[Cite as *Ohio Bur. of Workers' Comp. v. McKinley*, 2010-Ohio-1006.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

OHIO BUREAU OF WORKERS' COMPENSATION,	)	
	)	CASE NO. 09 CO 3
APPELLANT,	)	
VS.	)	O P I N I O N
JEFFREY McKINLEY, et al.,	)	
APPELLEES.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 08CV1143.

JUDGMENT: Reversed and Remanded.

APPEARANCES:

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

Dated: March 15, 2010

VUKOVICH, P.J.

¶{1} Appellant Ohio Bureau of Workers' Compensation (OBWC) appeals from the Columbiana County Court of Common Pleas' decision dismissing its complaint against appellees Jeffrey McKinley and Heritage-WTI, Inc. on the basis that the subrogation claim was barred by the statute of limitations. The issue raised in this appeal is whether R.C. 4123.931 creates an independent or derivative right of subrogation for OBWC. We hold that the language of R.C. 4123.931 entitles OBWC to an independent right of recovery. Thus, the six year statute of limitations in R.C. 2305.07 applies and the trial court erred in dismissing the claim on the basis that it was barred by the statute of limitations. Accordingly, the judgment of the trial court is reversed and this cause is remanded to the trial court for further proceedings.

STATEMENT OF THE CASE

¶{2} On July 13, 2003, while working for Safway Services, Inc. at Heritage-WTI, Inc.'s facility in East Liverpool, Ohio, McKinley was injured. Since Safway was a state funded employer, McKinley filed a claim for workers' compensation benefits with OBWC and received such benefits. McKinley also sued both Safway and Heritage-WTI. The claim against Safway was for an employer intentional tort and was later dismissed. A premises liability claim was brought against Heritage-WTI and was later settled for an undisclosed amount.

¶{3} Later, McKinley brought a declaratory judgment action in the Washington County Common Pleas Court challenging the constitutionality of R.C. 4123.93 and R.C. 4123.931. *McKinley v. Ohio Bur. of Workers' Comp.*, 170 Ohio App.3d 161, 2006-Ohio-5271. In the event that the court of common pleas did not find that the statutes violated the Ohio Constitution, McKinley asked the court to declare the amount owed to OBWC under R.C. 4123.931. Id. The Washington County Common Pleas Court found that the statutes violated Sections 2, 16, and 19, Article I of the Ohio Constitution. Id. OBWC appealed the decision to the Fourth Appellate District. On appeal, the court found that the statutes did not violate the Ohio Constitution, and accordingly, reversed the decision and remanded the cause to the trial court for further proceedings. Id. at ¶39.

¶{4} McKinley appealed that decision to the Ohio Supreme Court. *McKinley v. Ohio Bur. of Workers' Comp*., 112 Ohio St.3d 1489, 2007-Ohio-724. On the basis of its prior decision in *Groch*, the Ohio Supreme Court affirmed the appellate court's decision. Id. at ¶1, citing *Groch v. Gen. Motors Corp.,* 117 Ohio St.3d 192, 2008-Ohio-546. Thus, in accordance with the appellate court decision, the cause was remanded to the trial court. On remand, McKinley allegedly dismissed the cause of action against OBWC.

¶{5} Then on November 4, 2008, OBWC filed a complaint against McKinley and Heritage-WTI in Columbiana County Common Pleas Court. The complaint asserted its subrogation rights against both defendants. McKinley filed an answer asserting as defenses that R.C. 4123.931 was unconstitutional, that there was not an independent right of subrogation and that the statute of limitations had run. Likewise, Heritage-WTI filed a motion to dismiss claiming that the six year statute of limitations does not apply because R.C. 4123.931 does not create an independent right of subrogation. Thus, it asserted that the complaint had to be dismissed because the statute of limitations had run. OBWC responded to the motion to dismiss and asserted that R.C. 4123.931 does create an independent right of subrogation and that the six year statute of limitations espoused in R.C. 2305.07 is applicable.

¶{6} After reviewing the arguments, the trial court granted Heritage-WTI's motion to dismiss stating:

¶{7} "The Court is persuaded from a reading of the statute [R.C. 4123.931] that the same does not seek to create a separate right of subrogation, but only seeks to set forth procedures to be followed by the statutory subrogee (BWC) who seeks to exercise derivative rights which the subrogee (BWC) obtained through the claimant (Jeffrey McKinley) against the third party (Defendant Heritage)." 02/03/09 J.E.

¶{8} The court then added that although McKinley did not file a motion to dismiss, his answer set forth that OBWC's claim was barred by the statute of limitations. Accordingly, it also dismissed OBWC's claims against McKinley. This timely appeal follows.

ASSIGNMENT OF ERROR

¶{9} "THE COURT ERRED IN GRANTING DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED BECAUSE OHIO REVISED CODE SECTION 4123.931 IS NOT A TYPICAL SUBROGATION STATUTE AND PROVIDES THE OHIO BUREAU OF WORKERS' COMPENSATION AN INDEPENDENT RIGHT OF RECOVERY."

¶{10} A Civ.R. 12(B)(6) motion to dismiss based upon the statute of limitations may be granted when the complaint conclusively shows on its face that the action is time-barred. *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 493, 2006-Ohio-2625, ¶11. We review the trial court's decision to dismiss a case pursuant to Civ.R. 12(B)(6) de novo. *Perrysburg Twp. v. Rossford,* 103 Ohio St.3d 79, 2004-Ohio-4362, at ¶5.

¶{11} The central issue in this appeal is whether R.C. 4123.931 creates an independent rather than derivative right of subrogation for OBWC. OBWC filed its claim for subrogation a little over five years after McKinley was injured. McKinley had a two year statute of limitations for his claims against Heritage. Thus, if OBWC's subrogation rights are derivative then OBWC had to pursue the right to subrogation within that two year statute of limitations. However, if R.C. 4123.931 creates an independent right of subrogation then the six year statute of limitations in R.C. 2305.07 (stating liability created by statute must be brought within six years after cause accrued) applies. Accordingly, the action would have been timely.

¶{12} R.C. Chapter 4123 is the chapter on workers' compensation and R.C. 4123.931 is titled Subrogation Rights. OBWC argues that R.C. 4123.931(A) supports the conclusion that R.C. 4123.931 creates an independent cause of action for subrogation. This section states:

¶{13} "The payment of compensation or benefits pursuant to this chapter or Chapter 4121., 4127., or 4131., of the Revised Code creates a right of recovery in favor of a statutory subrogee against a third party, and the statutory subrogee is subrogated to the rights of a claimant against that third party. The net amount recovered is subject to a statutory subrogee's right of recovery."

¶{14} In arguing that this statute creates an independent right of subrogation, OBWC focuses on the language "creates a right of recovery." Heritage-WTI, on the other hand, in arguing that this statute does not create an independent right of subrogation, focuses on the language "the statutory subrogee [OBWC] is subrogated to the rights of a claimant [McKinley] against that third party [Heritage]."

¶{15} OBWC cites this court to three cases that it believes are instructive on whether the language in R.C. 4123.931(A) creates an independent or derivative right of subrogation. At the outset we note that these three cases do not interpret the language of R.C. 4123.931, but rather address other subrogation statutes and whether the language of those statutes create an independent or derivative right of subrogation.

¶{16} The first case is *Ohio Dept. of Human Services v. Kozar* (1995), 99 Ohio App.3d 713. In this case the decedent, Carvell, was injured when Kozar's car struck Carvell's moped. Carvell died after receiving substantial medical treatment funded by the Medicaid system. Carvell's estate sued Kozar for wrongful death. The estate voluntary dismissed the action multiple times and the trial court granted summary judgment for Kozar based on the double dismissal rule. That ruling was appealed and affirmed on appeal. Id., citing *Estate of Carvell v. Kozar* (June 22, 11989), 8th Dist. Nos. 55275 and 55277. Later, the state filed suit against Kozar seeking reimbursement of Medicaid benefits paid on behalf of Carvell. The trial court found that the state's claim, as subrogee, was barred by res judicata and the statute of limitations. It explained that the state's right of subrogation was derivative in nature and thus, since the estate could no longer sue Kozar because of the prior order of summary judgment and because the statute of limitations had expired, the state also could not bring its right of subrogation against Kozar.

¶{17} The state appealed that order. It asserted that it is "not a subrogee in the usual sense." R.C. 5101.58 is the statute which governs subrogation of Medicaid benefits by the Department of Human Services. The version of R.C. 5101.58 in effect at the time of the *Kozar* decision, stated:

¶{18} "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 count against the liability of a third party for the cost of medical services and care arising out of injury, disease or disability of the recipient. When an action or claim is brought against a third party by a recipient of aid under Chapter 5107., 5111., 5113., or 5115. of the Revised Code, the entire amount of any settlement or compromise of the action or claim, or any court award or judgment, is subject to the subrogation right of the department of human services or department of human services of any county. The department's subrogated claim shall not exceed the amount of medical expenses paid by the departments on behalf of the recipient. Any settlement, compromise, judgment or award that excludes the cost of medical services or care shall not preclude the departments from enforcing their rights under this section."

¶{19} After reviewing this statute, the Eighth District held that the state was subrogated to the estate's claim against Kozar to the extent of the Medicaid benefits paid, but the rights of the state as subrogee were no greater than those of the subrogor with which it was in privity. Thus, it was holding that the statute was a typical subrogation statute that created a derivative right of subrogation.

¶{20} Despite the state's insistence for the court to follow federal authorities which allowed for the government to seek recovery in similar circumstances, the appellate court declined to do so. It explained:

¶{21} "We cannot disregard the plain subrogation language of the controlling Ohio statute. R.C. 5101.58 uses the term 'subrogation' in its conventional sense ('The acceptance of aid * * * gives a right of subrogation to the department of human services * * *.') and does not create an 'independent right' of recovery as the federal statute does." Id. (Internal citations omitted).

¶{22} As can be seen, the reasoning relies on the general principle espoused by the Ohio Supreme Court that a subrogee has no greater rights than those of the subrogor with which it has privity. Id. citing *Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co.* (1989), 42 Ohio St.3d 40, 42. However, and more importantly, it also relies on the language in the statute of "right of subrogation" versus the absent language of "independent right."

¶{23} This "independent right" language comes from the next case cited by the OBWC, *United States v. York* (C.A.6, 1968), 398 F.2d 582. This case deals with the Medical Care Recovery Act, 42 U.S.C. 2651-2653. The government sought to recover the reasonable value of medical care and treatment furnished to Woodman when he was treated in a United States Naval Hospital for injuries caused by York. Woodman sued York and received a judgment. The government did not know of the lawsuit and did not intervene in the action. The government then brought an independent suit to seek its subrogation rights under the Medical Care Recovery Act. The District Court found that the independent action was barred because the government failed to intervene within six months after the first day in which care and treatment had been furnished. The government appealed and the Sixth Circuit reversed the decision.

¶{24} In doing so, it stated the following:

¶{25} "* * *, Congress in 1962 passed the Medical Care Recovery Act giving the United States '* * * a right to recover from * * * (a) Third person (who was liable in tort for injuries to persons treated by the United States) * * * the reasonable value of the care and treatment so furnished or to be furnished * * *.' 42 U.S.C. § 2651(a).

¶{26} "Seizing upon other language in Subsection (a) of Section 2651, the Defendants urge an interpretation of the Act that would give the United States only a right of subrogation or a right of assignment. All of the courts that have applied the Act are agreed, however, that the right of the United States is an independent right, subrogated only in the sense that the person sued by the Government must be liable to the injured person in tort. For example, the United States' right to recover for medical expenses is not barred by a state statute of limitations that would bar an action by the injured person. *United States v. Fort Benning Rifle and Pistol Club*, 387 F.2d 884 (5th Cir. 1967). Nor can the Government's recovery by [sic] denied because the injured person has given a release to the tortfeasor. *United States v. Greene*, 266 F.Supp. 976 (N.D.Ill.1967); *United States v. Winter*, 275 F.Supp. 895 (E.D.Penn.1967); *United States v. Guinn*, 259 F.Supp. 771 (D.N.J.1966). Moreover, the legislative history of the Act makes it clear that Congress intended to give the United States an independent right." Id. at 584.

¶{27} Therefore, according to *York*, when the statute contains the language "right of recovery," the statute is creating an independent right of subrogation.

¶{28} The last case cited is *Montgomery v. John Doe 26* (2000), 141 Ohio App.3d 242. In this case, three John Does committed unrelated murders and each victim's family sought and received reparations from the Crime Victims Fund (R.C. 2743.56). The state then filed suit against the John Does in an attempt to recover the monies paid by the fund to the victim's families. The John Does asserted that the state's claims were barred by the statute of limitations. The state moved for summary judgment, which was granted. The John Does then appealed the cause to the Tenth Appellate District.

¶{29} The appellate court stated that the central issue was whether R.C. 2743.72(A) was a typical subrogation statute or whether it created an independent cause of action. The version of the statute in effect at the time stated:

¶{30} "If an award of reparations is made under section 2743.51 to 2743.71 of the Revised Code, the state, upon the payment of the award or a part of the award is subrogated to all of the claimant's rights to receive or recover benefits or advantages 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 claimant may sue the offender for any damages or injuries caused by the offender's criminally injurious conduct and not compensated for by an award of reparations. The claimant may join with the attorney general as co-plaintiff in any action against the offender."

¶{31} In explaining that the statute of limitations had run on the state's right to seek subrogation, the court explained:

¶{32} "Similar to the statute at issue in *Kozar,* R.C. 2743.72(A) uses the term 'subrogation' in its traditional sense: the 'state, upon the payment of an award or part of the award, is subrogated to all of the claimant's rights * * *.' Unlike the statute at issue in *York,* R.C. 2743.72 never mentions the creation of a 'right' in the sovereign. To the contrary, it specifically refers only to the 'claimant's rights' that the state acquires through subrogation. Because R.C. 2743.72 is a traditional subrogation statute, the statute of limitations applies against the state. See, also, *Ohio Crime*

Victim's Fund v. Gray (Nov. 9, 2000), Franklin App. No. 00AP-218, unreported, 2000 WL 1678027." Id. at 250.

¶{33} The Tenth District then went on to explain that the statute had since the filing of the action been amended and that the amendment created an independent right of subrogation. Id. at 251. The statute as amended reads:

¶{34} "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 offense that is the basis of the award of reparations." R.C. 2743.72(A).

¶{35} A review of these three cases indicates to us that R.C. 4123.931(A)'s use of phrase "right of recovery" shows that R.C. 4123.931 creates an independent right of subrogation. Or in other words, we find that R.C. 4123.931 is not a traditional subrogation statute.

¶{36} However, in finding as such, this court acknowledges that while R.C. 4123.931(A) uses the phrase "right of recovery," it also states that "the statutory subrogee is subrogated to the rights of a claimant against that third party." The later phrase is more of a typical subrogation phrase. Therefore, R.C. 4123.931(A) contains a typical subrogation clause and also contains a clause that has been concluded to mean that there is an independent right of recovery. As such, one might conclude that this creates an ambiguity problem.

¶{37} A similar ambiguity problem also occurred in the legislation at issue in *York*. The pertinent language of that legislation was "the United States * * * a **right to recover** from * * * (a) Third person (who was liable in tort for injuries to person treated by the United States) * * * the reasonable value of the care and treatment so furnished or to be furnished * * * and shall, **as to this right be subrogated** * * * [to the right of the injured party.]" 42 U.S.C. § 2651(a). (Emphasis Added). The *Montgomery* court recognized this ambiguity problem and found that a review of the legislative history overwhelmingly supported the conclusion that the intent was to create an independent right of recovery for the subrogee. *Montgomery,* 141 Ohio App.3d at 249-250.

¶{38} Similarly, we now examine the legislative history of R.C. 4123.931. Said statute was enacted pursuant to S.B. 227 of the 124th General Assembly. The Legislative Service Commission's analysis of the proposal stated:

¶{39} "The bill revises the existing subrogation provision by eliminating all of the foregoing provisions and establishing the new provision described below. The bill states more specifically than the existing statute that payment of compensation or benefits **creates right of recovery, as opposed to existing law's 'right of subrogation,'** of a statutory subrogee against a third party, and the statutory subrogee is subrogated to the rights of a claimant against that third party." (Emphasis Added).

¶{40} The emphasized phrase is clearly an intention on the part of the legislature to create an independent right, not a typical derivative subrogation right. However, admittedly, the next phrase of the analysis makes a statement that the statutory subrogee is subrogated to the right of the claimant against the third party, which is language that is found in a typical derivative subrogation statute.

¶{41} Given the simultaneous use of the two phrases, this statute can be classified as a hybrid subrogation statute. As the *York* court explained when viewing these two clauses, the right of the subrogee to recover is an independent right, but it is subrogated in the sole sense that the subrogee (OBWC) can only recover from the claimant (McKinley) and/or third party (Heritage-WTI), if the third party (Heritage-WTI) is liable to the claimant (McKinley) in tort. Thus, even though R.C. 4123.931 can be classified as a hybrid subrogation statute, from the statutory language in section (A) and the legislative analysis, it is clear that the statute creates an independent right of subrogation.

¶{42} Other sections in R.C. 4123.931 equally support the conclusion that the statute creates an independent right of recovery. For instance, section (G) of R.C. 4123.931 states:

¶{43} "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."

¶{44} OBWC maintains that the last sentence of this section, the joint and several liability clause, supports the conclusion that it has an independent right of recovery. We agree. While there is no direct case law on the issue of whether the joint and several liability clause indicates that an independent right of recovery was created, it is observed that typical subrogation statutes do not contain a clause allowing for joint and several liability against the claimant and the third party. The addition of this language in R.C. 4123.931(G) suggests that R.C. 4123.931 is not a typical subrogation statute.

¶{45} In response to OBWC's argument that subsection (G) supports the conclusion that R.C. 4123.931 creates an independent right of recovery, Heritage-WTI and McKinley argue that if (G) does create an independent right, it is not applicable here because OBWC admits that it had notice of the settlement. They seem to be under the impression that joint and several liability is only possible when notice is given. The last sentence of section (G), which contains an "or," clearly indicates that there are two instances when the third party and the claimant can be jointly and severally liable. The first is if the attorney general is not given notice when there was a requirement for it to be notified. The second is if a settlement excludes any amount paid by the statutory subrogee. It is alleged here that the settlement excluded any amount paid by OBWC, thus joint and several liability appears to be an option. Consequently, as can be seen, the premise of Heritage-WTI and McKinley's argument that notice of the settlement forecloses an independent cause of action is incorrect.

¶{46} Furthermore, in addition to section (G), section (H) may also provide an indication that the subrogation right in R.C. 4123.931 is an independent right. That section provides:

¶{47} "The right of subrogation under this chapter is automatic, regardless of whether a statutory subrogee is joined as a party in an action by a claimant against a third party. A statutory subrogee may assert its subrogation rights through correspondence with the claimant and the third party or their legal representatives. A statutory subrogee may institute and pursue legal proceedings against a third party either by itself or in conjunction with a claimant. If a statutory subrogee institutes legal proceedings against a third party, the statutory subrogee shall provide notice of that fact to the claimant. If the statutory subrogee joins the claimant as a necessary party, or if the claimant elects to participate in the proceedings as a party, the claimant may present the claimant's case first if the matter proceeds to trial. If a claimant disputes the validity or amount of an asserted subrogation interest, the claimant shall join the statutory subrogee as a necessary party to the action against the third party." R.C. 4123.931(H).

¶{48} This section is not typical of a traditional subrogation statute because it provides that the statutory subrogee's right is automatic and that the statutory subrogee can bring the action on its own without the claimant. Thus, section (H) of R.C. 4123.931 lends support for the conclusion that R.C. 4123.931 creates an independent right of recovery.

¶{49} Furthermore, in addition to the above analysis, a recent decision out of the Second Appellate District supports our conclusion that R.C. 4123.931 creates an independent right of subrogation. *Corn v. Whitmere*, 2d Dist. No. 2008CA96, 2009-Ohio-2737. In *Corn*, an employee of AT&T was injured in the course of his employment when a vehicle collision occurred between him and Whitmere. Corn filed a complaint for personal injuries against Whitmere and Erie Insurance (insurer of Corn's vehicle). Later Corn amended his complaint and joined AT&T. AT&T was joined because, as a self-insuring employer, it provided Workers' Compensation benefits to Corn. AT&T filed a motion for partial summary judgment claiming it was "entitled to judgment as a matter of law that its statutory right to recover the amounts that it has paid to, or on behalf of, Joseph Corn is enforceable against Whitmere and/or any recovery that the Corns may obtain from Whitmere in this action." Whitmere moved to dismiss all claims against him because they were commenced

outside the applicable statute of limitations. The trial court granted the motion by concluding that AT&T's counterclaim could not stand alone, thus, it was a derivative right not an independent right. It found that a two year statute of limitations was applicable and as the claim was brought outside that time period, the claim was barred by the statute of limitations.

¶{50} The appellate court disagreed and determined that a six year statute of limitations in R.C. 2305.07 applied. It doing so it did not discuss the language of R.C. 4123.931. Rather, it explained the workers' compensation system in Ohio and then discussed subrogation in the workers' compensation system versus subrogation in the insurance context. It explained that in the insurance context a subrogated insurer stands in the shoes of the insured-subrogor and has no greater rights than those of its insured-subrogor. Id. at ¶35. It stated that where an insured's tort claim is subject to a statute of limitations, so to is the insurer's subrogation claim. Id. It then summed up its conclusion by stating:

¶{51} "In sum, in the Worker's Compensation context, AT&T has accepted liability without fault to Corn, Corn's recovery from AT&T is limited to the benefits under R.C. 4123.931 et seq., AT&T has relinquished its common-law defenses, and the subrogation statute is meant to encourage Corn to seek reimbursement for his damages from the party responsible so that AT&T may be reimbursed out of any recovery made by Corn. Far from a modification of a common-law cause of action, AT&T's right to reimbursement from Whitmere is nonexistent but for the statute. Accordingly, AT&T's claims are governed by the six-year statute of limitation." Id. at ¶41.[1]

¶{52} We agree with the *Corn* reasoning and find that it supports our determination that the language of R.C. 4123.931 creates an independent right of subrogation.

¶{53} However, prior to concluding our analysis of R.C. 4123.931, we recognize that Heritage-WTI's makes a public policy argument for why R.C. 4123.931 does not create an independent right. It argues that to allow the cause of action to be

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[1]It is noted that *Corn* did not deal with the OBWC as the statutory subrogee, rather the self-insured employer was the statutory subrogee. However, this is a distinction without difference because the definition of statutory subrogee includes a self-insuring employer.

an independent right of recovery will cause a hardship to Ohio businesses because the longer statute of limitations will allow a subrogee to delay action and it will not "encourage prompt prosecution" claims.

¶{54} Determinations of public policy remain with the general assembly, not the courts. *William v. Spitzer Autoworld Canton, L.L.C.*, 122 Ohio St.3d 546, 2009-Ohio-3554, ¶21. Thus, we can only interpret the statute as written and look to the intention of the general assembly when the statute is ambiguous. If the statute purportedly goes against public policy, that argument must be taken to the general assembly to change the statute, not to the courts. Hence, Heritage-WTI's argument regarding public policy does not impact our determination of whether R.C. 4123.931 creates an independent or derivative right of subrogation for the statutory subrogee; our focus is solely on the language of the statute.

¶{55} Consequently, in conclusion, considering all the above, we find that R.C. 4123.931 creates an independent right of recovery for the statutory subrogee. This conclusion is supported by the language of R.C. 4123.931(A), (G) and (H), the *Kozar*, *York* and *Montgomery* cases, which dealt with whether the language of various statutes were typical subrogation statutes or whether those statutes created an independent right of subrogation, and the *Corn* case which dealt directly with R.C. 4123.931. Thus, OBWC's argument that R.C. 4123.931 creates an independent right of recovery has merit. Accordingly, R.C. 2305.07's six year statute of limitations for liability created by statute is applicable and the statute of limitations does not bar OBWC's complaint.

¶{56} In their appellate brief, Heritage-WTI and McKinley argue that even if we reach the conclusion that R.C. 4123.931 creates an independent right of recovery, which we did, this court is not required to reverse the trial court's dismissal of the complaint. Heritage-WTI argues that we can still affirm the trial court's dismissal because "summary judgment" could have been granted on the basis that the claim is barred by res judicata. Thus, it contends that the trial court's error is harmless.

¶{57} McKinley presents three alternative arguments. First, he contends that R.C. 4123.931 does not authorize OBWC to bring a direct action against him. Next, he

argues that the complaint is barred by the compulsory counterclaim rule. Finally, he argues that res judicata bars the claim.

¶{58} For purposes of this appeal, none of the above arguments provide an alternative basis for affirming the trial court's decision. The trial court granted the motion to dismiss specifically on the basis of the statute of limitations; it did not rule on any of these other arguments.

¶{59} Moreover, both the res judicata and compulsory counterclaim rule arguments rely on McKinley's previous suit against Heritage-WTI and/or McKinley's declaratory judgment action in Washington County. Thus, in order to review those arguments, one must look beyond the complaint to determine whether they have any merit. As aforementioned, this court reviews a trial court's decision to dismiss a case pursuant to Civ.R. 12(B)(6) de novo. *Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶5. In considering a Civ.R. 12(B)(6) motion to dismiss, the trial court must review only the complaint, accepting all factual allegations as true and making every reasonable inference in favor of the nonmoving party. *Mitchell v. Milk Lawson Co.* (1988), 40 Ohio St.3d 190, 193. The trial court may not, however, rely upon any materials or evidence outside the complaint in considering a motion to dismiss. *State ex rel. Fuqua v. Alexander* (1997), 79 Ohio St.3d 206, 207. Where the trial court chooses to consider evidence or materials outside the complaint, the court must convert the motion to dismiss into a motion for summary judgment and give the parties notice and a reasonable opportunity to present all materials made pertinent to such motion by Civ.R. 56. *State ex rel. The V. Cos. v. Marshall* (1998), 81 Ohio St.3d 467, 470.

¶{60} The trial court here did not convert the motion to dismiss into a motion for summary judgment. As such, we will not determine whether these facts justify a grant of summary judgment. This court would be overstepping its review, even under a de novo standard of review, to now convert the motion to dismiss to a motion for summary judgment so that we could determine whether res judicata or the compulsory counterclaim rule require dismissal of the claim.

¶{61} Furthermore, as to McKinley's argument that OBWC cannot bring a direct action against him, this argument has no merit. R.C. 4123.931(G) controls this issue. As explained earlier, that section provides that the claimant and the third party

can be jointly and severally liable when the attorney general (when required) is not given notice or when a settlement excludes any amount paid by the statutory subrogee. Since in this case it is alleged that the settlement excluded any amount paid by OBWC, it appears an action can be brought against the claimant.

¶{62} Consequently, Heritage-WTI and McKinley's alternative arguments for purposes of this appeal do not provide a basis for affirming the trial court's decision.

CONCLUSION

¶{63} In conclusion, OBWC's assignment of error has merit. R.C. 4123.931 provides an independent right of recovery and the six year statute of limitations in R.C. 2305.07 is applicable. Thus, the trial court's Civ.R. 12(B)(6) dismissal of the claim on the basis that the statute of limitations had expired is hereby reversed, and this cause is remanded to the trial court for further proceedings according to law and consistent with this Court's opinion.

Donofrio, J., concurs.
Waite, J., concurs.