id.*). The decision set forth the factors that were considered in determining the amount that the BWC would receive from the settlement proceeds. (*Id.*). Significantly, the decision expressly noted that "[t]he claimant's third party settlement of \$1.5M was also taken into account." (*Id.*) (emphasis added). The decision further ordered McKinley to "remit the payment within 30 days of receipt of this order or [sic] BWC will certify the matter to the AG's office for collection." (*Id.*). Thus, the BWC knew the settlement amount.

¹ \$1.1M was paid in cash with the remaining \$400,000 purchasing an annuity which would pay \$972,892.80 in monthly installments to McKinley until 2034. Thus, the settlement amount was \$1.5M.

² Heritage was formerly known as Von Roll America.

The BWC also knew that the settlement agreement was final or imminent, particularly considering that McKinley was only given 30 days to pay the BWC's lien.

On April 20, 2005, the BWC followed up with McKinley and demanded a check along with the signed settlement agreement within 14 days. (Appx. A). The BWC further threatened to have the Attorney General's Office initiate collection efforts directly against McKinley. (*Id.*). At no time in this process did the BWC, the Administrator's Designee, or the two lawyers who represented the BWC demand direct payment from Heritage, or state that Heritage should not pay the proceeds to McKinley until after the lien was satisfied. In fact, the January 10, 2005 decision did the opposite—it indicated that Heritage should pay McKinley first and then McKinley should pay the BWC.

D. The BWC Negligently Waits Nearly Four Years To Assert Its Subrogation Rights In Court.

Although the BWC was aware of its subrogation interest in 2004, negotiated its lien amount, and ordered McKinley to satisfy the lien with the settlement proceeds, the BWC never followed through on its promise to collect directly against McKinley. (Appx. A; Appx. C). Nor did it try. Unexpectedly, McKinley opted to challenge the constitutionality of the subrogation statute rather than pay the BWC's lien. *See McKinley v. Ohio Bureau of Worker's Comp.*, 170 Ohio App. 3d 161, 2006-Ohio-5271, 866 N.E. 2d 527 (4th Dist.). He lost. (*Id.*). Notably, during the declaratory judgment action, the BWC never counterclaimed to recover its subrogation interest. *Id.* Thus, the case was dismissed without the BWC ever asserting an affirmative claim against McKinley.

Although the BWC issued a decision and sent correspondence to McKinley's counsel indicating that it would seek to recover its lien from McKinley, the BWC drastically altered its strategy. On November 4, 2008—four years after the settlement—the BWC filed a Complaint

seeking to recover from Heritage. The BWC has yet to come forth with an explanation as to why it reneged on its initial intent to collect from McKinley other than the astonishing admission that the BWC simply believes it is easier to collect from a “large, commercial entity” like Heritage. (Memo in Sup. Jur., p. 9).

E. The Case Proceeds To This Court On The Statute Of Limitations Issue And Justice Pfeifer Clarifies That Heritage Can Only Be Held Liable If The Settlement Expressly Excludes The BWC’s Lien.

The BWC’s Complaint was initially dismissed on statute of limitations grounds, but was reinstated on appeal. *See McKinley II*, 130 Ohio St.3d 156, 2011-Ohio-4432, 956 N.E.2d 814. Before remanding to the trial court, Justice Pfeifer wrote a concurring opinion stressing that under R.C. 4123.931(G), unless the BWC was not given notice (which was never alleged) the BWC’s **only** hope to recover from Heritage would be a provision in the settlement agreement that specifically excluded the **payments** made by the BWC. *McKinley II* at ¶¶46-48. (emphasis added). In particular, Justice Pfeifer noted that “[t]his 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.” *Id.* at ¶48. He advised the trial court to proceed on this limited basis. *Id.*

On August 30, 2012, the trial court re-examined the case on remand and found that the settlement between Heritage and McKinley did not exclude the amount paid by the BWC. *See Ohio Bureau of Workers’ Compensation v. Heritage-WTI, Inc.*, Columbiana C.P. No. 2008 CV 1143, 3 (Aug. 30, 2012). (BWC Br., Appx., Ex. 4). As such, the court granted summary judgment in Heritage’s favor. *Id.* On January 11, 2013, the BWC appealed to the Seventh District, which affirmed the trial court’s decision. *Ohio Bureau of Workers’ Comp v. McKinley*, 7th Dist. Columbiana No. 12CO41, 2014-Ohio-1397, ¶37 (hereinafter “*McKinley III*”). The Seventh District held that the BWC did not establish that the settlement excluded its subrogation

lien, and emphasized that the total settlement of \$2M far exceeded the lien. *McKinley III* at ¶26. The Seventh District further held that the BWC had a reasonable opportunity to assert its rights. *Id.* at ¶33. Additionally, the Seventh District explained how the BWC could still exercise its rights under the statutory collection formula set forth in R.C. 4123.931(B) to extract its lien from McKinley's settlement. *Id.* at ¶¶28–29.

On May 15, 2014, the BWC, obviously dissatisfied with the Seventh District's decision, filed a notice of appeal with this Court. (BWC Br., Appx., Ex. 1). Although the BWC was undeniably aware of the settlement negotiations between McKinley and Heritage, negotiated its lien based on the amount of McKinley's settlement, and instructed McKinley to remit payment and submit the signed settlement agreement, the BWC now contends that McKinley's personal injury claim was settled in "secret." (BWC Br., p. 7). The BWC further claims that the settlement agreement excluded the BWC's lien, thereby triggering Heritage's liability, because the provision requiring McKinley to pay *all* liens did not mention the BWC by name. (BWC Br., pp. 17, 23). Based upon the above undisputed facts, the BWC's tale of secrecy, exclusion, and non-participation is disingenuous and false.

III. RESPONSE TO PROPOSITION(S) OF LAW:

Once proper notice is provided under R.C. 4123.931(G), a third-party tortfeasor cannot be held liable when there is no evidence that the amount paid by the statutory subrogee was excluded from the settlement. Further, the amount paid by a statutory subrogee is not excluded when the settlement includes an amount sufficient to satisfy the subrogation lien and expressly requires the claimant to satisfy the lien with the settlement proceeds.

Rarely will this Court be confronted with a party attempting to torture the record, the language of an agreement, and a statute, as the BWC has done here. The BWC contorts the record by repeatedly representing that McKinley and Heritage entered into a "secret settlement" when the BWC purposefully negotiated its lien based on the settlement amount that McKinley

received from Heritage. (BWC Br., Supp. S-17). Inexplicably, the BWC argues that it had insufficient information to pursue its subrogation interest despite threatening to collect directly against McKinley in Spring 2005. (Appx. A). The BWC's litany of contradictions does not stop there. Instead, the BWC continues to assert—in a vacuum and ignoring what actually happened during the settlement process—that the settlement agreement did not require McKinley to satisfy the BWC's lien even though the agreement he signed promised to “discharge” any and all liens.

The BWC was negligent in not collecting the money from McKinley and it now seeks to remedy that negligence by requiring a double payment from a “large, commercial entity.” (Memo in Sup. Jur., p. 9). To do so, the BWC ignores the plain language of R.C. 4123.931(G) and requests this Court to interpret the statutory language, “excludes any amount paid,” to mean “fails to affirmatively provide for payment.” (BWC Br., p. 16). The BWC resorts to these extreme measures because convincing this Court to ignore the facts and to rewrite the statute to impose strict liability on commercial entities when a claimant fails to meet their statutory and contractual obligations is the BWC's only hope for recovery against Heritage.

A. Heritage Cannot Be Held Liable Because The Amount Paid By The BWC Was Not Excluded From The Settlement.

This appeal involves the interpretation of R.C. 4123.931(G), which states in part:

“If a statutory subrogee and, when required, the attorney general are not given that notice, or if a settlement or compromise *excludes any amount paid* by the statutory subrogee, the third party and the claimant shall be jointly and severally liable to pay the statutory subrogee the full amount of the subrogation interest.”

R.C.4123.931(G). Ignoring the plain language, the BWC contends that the phrase “excludes any amount” should be interpreted so that it holds a third party liable whenever a settlement does not require payment to the BWC. (BWC Br., pp. 16–17). This argument fails for several reasons. First, the BWC confuses the word “settlement” with “settlement agreement,” which have distinct

legal meanings. A requirement that parties to a settlement include a provision in the settlement agreement providing for payment of the BWC's lien is nowhere in the statute.

Second, the statute does not contain language requiring a settlement to "include payment" to the BWC before a third party is absolved of liability. Liability is only triggered when "any amount paid" by the BWC is excluded from the settlement between the claimant and third party. R.C. 4123.931(G) (emphasis added). In enacting R.C. 4123.931(G), the General Assembly was concerned about settlements that would leave the BWC without a means of recovering from the claimant. Prior to R.C. 4123.931(G), parties would collude to exclude the BWC's interest by characterizing a settlement as providing compensation for damages that were not subject to the BWC's lien such as pain and suffering. For instance, parties would draft settlement agreements that noted "this settlement is for pain and suffering only." In those situations the "amount paid" by the BWC was excluded. The General Assembly amended the statute to avoid parties carving the BWC's lien out of the settlement.

But in this case the amount paid by the BWC was not excluded from the settlement. McKinley received a settlement amount that more than *tripled* the BWC's lien. The BWC was aware of this because the settlement process proceeded exactly as the BWC contemplated—it negotiated the lien based on the settlement amount. (BWC Br., Supp. S-17). Further, the settlement agreement did not attempt to exclude the BWC's lien by pretending that the settlement was exclusively for damages that were not recoverable by the BWC. Quite the opposite, the settlement agreement specifically required McKinley to discharge all liens. The BWC has a right to recover its subrogation interest—but it is pursuing the wrong party.

1. ***Because the settlement provided in excess of three times the BWC's lien, the amount the BWC paid was not excluded.***

Under the BWC's theory, unless a settlement agreement "include[s] payment" to the BWC it "excludes any amount paid" by the BWC. (BWC Br., p. 1). The most glaring problem with the BWC's theory is that it is not supported by the language of the statute. Instead, R.C. 4123.931(G) only imposes liability on a third party if the settlement "excludes *any amount* paid by the statutory subrogee." (Emphasis added.). There is nothing in the statute obligating parties to a settlement agreement to specifically include payments to the BWC.

The BWC's twisted interpretation of the statute violates well-established rules of statutory interpretation. Indisputably, R.C. 4123.931(G) creates a right in derogation of the common law and, therefore, must be strictly construed. *U.S. Promotion Co. v. Anderson*, 100 Ohio St. 58, 61, 125 N.E. 106 (1919). Statutes in derogation of the common law cannot be construed as changing the common law unless those changes are specifically expressed in the statute. *Shaw v. Merchant's Nat'l Bank*, 101 U.S. 557, 565, 25 L. Ed. 892 (1879). If there is any doubt about the meaning of R.C. 4123.931(G), the statute should be construed as making the least changes to the common law, as oppose to the most. *Id.*; 3 Singer, *Sutherland Statutory Construction Section*, Section 61 at 1 (7th Ed.2014). As such, statutes that change the common law should be construed most favorably to the entity, like Heritage, subjected to the liability created by the statute. *Hardy Bros Body Shop v. State Farm*, 848 F.Supp. 1276, 1287 (S.D. Miss. 1994).

Here, the BWC proclaims that the statutory language prohibiting settlements that "exclude any amount paid" by the BWC should be interpreted as affirmatively requiring settlements to expressly state that they "include payment" to the BWC. This ignores fundamental statutory interpretation principles. If the legislature wanted to impose an affirmative duty that payment to the BWC be expressly mentioned, it would have so stated. It did not. Instead, the

statute is written in the negative. The Seventh District appropriately recognized that the statute was intentionally written to address an exclusion of the subrogation lien, rather than in terms of a failure to include it, because there is a statutory presumption that the BWC will recover its lien via the proportional collection procedure set forth in R.C. 4123.931(B). *McKinley III*, supra, at ¶27. If the parties try to avoid or negate the statutory presumption by carving out the amount owed to the BWC (characterizing a settlement as only compensating for pain and suffering), then joint and several liability applies. *Id.*

This is consistent with terms of the statute, which are clearly focused on a monetary amount—did the settlement provide sufficient funds to discharge the BWC’s lien. If a third-party tortfeasor pays an amount sufficient to discharge the BWC’s lien and the settlement does not purport to exclude the BWC’s lien, then the third-party tortfeasor does not face further liability. The third party has paid a settlement that encompasses the “amount paid” by the BWC. As stated by Justice Pfeifer, the resulting battle over the distribution of the settlement proceeds is left between the claimant and the BWC—not the third-party tortfeasor. *McKinley II*, supra, at ¶48. Otherwise the third-party tortfeasor, which is often an Ohio business, will be subject to double payment while the claimant pockets a double recovery. This is not what the statute allows or what the legislature contemplated.

Moreover, interpreting the statute to impose a negative duty on a third party to refrain from excluding the amount of the BWC’s subrogation interest is consistent with how subrogation interest are customarily resolved in personal injury cases—and have been for decades. While this is not a trial court, this Court is familiar with the settlement process. With this familiarity, the Court is aware that the tortfeasor and the plaintiff typically agree on a proposed settlement amount. Then, if there is a subrogated interest, the plaintiff tries to negotiate the subrogation lien

to maximize the plaintiff's recovery. Once the plaintiff reaches an agreement with the subrogated party, the settlement proceeds are disbursed to satisfy the lien. As long as the settlement proceeds exceed the agreed upon lien, the subrogated party is paid out of the plaintiff's settlement proceeds.

Other examples further demonstrate that Heritage's construction of R.C. 4123.931(G) is consistent with how subrogation matters are handled in Ohio. For instance, the statute expressly allows the BWC to bring a direct action against the tortfeasor. R.C. 4123.931(H). Similarly, subrogated parties in Ohio can bring a direct action through the contract that gave them the subrogation right. Likewise, the statute allows the BWC to negotiate its lien and provides a dispute resolution process, which is how subrogated parties generally negotiate their liens in Ohio. R.C. 4123.931(B). It is clear that the General Assembly did not intend to catastrophically disrupt the customary, decades-old settlement process when enacting R.C. 4123.931(G). The statute was drafted to allow the personal injury settlement process to continue just as it has for the last 50 years. A claimant has the right to negotiate or contest the BWC's lien before paying it. But when a third-party tortfeasor has settled a case for an amount that allows the claimant to honor the BWC's lien and does not attempt to carve out the BWC's lien, the "amount paid" by the BWC is not excluded.

During the settlement of McKinley's personal injury case, the BWC behaved exactly as set forth above—with the understanding that McKinley would negotiate the BWC's lien and then make payment after he received the settlement proceeds from Heritage. Indeed, on November 3, 2004, the BWC set forth its subrogation interest and instructed McKinley that *he*—not Heritage—should (1) send a check and (2) enclose the *executed* settlement agreement. (BWC Br., Supp. S-10). Thus, the BWC was fine with receiving a check from McKinley's counsel and

a settlement agreement, which the BWC assumed would be executed before it received payment. The BWC, fully informed of the settlement amount, held a hearing on January 10, 2005 to determine the amount of the settlement proceeds that it would receive for its lien. (BWC Br., Supp. S-17). The BWC then issued a decision following the hearing in which all parties participated, including two BWC attorneys. (BWC Br., Supp. S-17). The decision specifically directed *McKinley*—not *Heritage*—to submit the payment. *Id.* There was no request that *Heritage* issue a separate payment to the BWC. The BWC then followed up, shortly after the hearing, and again threatened collect directly against *McKinley*—*not Heritage*. (Appx. A).

The BWC's correspondence and decision reveals that the BWC viewed the statute and subrogation process the way *Heritage* did. It is undisputed that there were sufficient funds to pay the BWC's lien from the settlement proceeds. (BWC Br., Supp. S-23). The BWC knew that the settlement amount tripled the subrogation lien. As such, the BWC believed it was *McKinley*'s obligation to satisfy the lien. (BWC Br., Supp. S-17). Now, nine years later, the BWC has adopted a completely contrary position. In an inequitable fashion, the BWC urges this Court to construe R.C. 4123.931(G) in a manner that would hold *Heritage* liable for proceeding exactly as the BWC instructed.

This Court should reject the BWC's request to rewrite the statute and hold that a settlement providing sufficient funds to satisfy the BWC's lien that does not attempt to "exclude any amount paid" by the BWC absolves a third party of liability. This is the correct interpretation of the statute and would allow personal injury claims to settle as the legislature intended, and how litigants have proceeded for decades.

2. As A Matter Of Law, The Settlement Did Not Exclude The Amount Paid By The BWC.

The BWC, relying upon its flawed interpretation of the statute, contends that Heritage is liable because the settlement agreement did not “include” a provision affirmatively providing for the amount owed to the BWC. (BWC Br., p. 16). As discussed above, the BWC’s position is legally flawed because the R.C. 4123.931(G) does not set forth any requirement that a settlement agreement expressly set forth the BWC’s lien. The only obligation is that the “amount paid” is not “excluded” from the settlement. Aside from the legal flaw of the BWC’s argument, its position is factually inaccurate.

Initially, there is no dispute that Heritage and McKinley believed the settlement agreement included the amount paid by the BWC. (Amended Brief for Jeffrey McKinley as Amicus Curiae, pp. 1, 7; *Ohio Bureau of Workers’ Compensation v. Heritage-WTI, Inc.*, 2014-Ohio-0795 (7th Dist. 2014)). Despite the fact that McKinley has every incentive to make Heritage pay the BWC’s lien (again) he has not taken that position. *Id.* To the contrary, McKinley has unequivocally informed this Court that the settlement *did not* exclude the amount paid by the BWC. It is well established that when interpreting agreements the intent of the parties controls. *Skivolocki v. E. Ohio Gas Co.*, 38 Ohio St. 2d 244, 247, 313 N.E.2d 374, 376 (1974). Here, there is no dispute—the parties to the settlement agreement intended that the settlement *include* amounts paid by the BWC. The inquiry should end here.

The language of the settlement agreement further supports this intent. The indemnification provision provides:

In further consideration of the payments...Plaintiff [McKinley] hereby **DISCHARGES** and agrees to indemnify and to save and hold harmless Defendant [Heritage]...against **any and all...subrogation claims or liens**, that are, have been in the past or may be in the future asserted...as a result of the aforesaid incident.

(BWC Br., Supp. S-23 at Art. VII) (emphasis added). Although the BWC argues that the settlement agreement does not require McKinley to pay the BWC's lien because the agreement merely contains a "generic indemnification" clause, the BWC conveniently ignores that the agreement contains the word "discharges." The word "discharge" means: "the payment of a debt or satisfaction of some other obligation." *Black's Law Dictionary* (9th Ed.2009). By the terms of the written settlement agreement, McKinley was to "discharge"—*i.e.* pay—all "subrogation claims or liens." (BWC Br., Supp. S-23). This indisputably included the BWC's lien. The agreement likewise required McKinley to "cooperate fully" and to "take all additional actions that may be necessary . . . to give full force and effect to the terms and intent of this agreement." (BWC Br., Supp. S-23 at Art. VIII).

Looking at McKinley's admission that the settlement did not exclude the BWC's lien, and further considering the requirement that *all* liens be discharged in conjunction with the indemnification provisions, and the requirement that McKinley take future acts to effectuate the intent (as McKinley agrees) to pay the BWC, there can be no doubt—the amount paid by the BWC was not excluded from the settlement agreement.

B. The BWC Had A Reasonable Opportunity To Assert its Subrogation Interest And Was Not Excluded From The Settlement Process.

Confronted with a settlement amount that tripled the BWC's lien and a settlement agreement that expressly required McKinley to discharge all liens with the settlement proceeds, the BWC resorts to hyperbole—and kicks it into overdrive—by alleging that the parties engaged in a settlement process with the sole purpose of allowing Heritage to "walk away." (BWC Br. at p. 13). The BWC further contends that Heritage joined McKinley in trying to keep the BWC "out of their two-way deal." (*Id.* at p. 28). According to the BWC, it was denied a reasonable opportunity to pursue its subrogation interest because the parties entered into a "secret

settlement.” (*Id.* at pp. 23–24). The BWC’s argument fails because it once again ignores the language of the statute and the actual facts of this case.

Legally, the BWC’s argument runs afoul of the statutory language of R.C. 4123.931(G). The first sentence of this statute requires a claimant to identify “all third parties against whom the claimant has or may have a right to recovery.” R.C. 4123.931(G). The next sentence provides that a settlement is not final unless the BWC gets “prior notice and a *reasonable opportunity to assert its subrogation rights.*” *Id.* (emphasis added). Thus, the BWC need only receive prior notice that provides a “reasonable opportunity” to assert its subrogation rights, both of which undeniably occurred. But even if the statute provided the BWC with the right to reasonably participate in the settlement process it would not support the BWC’s position. Given the circumstances, particularly the BWC’s close involvement in the settlement process, the BWC’s argument that it was “excluded” from the critical stages of the settlement process is simply embarrassing.

The record shows that McKinley’s counsel notified the BWC that settlement negotiations were underway and that he told the BWC the amount of the settlement. (BWC Br., Supp. S-1; S-9). Obviously, at this time, the BWC had the right to (1) intervene in the suit and/or (2) request more information regarding the details surrounding the settlement negotiations.³ (*Id.*). Instead, the BWC consciously abstained from the settlement process. Indeed, the BWC wrote to McKinley’s counsel on November 3, 2004 and requested that McKinley issue a check payable to the BWC “and enclose a copy of the signed release entered into between the injured worker and the insurance company.” (BWC Br., Supp. S-10). This letter expressly contemplates that the next

³ For example, the BWC could have requested the pleadings and taken a look at the summary judgment motion. Or it could have had one of its lawyers involved in the case request to a draft of the settlement agreement.

step would be signing the settlement agreement—outside the presence of the BWC—without further action by the BWC. (*Id.*). The BWC unilaterally restricted the scope of its participation by merely asking for a check and a signed copy of the release. (*Id.*). Never did the BWC request that McKinley or Heritage give advance notice before the settlement agreement was signed.

The BWC's concern was the amount it would receive from the settlement proceeds. To determine the amount the BWC would recover, the BWC recommended that McKinley request a hearing in front of the Administrator's Designee, which McKinley did. (BWC Br., Supp. S-14; S-15). That hearing was held on January 10, 2005 for the sole purpose of determining the amount the BWC would receive. The BWC had two lawyers there. (BWC Br., Supp. S-17). McKinley's counsel and Heritage's counsel also attended. (*Id.*). Logically, if McKinley and Heritage intended to exclude the BWC, then they would not have attended the hearing. But what occurred at the hearing destroys the BWC's claim that it was somehow excluded by a "secret settlement." The entire case was discussed and the settlement amount was disclosed to the BWC's administrator who, in turn, determined the amount McKinley was required to pay from the settlement proceeds if he wished to avoid the BWC's collection efforts. (*Id.*).

Although the BWC now claims that it did not know that the settlement was final, the Administrator Designee specifically required McKinley to remit payment "within 30 days." (*Id.*). The BWC clearly knew at the time of the hearing that the settlement was final or imminent. (*Id.*). This is further demonstrated by the BWC's April 20, 2005 correspondence instructing McKinley to "remit the check and signed settlement agreement *within fourteen (14) days* of receipt of this letter" (Appx. A). The BWC further threatened to pursue a collection action if payment was not submitted by McKinley. (*Id.*). Obviously, McKinley could not remit payment and send a signed settlement agreement unless the settlement was finalized. This leads to the

conclusion that the BWC was undoubtedly aware of the settlement but failed to back up its threat to collect directly from McKinley. The BWC's disingenuous claim that it had no opportunity to participate in the settlement process and pursue its lien rightfully casts a cloud over every other assertion the BWC makes in this case.

What truly occurred could not be clearer. The BWC actively participated in the settlement process, at least to the extent that it unilaterally deemed necessary, knew the amount of the settlement, and knew the settlement was final or imminent when it demanded payment from McKinley. (BWC Br., Supp. S-17; Appx. A). The BWC negligently and unexplainably waited four years to follow through on its threat to collect from McKinley. (*Id.*). Knowing that McKinley likely does not have the money, it now seeks to sue a "large, commercial entity" to make an Ohio business pay double to cover up the BWC's own negligence. (Memo in Sup. Jur., p. 9).

C. Interpreting R.C. 4123.931 Such That Third Parties Are Strictly Liable Anytime The BWC Is Not Reimbursed Renders The Statute Unconstitutional.

Realizing that there is no evidence that any "amount paid" by the BWC was excluded from the settlement, the BWC urges this Court to interpret R.C. 4123.931(G) as imposing strict liability on third-party tortfeasors anytime the BWC is not reimbursed. (BWC Br., p. 16). In essence, the BWC seeks to transform "large, commercial entities" into insurers of the BWC's lien. (BWC Br., p. 16). Under the BWC's construction, the only way that Ohio's businesses can avoid liability is to issue a settlement check directly to the BWC (which the BWC never requested in this case) *before* the claimant and third-party tortfeasor reach a final settlement. This interpretation is unsupported by R.C. 4123.931(G) or the statutory scheme of R.C. 4123.931. More importantly, as the Seventh District recognized, such an interpretation renders the statute unconstitutional. *McKinley, III*, supra, at ¶29.

It is a fundamental tenet of statutory interpretation courts confronted with two interpretations of a statute should choose the interpretation that renders the statute constitutional. *Buchman v. Wayne Trace Local Sch. Dist. Bd. of Edn.*, 1995-Ohio-136, 73 Ohio St. 3d 260, 269, 652 N.E.2d 952, 960; *Cincinnati v. De Golyer* (1971), 25 Ohio St.2d 101, 106, 54 O.O.2d 232, 234, 267 N.E.2d 282, 285. The BWC's interpretation of R.C. 4123.931(G)—which would require that the BWC be reimbursed before a settlement can be finalized—would render the statute unconstitutional under *Holeton v. Crouse Carthage Co.* 92 Ohio St.3d 115, 116 748 N.E. 2d 1111 (2001). As this Court is aware, the proportional formula in R.C. 4123.931(B) was created by 2002 S.B. 227 in response to *Holeton*. Prior to the S.B. 227, the statute allowed the BWC to recover its entire lien before any settlement funds were disbursed to the claimant regardless of whether the claimant's losses had been compensated. *McKinley, III*, supra, at ¶28. This Court held that this was a harsh result and unconstitutional because it failed “to adequately correlate the subrogee's reimbursement amount to any amount recovered by the claimant that [could] be characterized as duplicative or double when the claimant settled with the tortfeasor.” *See Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, ¶63.

In 2003, R.C. 4123.931 was amended to provide the BWC with the right to recover only a proportional share of the settlement received by the claimant. *See* S.B. 227. In other words, the current statute mandates that the claimant collect a settlement *before* the BWC can be reimbursed. R.C. 4123.931(B). As stated above, the BWC understood what the statute requires, which is exactly why it attended the Administrator Designee's hearing and instructed McKinley to remit payment *after* he completed the settlement with Heritage. (BWC Br., Supp. S-17; Appx. A). Once Heritage disbursed the settlement proceeds to McKinley for an amount that tripled the BWC's lien, pursuant to an agreement that expressly required McKinley to discharge the lien,

Heritage had no further control. It satisfied its sole obligation of ensuring that the “amount paid” by the BWC was not excluded from the settlement.

But the BWC—in further hostility to Ohio’s businesses—argues that a “third-party tortfeasor remains responsible, even if the claimant makes mistakes.” (BWC Br., p. 16). Under the BWC’s theory, Heritage must foot the bill because McKinley failed to meet his obligation—as directed by the BWC and Heritage—to properly disburse the settlement proceeds. Aside from the obvious unfairness of this position, it is also unconstitutional because it violates Heritage’s due process rights, which cannot be waived by unrelated parties. *Schad v. Arizona*, 501 U.S. 624, 625, 111 S.Ct. 2491, 2493 (1991); *Lucas v. Forty-Fourth Gen. Assembly of State of Colo.*, 377 U.S. 713, 736-37, 84 S. Ct. 1459, 1474, 12 L. Ed. 2d 632 (1964). Quite noticeably, the BWC omits any legal authority that would permit a third-party to be held strictly liable solely for another party’s conduct, over which that third party has no control.

The BWC’s position leaves third-party tortfeasors with no means of insulating themselves from liability. This interpretation is not only unconstitutional but would also have a devastating impact on settlements in Ohio. A third-party tortfeasor would be required to assume the risk of liability anytime it settled a claim involving a BWC lien. Conversely, claimants would have no incentive to satisfy the BWC’s lien because they can be rest assured that the BWC will pursue the large commercial entities that already paid a hefty settlement. This is not what the legislature intended. The BWC’s draconian interpretation of the statute, which insulates the BWC from the costs of its own negligence, completely conflicts basic due process guarantees and imposes liability an unrelated party’s unanticipated acts. *Morissette v. United States*, 342 U.S. 246, 350-51, 72 S. Ct. 240 (1952). Accordingly, this Court should reject the BWC’s request to rewrite R.C. 4123.931(G) and should further affirm summary judgment in Heritage’s favor.

IV. CONCLUSION

There can be no doubt what occurred here. McKinley's personal injury claim was settled just as the BWC expected in 2004. The BWC requested a check from McKinley, not Heritage. The BWC had every opportunity to bring a collection action against McKinley, or even a counterclaim under Civil Rule 13 (A), but it did not⁴. The BWC's current position—as to what the subrogation statute means—is completely contrary to the way the BWC behaved in 2004 and 2005. The BWC “dropped the ball” on collecting from McKinley and now wishes to make an Ohio business pay double simply because the BWC was dilatory in its collection efforts. Just because a tortfeasor is a “large, commercial entity” does not mean that the language of the statute should be tortured and that basic principles of subrogation should be ignored. Heritage settled for an amount that included the amount paid by the BWC. The BWC agreed did not dispute this on January 10, 2005. Summary judgment was therefore appropriately granted.

Respectfully submitted,



Patrick Kasson (0055570)
Gregory D. Brunton (0061722)
Melvin J. Davis (0079224)
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65 E. State Street St., 4th Floor
Columbus, OH 43215
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pkasson@reminger.com
gbrunton@reminger.com
mdavis@reminger.com
Counsel for Appellee Heritage WTI, Inc.

⁴ The irony of the situation is that, if this matter is remanded, then the BWC may be barred from even pursuing McKinley because it did not bring the compulsory counterclaim when the declaratory judgment action was filed.

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 7 day of January, 2015 upon:

T. Jeffrey Beausay, Esq.
THE DONAHEY LAW FIRM
495 South High Street, Suite 100
Columbus, Ohio 43215
*Counsel for Defendant
Jeffrey McKinley*

Michael Dewine
Eric E. Murphy
Stephen P. Carney
Jeffrey Jarosch
Sherry M. Phillips
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215

Bradley R. Glover
Lee M. Smith, Esq.
LEE M. SMITH & ASSOCIATES
929 Harrison Avenue, Suite 300
Columbus, Ohio 43215
*Special Counsel for Plaintiff/Appellant
Ohio Bureau of Workers' Compensation*



Patrick Kasson, Esq. (0055570)
Gregory D. Brunton, Esq. (0061722)
Melvin J. Davis, Esq. (0079224)

APPENDIX

- APPENDIX A Letter from Appellant Ohio Bureau of Workers' Compensation to Jeffrey McKinley's Counsel (April 20, 2005)
- APPENDIX B Appellant Ohio Bureau of Workers' Compensation Complaint filed on Columbiana County, Ohio Case No. 2008-CV-1143 (November 2008)
- APPENDIX C BWC Subrogation Referral Form (October 25, 2004)
- APPENDIX D Letter from Jeffrey McKinley's Counsel to the Ohio Attorney General (November 1, 2004)



Bob Taft
Governor

James Conrad
Administrator/CEO

The Ohio Bureau of Workers' Compensation
Legal Operations Department
30 West Spring Street, L26
Columbus Ohio 43215-2256

Phone: 614.466.6600 Fax: 614.728.7356

April 20, 2005

Jeffrey Beausay

Fax: 614-849-0475

RE: Bureau Subrogation Rights:
Claim No. 03-840022
Claimant: Jeff McKinley
Date of Injury: 07/13/03

Dear Mr. Beausay:

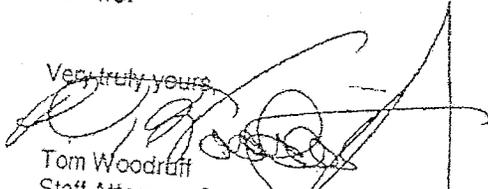
Please remit the check and the signed settlement agreement *within fourteen (14) days of receipt of this letter to:*

Bureau of Workers' Compensation
Attn: Subrogation Dept.
PO Box 15487
Columbus, OH 43215-0127

If you do not remit the signed settlement agreement within fourteen (14) days of receipt of this letter, BWC will certify its subrogation lien to the Attorney General's Office for collection and return your check. The Attorney General's office will negotiate settlement with you and BWC's offer will be withdrawn at that time.

Should you have any questions, please feel free to call me.

Very truly yours,


Tom Woodruff
Staff Attorney, Subrogation Unit

cc: Claim File



IN THE COURT OF COMMON PLEAS
COLUMBIANA COUNTY, OHIO

OHIO BUREAU OF WORKERS'
COMPENSATION
30 W. Spring Street
Columbus, OH 43215

CASE NO.: 08 cv 1143

C. Ashley Pike

Plaintiff,

v.

JEFFREY MCKINLEY
309 Calder Ridge Rd.
Belpre, OH 45714

Heritage-WTI, Inc.
F.K.A. Von Roll America Inc.
1250 Saint George St.
East Liverpool, OH 43920
c/o Statutory Agent CT Corporation
1300 E. 9th ST.
Cleveland, OH 44114

Defendants.

FILED
COLUMBIANA COUNTY
COURT OF COMMON PLEAS

NOV 04 2008

ANTHONY J. DATTILIO
CLERK (PAG)

COMPLAINT

Now comes the Ohio Bureau of Workers' Compensation, by and through Special Counsel,
and hereby states a claim for relief against the defendants jointly and severally as follows:

1. On or about July 13, 2003, Defendant Jeff McKinley was injured in the course and scope of his employment in East Liverpool, Ohio.
2. As a result of the injury/accident referenced in Paragraph 1 of Plaintiff's Complaint, Defendant Jeffrey McKinley filed a claim for workers' compensation benefits with the Ohio Bureau of Workers' Compensation such claims were allowed and assigned claim number 03-840022.



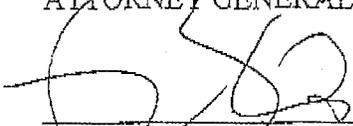
3. As a result of the injuries described above, Defendant Jeff McKinley filed a personal injury lawsuit against Defendant Heritage-WTI formally known as Von Roll American Inc. alleging that Mr. McKinley's injuries were caused by the fault of Defendant Heritage-WTI.
4. As a result of the injuries sustained by the Defendant Jeff McKinley on or about July 13, 2003, the Bureau of Workers' Compensation has paid a total of \$463,756.18 in medical bills and compensation and may continue to pay future medical bills and indemnity benefits as a result of Mr. McKinley's allowed workers' compensation claim.
5. By virtue of sections 4123.93 and 4123.931 of the Ohio Revised Code, the Ohio Bureau of Workers' Compensation is entitled to recover amounts expended for medical and compensation benefits, rehabilitation costs, and any other costs or expenses paid to or on behalf of Defendant McKinley out of any funds paid by Defendant Heritage-WTI to Defendant McKinley in settlement, compromise, judgment, award, or any other recovery under this claim.
6. As a result of the personal injury action filed by Defendant McKinley described in paragraph 3 of this complaint, Defendant Heritage-WTI entered into a settlement agreement with Defendant McKinley and Defendants have refused to honor the Bureau of Workers' Compensation's subrogation lien.
7. Pursuant to Ohio Revised Code Sections 4123.93 and 4123.931, the Bureau of Workers' Compensation's subrogation interest has vested in this matter and Defendants are in violation of the aforementioned statute.
8. Pursuant to Ohio Revised Code Section 4123.931(G) Defendants are jointly and

severally liable to the Bureau of Workers' Compensation for their failure to satisfy the Bureau's valid and enforceable subrogation lien.

9. Wherefore, Plaintiff, Ohio Bureau of Workers' Compensation demands judgment in the amount of \$463,756.18 plus estimated future expenses by way of medical bills and indemnity benefits paid to Defendant Jeff McKinley under Ohio Workers' Compensation claim number 03-840022 by virtue of Ohio Revised Code sections 4123.93 and 4123.931. Plaintiff also requests reasonable attorney fees, court cost, and any further relief this court deems appropriate.

Respectfully Submitted,

NANCY H. ROGERS,
ATTORNEY GENERAL OF OHIO



Benjamin W. Crider, (#0074175)

Lee M. Smith (#0020861)

LEE M. SMITH & ASSOC. CO., L.P.A.

Special Counsel

929 Harrison Avenue, Suite 300

Columbus, Ohio 43215

(614) 464-1626

(614) 464-9280 Fax

IN THE COURT OF COMMON PLEAS
COLUMBIANA COUNTY, OHIO

OHIO BUREAU OF WORKERS'
COMPENSATION
30 W. Spring Street
Columbus, OH 43215

Plaintiff,

v.

JEFFREY MCKINLEY
309 Calder Ridge Rd.
Belpre, OH 45714

Heritage-WTI, Inc.
F.K.A. Von Roll America Inc.
1250 Saint George St.
East Liverpool, OH 43920
c/o Statutory Agent CT Corporation
1300 E. 9th ST.
Cleveland, OH 44114

Defendants.

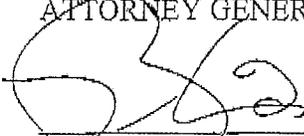
CASE NO.:

PRAECIPE

Please serve a copy of the Complaint by Certified Mail upon all named Defendants.

Respectfully Submitted,

NANCY H. ROGERS,
ATTORNEY GENERAL OF OHIO



Benjamin W. Crider, (#0074175)

Lee M. Smith (#0020861)

LEE M. SMITH & ASSOC. CO., L.P.A.

Special Counsel

929 Harrison Avenue, Suite 300

Columbus, Ohio 43215

(614) 464-1626

(614) 464-9280 Fax

BWC Subrogation Referral Form

Claimant J. H. McKinley

Claim No. 03-840022

Claimant's PI Attorney and Address

T. Jeffrey Beausay

495 S. High St.

Columbus Ohio 43215

Telephone No. _____

Third Party's Insurance Company
Address, Claim No. and Claims Rep

Date of Injury March 13, 2003

Third Party Name and Address

Vand Ball America Waste Technologies Inc.

Telephone No. _____

Third Party's Attorney (If known)
Name and address

Gregory Brunton

505 S High St

Columbus Ohio 43215

Description of Accident

Claimant fell into hot ash inside boiler - happen
sustaining severe burns to his legs and arms.

Refer to:

Subrogation Department

PO Box 15487

Columbus, OH 43215

Phone: (614) 466-6600

Fax: (614) 728-7278

Referred By: T. Jeffrey Beausay

Telephone: 614 224 8166

Affiliation: _____

Date: 10-25-04

Attached:

MVA Report _____

Other _____ Specify _____



TWYFORD & DONAHEY PLL

Attorneys at Law

T. Jeffrey Beausay
tjbeausay@twyfordanddonahey.com

495 South High Street, Suite 100
Columbus, Ohio 43215-5058

November 1, 2004

614.224.8166 (Columbus Office)
614.849.0475 (Facsimile)

James M. Petro
Ohio Attorney General
30 E Broad St, 17th Floor
Columbus, OH 43215-3428

Jeff McKinley v. Von Roll America, Inc./Waste Technologies Industries
BWC Claim No. 03-840022
DOA: 7/13/03

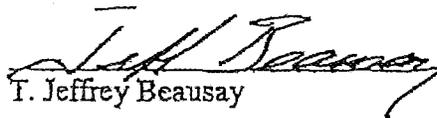
Dear Mr. Petro:

Please be advised that, pursuant to R.C. 4123.931, notice is hereby given of the above-referenced case. This case arises out of an accident while Jeff McKinley was on the job; he therefore was eligible for and is receiving worker's compensation benefits. He may also have a right of recovery against the above-referenced defendant. Please see the attached paperwork for further details of this matter.

We are in the process of trying to settle the case against the third party. The defendant, Von Roll America, Inc. (dba Waste Technologies Industries), has filed a motion for summary judgment, which is pending at this time. The parties are attempting to settle the case before said motion is ruled upon.

If you have any questions or would like to discuss this matter, please do not hesitate to contact me.

Very truly yours,


T. Jeffrey Beausay

TJB/

Encl.

