ORIGINAL

IN THE SUPREME COURT OF OHIO

OHIO BUREAU OF WORKERS' COMPENSATION **Appellee,** **v.** **JEFFREY MCKINLEY, et al.** **Appellants.**	: : : : : : : : : : :	**Supreme Court Case No. 2010-0720** **On Appeal from the Seventh District Court of Appeals Case No. 09CO3 (To Columbiana C.P.C. No. 08CV1143)**

OHIO BUREAU OF WORKERS' COMPENSATION'S MOTION IN OPPOSITION OF JURISDICTION

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EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

This Court should not accept jurisdiction in *Ohio Bureau of Workers' Compensation v. Jeffrey McKinley*, 7th Dist. No. 09 CO 3, 2010-Ohio-1006 because the case does not involve a substantial constitutional question, and is not of public or great general interest. The Seventh District Court of Appeals merely interpreted the plain language of R.C. 4123.931, compared the statute to similarly worded subrogation statutes, and reviewed the legislative history of R.C. 4123.931. And the court of appeals properly determined that the trial court erred when it dismissed the Bureau's claim pursuant to Civ.R. 12(B)(6).

Appellant Heritage WTI, Inc. ("Heritage") proposes that this Court accept jurisdiction because the court of appeals should have ruled that R.C. 4123.931 does not create an independent right of recovery in favor of the statutory subrogee and thus, does not fall within the purview of R.C. 2305.07 which provides that an action "...upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued." (Heritage's Memorandum in Support of Jurisdiction, pp. 4-6). However, the court of appeals considered whether the language in R.C. 4123.931 purports to create an independent right or mere derivative right of subrogation and determined based upon similar subrogation statutes and the legislative history of R.C. 4123.931 that the statute creates an independent right of recovery. *McKinley* at ¶55. Furthermore, despite claims of Heritage that R.C. 4123.931 does not authorize the BWC to independently maintain an action against a tortfeasor (Heritage's Memorandum in Support of Jurisdiction, pp. 5, 12), the appellate court recognized the clear and unambiguous language of R.C. 4123.931(G). *McKinley* at ¶42-44. R.C. 4123.931(G) unequivocally authorizes the Bureau to bring an independent cause of action against a third-party tortfeasor and a worker's compensation claimant jointly and severally.

As such, in the absence of any issue deserving of this Court's resources, it should decline jurisdiction and dismiss Heritage's appeal.

STATEMENT OF THE CASE AND FACTS

Jeffrey McKinley was injured in the course and scope of his employment on or about July 13, 2003. As a result of injuries suffered, Mr. McKinley filed a claim with the Ohio Bureau of Workers' Compensation, which was designated as claim number 03-840022. Such claim was allowed and the Bureau of Workers' Compensation has paid medical bills and compensation on behalf of Mr. McKinley, and will make payments ongoing into the future as needed and approved per Bureau guidelines and regulations. Subsequently, Mr. McKinley filed a third-party, personal-injury lawsuit against the alleged tortfeasor-which in this case was Appellant Heritage-and recovered a settlement. Despite the mandates of Ohio Revised Code Sections 4123.93 and 4123.931, Mr. McKinley failed to reimburse the Bureau out of the personal injury proceeds for amounts paid as a result of his allowed workers' compensation claim.

Instead, on April 11, 2005, Mr. McKinley filed a declaratory judgment action in the Washington County Court of Common Pleas designated as Case Number 05OT122. In the declaratory claim for relief, Mr. McKinley named the Bureau as a Defendant and requested a finding that Ohio Revised Code Sections 4123.93 and 4123.931 were unconstitutional on a multitude of theories. On January 17, 2006, the Washington County Court issued a decision in favor of Mr. McKinley declaring the aforementioned statutes unconstitutional. On or about January 23, 2006, the Bureau filed an appeal to this decision with the Fourth District Court of Appeals designated as Case Number 06CA7. Subsequent to the filing of briefs, on September

26, 2006, the court of appeals issued a decision reversing the lower court's ruling; finding that Ohio Revised Code Sections 4123.93 and 4123.931 withstood constitutional muster. On November 13, 2006 the Fourth District decision was appealed to the Ohio Supreme Court by Mr. McKinley, which was assigned case number 2006-2095. Then, on or about February 28, 2007 a request to stay these proceedings was filed with the Supreme Court pending the outcome of *Groch v. Gen. Motors Corp.,* 117 Ohio St.3d 192, 2008-Ohio-546 as the court's decision in *Groch v. Gen. Motors Corp.* would be dispositive of the constitutional issues raised by Mr. McKinley. On April 16, 2008 the Supreme Court issued its decision in *Groch v. Gen. Motors Corp.* declaring that Ohio Revised Code Sections 4123.93 and 4123.931 are constitutional.

Subsequent to the *Groch* decision, Mr. McKinley's appeal was referred back to the Washington County Court of Common Pleas. However, on or about April 30, 2008 Mr. McKinley, by and through counsel, sent a notice of voluntary dismissal of his declaratory judgment action without prejudice pursuant to Ohio Civil Rule 41(A). Subsequent to fruitless settlement negotiations with counsel for Mr. McKinley, on February 17, 2009, the Bureau instituted the present action in the Columbiana Court of Common Pleas naming Mr. McKinley and Heritage as defendants jointly and severally in accordance with Ohio Revised Code Section 4123.931(G).

In lieu of answering the Bureau's complaint, Heritage filed an Ohio Civil Rule 12(B)(6) motion asserting that the Bureau's complaint failed to state a claim upon which relief could be granted, and that the applicable statute of limitations expired to file such a complaint. In response, the Bureau filed a memorandum in opposition arguing that if there was a statute of limitations limiting the Bureau to file such a complaint, the applicable statute of limitations in accordance with R.C. 2305.07 was six years from the date that the parties settled the underlying personal injury action. The Bureau further argued that the liability giving rise to this matter is an independent right of recovery created solely by Ohio Revised Code Sections 4123.93 and 4123.931. Heritage then replied, re-alleging that the Bureau's right to recover was strictly derivative in nature and thus, the Bureau's right to sue would be barred by the statute of limitations governing Mr. McKinley's right to bring an action in tort for the injuries sustained. On February 3, 2009, and despite the clear and unequivocal language contained in R.C. 4123.931(G), the trial court issued a decision granting Heritage's motion to dismiss not only as to Heritage, but also as to Mr. McKinley.

The Bureau timely appealed the lower court's decision, and the Seventh District Court of Appeals reversed the trial court's decision dismissing the Bureau's complaint. The appellate court found that the trial court erred in determining that the statute of limitations had expired. *McKinley* at ¶53. Heritage filed a memorandum in support of jurisdiction on April 26, 2010.

RESPONSE TO HERITAGE'S PROPOSITION OF LAW

I. Introduction

In its sole proposition of law, Heritage argues that R.C. 4123.931 confers no independent right of recovery to the Bureau and thus, the Bureau is afforded no greater rights to sue than those of Jeffrey McKinley. In furtherance of an attempt to support this argument, Heritage makes comparison to loss of consortium claims, subrogation in the insurance context, as well as comparisons to past Medicaid and Ohio Crime Victim's Fund subrogation statutes all the while ignoring two fundamental and indisputable facts; 1) That the Bureau's right to bring the underlying cause of action would not exist but for the statute; and 2) the unequivocal language contained in 4123.931(G).

II. The Bureau's right to recover pursuant to Ohio Revised Code Section 4123.931(G).

Ohio's workers' compensation subrogation statute as enacted by the 124th Ohio General Assembly in Substitute Senate Bill No. 227 and codified at R.C. 4123.93 and 4123.931, "...creates a right of recovery in favor of a statutory subrogee against a third party, and the statutory subrogee is subrogated to the rights of a claimant against that third party." R.C. 4123.931(A). A claimant "...means a person who is eligible to receive compensation, medical benefits, or death benefits..." in accordance with Chapters 4123., 4121., 4127., or 4131 of the Revised Code. R.C. 4123.93(A). A third party is "...an individual, private insurer, public or private entity, or public or private program that is or may be liable to make payments to a person without regard to any statutory duty contained in..." Chapters 4123., 4121., 4127., or 4131. of the Revised Code. R.C. 4123.93(C). Furthermore, R.C. 4123.931(G) 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.

In the present case, it is undisputed that the third party and claimant settled the underlying tort action without satisfying the claim of the statutory subrogee and to this day, have failed to reimburse the Ohio Bureau of Workers' Compensation for any amounts the Bureau has paid on behalf of Jeffrey McKinley. As such, and pursuant to R.C. 4123.931(G), the Bureau of Workers'

Compensation's right to sue defendants jointly and severally arises directly from R.C. 4123.931(G). Heritage at page 12 of its Memorandum in Support of Jurisdiction continues to maintain that the Bureau "...cannot bring an action on its own directly against the tortfeasor." The language contained in R.C. 4123.931(G) could not be any clearer. The third party tortfeasor and claimant are jointly and severally liable to the Bureau according to the facts of this matter.

III. The Bureau's right to recover is an independent right.

Clearly, 4123.931(G) is an independent right of recovery above and beyond that of mere "derivative rights" found in a "typical" subrogation statute. Despite this plain language, Heritage continues to maintain that the Bureau's rights are no more than mere "typical" rights associated with more traditional forms of subrogation. As Heritage did in its merit brief before the lower court, so now in its Memorandum in Support of Jurisdiction does Heritage continue to rely on *Ohio Department of Human Services' v. Kozar* (1995), 99 Ohio App.3d 713 and *Montgomery v. John Doe 26, et al.* (2000), 141 Ohio App.3d 242 in an attempt to support the argument that R.C. 4123.931 is a "typical" subrogation statute granting nothing more than mere derivative subrogation rights to the Bureau. However, as the Seventh District Court of Appeals notes beginning at ¶15, these cases are actually instructive as to how R.C. 4123.931 indeed does create an independent right of recovery in favor of the Bureau.

In *Ohio Department of Human Services' v. Kozar* (1995), 99 Ohio App.3d 713, the State, as subrogee of a deceased moped rider, brought suit against the driver of the automobile that caused the fatal injuries to the rider to recover Medicaid benefits extended on behalf of the moped rider prior to death. In *Kozar*, the court of appeals affirmed summary judgment filed by the Defendant finding that the claim was barred pursuant to the plain language of the statute in effect at that time. The court determined that the term "subrogation" used in former R.C.

5101.58 was used in the "conventional sense" and did not create an independent right of recovery. At the time of *Kozar*, R.C.5101.58 stated in pertinent part:

> The acceptance of aid pursuant to Chapter 5107.,5111.,5113., or 5115. of the revised code gives a right of subrogation to the Department of Human Services and the Department of Human Services of any county against the liability of the third party for the cost of medical services and care arising out of injury, disease, or disability of the recipient.

The fact that former version of R.C. 5101.58 only used the specific language of "right of subrogation" persuaded the Eighth Appellate District that the State's rights of subrogation were merely derivative in nature and no greater than the estate's rights-which were time barred-and as such, the State's claims were time barred as well.

The State, in *Kozar*, attempted to overcome the court's plain language and interpretation of former R.C. 5101.58 by citing to various federal authorities that permit the federal government to seek recovery in circumstances similar to the ones in *Kozar* for benefits paid under the Medical Care Recovery Act, Section 2651, Title 42, U.S. Code. In attempting to further those arguments, the State and *Kozar* cited *United States v. York* (6^{th} Cir. 1968), 398 F.2d 582. In *United States v. York,* the circuit court determined that the United States has an independent right of recovery under the Medical Care Recovery Act to recover from the tortfeasor the value of care and treatment it furnished the injured party. Affirming the existence of an independent right of recovery, the court looked to the legislative history of the Act noting that the drafters of the Act originally only referred to a "mere right of subrogation." *United States v. York*, 398 F.2d at p. 584, Fn.3. However, the court went on to explain that the House of Representatives amended the bill to indicate that the United States shall have a **right to recover** from the third party the reasonable value of care and treatment. Id. (Emphasis added.) As such, the *Kozar* Court determined that because former version R.C. 5101.58 only purported to give the state a "right of subrogation," the State's rights were derivative in nature only and distinguishable from the Medical Care Recovery Act cited in *United States v. York,* which uses the term "right to recover" and thus, creating a independent right of recovery in favor of the United States.

Since the court's decision in *Kozar*, the General Assembly amended R.C. 5101.08 to create an independent right of recovery:

> The acceptance of public assistance gives an automatic right of recovery to the Department of Job and Family Services and any county department of Job and Family Services against the liability of a third party for the costs of medical assistance paid on behalf of a public assistance recipient or participant.

Similarly, R.C. 4123.931(A) "...creates a right of recovery..." in favor of a statutory subrogee against the third party **and** the subrogee is subrogated to the rights of a claimant against that third party. As such, R.C. 4123.931 does indeed provide for an independent recovery on behalf of the Bureau. The existence of an independent recovery is additionally supported by R.C. 4123.931(G), which unlike a typical subrogation statute, provides for joint and several liability against the claimant and third party if they settle without satisfying the Bureau's subrogation lien.

Montgomery v. John Doe 26, et al. (2000), 141 Ohio App.3d 242 dealt with former Ohio Revised Code Section 2743.72, which allowed the Ohio Crime Victim's Fund to recover from criminal defendants, among others, monies paid from the fund pursuant to R.C. 2743.56 to crime victims and their families. The heart of the analysis in *Montgomery v. John Doe 26, et al.* was whether former R.C. 2743.72 was a "typical" subrogation statute, or whether it created an independent cause of action for the state. If the court determined that former R.C. 2743.72 was a typical subrogation statute, the State's claims against the defendants would have been time barred. However, if the court determined that former R.C. 2743.72 created an independent cause of action in favor of the State, then the State's action would have been timely filed.

At the time *Montgomery v. Joe Doe 26, et al.* was decided, the pertinent portion of R.C. 2743.72(A) stated:

> If an award of reparations is made under sections 2743.51 to 2743.71 of the revised code, the state, upon the payment of the award or part of the award, is subrogated to all of the claimant's rights to receive or recover benefits or damages for economic loss for which an award of reparations was made from a source that is a collateral source or would be a collateral source if it were readily available to the victim or claimant.

The court then when on to note that R.C. 2743.72 had been amended during the pendency of litigation. The amended version of the statute granted an independent right to recover to the state. This is reflected in the final bill analysis report-attached as "Exhibit B" to the Bureau's Merit Brief submitted to the Seventh District Court of Appeals-which indicates under the heading "the reparations funds right of repayment, reimbursement, recovery, and subrogation," that the amended statute replaces the phrase "subrogated" to what is now the current language in R.C. 2743.72(A) stating:

> The payment of an award of reparations from the reparations fund established by section 2743.191 of the Revised Code creates a right of reimbursement, repayment, and subrogation in favor of the reparations fund from an individual who is convicted of the offenses the basis of the award for reparations.

Indeed, the current version of R.C. 2743.72 includes the language "right of reimbursement, repayment, and subrogation" throughout the body of the statute.

Similar to the current versions of R.C. 2743.72 and R.C. 5101.58, R.C. 4123.931 is not a "typical" subrogation statute in that it provides for both an independent right of recovery and subrogation against the third party and claimant. Such an independent right of recovery in the present situation is wholly created by R.C. 4123.931 authorizing the Bureau to proceed against the claimant and the third party jointly and severally.

Further support for an independent right of recovery is found in the legislative history of Ohio Revised Code Section 4123.931. In the status report of legislation for Ohio Bill Analysis, 2002 SB.227 attached to the Bureau's Merit Brief submitted to the Seventh District Court of Appeals as "Exhibit A", under the heading of "right of recovery", the report summarizes by indicating:

> The act revises the previous subrogation provisions by eliminating all of the foregoing provisions and establishing the new provisions described below. The Act states more specifically then the previous statute that payment of compensation or benefits creates a **right of recovery**, as opposed to prior laws "right of subrogation," of a statutory subrogee against the third party, and the statutory subrogee is subrogated to the rights of the claimant against the third part.

This intentional revision to R.C. 4123.931(A) is clear legislative intent that the Ohio Legislature altered the previous version of R.C. 4123.931 to give the Bureau an independent right of recovery similar to the House of Representative's intent reflected in *United States v. York* and mentioned above.

IV. At the bare minimum, the Bureau had six years to file suit in the present action.

Limitations may run in favor of the State. *State v. Fenn* (Ohio Cir. Ct. 1912), 25 Ohio C.D. 75. However, a sovereign government is not bound by statutes of limitation unless the government, by law, has clearly indicated a contrary intention. This rule is applicable both as to the United States and the State of Ohio. The United States is not bound by the statute of limitations unless Congress clearly manifests its intention that it should be so bound, and in no event can the federal government be bound by a statute of limitations passed by a state. *United*

States v. Frank B. Killian Co. (6th Cir. 1959), 269 F.2d 491. Likewise, statutes of limitation generally do not run against the State of Ohio. *State, Dept. of Transportation v. Sullivan* (1988), 38 Ohio St.3d 137. Immunity from the operation of the statutes of limitations is an attribute of sovereignty and can only be waived by express provision to that effect within the statute. Id. No inaction, procrastination, or delay on the part of public officers will prevent the state from recovering its due or bar the State's right thereto. *In re Decker's Estate* (1945), 76 Ohio App. 39. A state agency is in effect the state and likewise cannot be barred by the statute of limitations. *In re Sowards' Estate* (1957), 105 Ohio App. 239.

If it is determined that the State is bound by a statute of limitations in the present action, at the bare minimum, the limitation to file such suit is six years in accordance with R.C. 2305.07. The pertinent portion of R.C. 2305.07 provides that an action "...upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued." Whether the present cause of action accrued at the time Mr. McKinley sustained his injuries, or at the time that the claimant and third party settled the underlying personal injury action, is not relevant in this matter as under both interpretations of the accrual of the cause of action, the Bureau's Complaint was timely filed in accordance with R.C. 2305.07. In order for a statutory cause of action to be "action upon a liability created by statute," so that the statute of applications is applicable, the cause of action must be one that would not exist but for statute. *McAuliffe v. W. States Import Company Inc.* (1995), 72 Ohio St.3d 534. The independent right of recovery authorizing the Bureau to sue the claimant and third party in this case is specifically authorized by R.C. 4123.931 and nothing else. This is more than evident when reviewing the history of how the current version of R.C. 4123.931 came to be. Prior to the enactment of the current version of the statute, at least two prior versions were found unconstitutional for various reasons. See *Groch v. Gen. Motors Cor.*, 117 Ohio St.3d 192, 2008-Ohio-546. Prior to the enactment of the current versions of the statute, and subsequent to those prior version being found to be unconstitutional, the Bureau of Workers' Compensation indeed had no right to recover from any party by way of subrogation or otherwise.

Although Heritage maintains that workers' compensation laws are "founded upon the principles of insurance" (Memorandum in Support of Jurisdiction at page 12), it is well established that workers' compensation is a creature of statute. *Westenberger v. Industrial Commission of Ohio* (1939), 135 Ohio St. 211, 213. Thus, the Bureau's right of recovery is conferred strictly by statute and the appropriate statute of limitations, if any, is six years. Heritage's reliance on subrogation in the insurance context and on derivative loss of consortium claims are inapposite as R.C. 4123.931 is specific to the workers' compensation statutory framework.

CONCLUSION

This Court should not accept jurisdiction and allow Heritage to present an argument for reversal merely because Heritage disagrees with the court of appeals and the Ohio Legislature. In the exercise of its sound discretion, the court of appeals merely interpreted the clear language and legislative history behind R.C. 4123.931. Because this Court requires more than a simple allegation of appellate court error to justify a grant of jurisdiction, it should declin e jurisdiction and dismiss Heritage's appeal. For the foregoing reasons, this Court should decline to accept jurisdiction in this case and let the decision of the Seventh District Court of Appeals stand.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Ohio Bureau of Workers' Compensation's Motion in Opposition of Jurisdiction was mailed via regular mail, postage pre-paid, on this 25th day of May, 2010, to the following:

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