

IN THE SUPREME COURT OF OHIO

DOUGLAS GROCH et al, *
* On Questions Certified by the United States
Petitioners, * District Court for the Northern District of
v. * Ohio, Western Division
GENERAL MOTORS *
CORPORATION, et al * Case No. 2006-1914
*
Respondents * U.S. District Court Case No. 3:06-CV-1604
*

**PRELIMINARY MEMORANDUM OF PETITIONER, DOUGLAS GROCH,
IN SUPPORT OF ACCEPTANCE OF CERTIFIED QUESTIONS**

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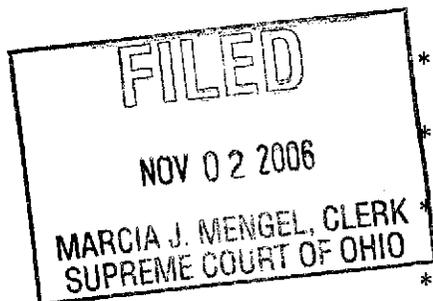


TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	p. iii.
STATEMENT OF THE CASE.....	p. 1.
THE WORKERS' COMPENSATION SUBROGATION STATUTE QUESTIONS.....	p. 2.
Background Facts.....	p. 2.
The Questions.....	p. 3.
A. Article I, Section 19.....	p. 4.
B. Article I, Section 16.....	p. 5.
C. Article I, Section 2.....	p. 7.
THE STATUTE OF REPOSE QUESTIONS.....	p. 8.
Background Facts.....	p. 8.
The Questions.....	p. 9.
A. Article II, Section 28.....	p. 9.
B. Article I, Section 2.....	p. 10.
C. Article I, Section 16.....	p. 11.
D. Article I, Section 19.....	p. 12.
CONCLUSION.....	p. 13
CERTIFICATE OF SERVICE.....	p. 15.

APPENDIX

Order of the United States District Court for the Northern District of
Ohio Western Division Certifying Questions to the Supreme Court
of Ohio

TABLE OF AUTHORITIES

CASES

<u>Benjamin v. City of Columbus</u> , (1957) 167 Ohio St. 103.....	p. 6.
<u>Brennaman v. R.M.I. Company</u> , (1994) 70 Ohio St. 3d 460.....	p. 11.
<u>Commissioners v. Gates</u> , (1910) 83 Ohio St. 19.....	p. 12.
<u>Gregory v. Flowers</u> , (1972) 32 Ohio St. 2d 48.....	p. 10.
<u>Holeton v. Crouse Cartage Co.</u> , (2001) 92 Ohio St. 3d 115.....	pp. 5, 7, 10.
<u>Menefee v. Queen City Metro</u> , (1990) 49 Ohio St. 3d 27.....	p. 7.
<u>Modzelewski v. Yellow Freight Systems, Inc.</u> , (2004) 102 Ohio State 3d 192.....	pp. 4-5.
<u>Mominee v. Scherbarth et al.</u> , (1986) 28 Ohio St. 3d 270.....	p. 5.
<u>State of Ohio v. Buckley et al.</u> , (1968) 16 Ohio St. 2d 128.....	pp. 7, 10.

STATUTES

R.C. § 2305.10.....	p. 9.
R.C. § 4123.93.....	pp. 2-3.
R.C. § 4123.931.....	pp. 2-3.

OHIO CONSTITUTION

OH CONST. art. I, § 19.....	p. 4.
OH CONST. art. II, § 28.....	p. 9.

RULES OF PRACTICE OF THE SUPREME COURT OF OHIO

SCt R 18(1).....	p. 3.
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STATEMENT OF THE CASE

This action originated in the Court of Common Pleas, Lucas County Ohio. The Petitioner Douglas Groch (hereinafter "Petitioner") brought a claim asserting an employer intentional tort against Defendant/Respondent General Motors Corporation (hereinafter "GM"). Petitioner also brought a claim asserting product liability against Defendants/Respondents Kard Corporation and Racine Federated, Inc (hereinafter "Kard" and "Racine Federated"). An action for loss of consortium was brought by Plaintiff Chloe Groch.

The matter was removed to the United States District Court for the Northern District Western Division of Ohio by GM by virtue of diversity of citizenship jurisdiction. In his Complaint the Petitioner, Douglas Groch, had asserted that several statutes germane to the outcome of the present action were in violation of the constitution of the State of Ohio. In response to the Petitioners' pleadings the federal court issued an order directing the parties to file joint or separate motions seeking leave to certify questions to the Supreme Court of Ohio. Petitioner, Respondent Attorney General and Racine Federated filed a joint motion pursuant to that order. The federal court then issued an order certifying seven questions, set out and discussed individually below, to the Supreme Court of Ohio.

The questions fall into two general categories: the workers compensation subrogation statute questions and the statute of repose questions. Petitioner respectfully prays the Court to certify and answer all seven Certified Question posed by the district court as such questions are determinative of various aspects of the

proceeding and there is at this time no binding precedent upon which the federal court could rely.

**THE WORKERS' COMPENSATION
SUBROGATION STATUTE QUESTIONS**

I. Background Facts

The Petitioner was injured on March 3, 2005 when the trim press he was operating came down on his right arm and wrist. At the time of his injury Petitioner was acting in the course and scope of his employment with Defendant GM. The trim press that he was using was manufactured by Defendants Kard and Racine Federated.

Pursuant to his injury the Petitioner received workers compensation benefits. The employer, GM, for purposes of workers compensation, is a self-insured employer and thus is a statutory subrogee as that term is defined in R.C. § 4123.93 thus giving the employer subrogation rights pursuant to R.C. § 4123.931.

There have been two prior workers' compensation subrogation statutes in Ohio. The first was passed in 1993 as part of H.B. 107. The subrogation statute itself was located at R.C. § 4123.93.

The first statute was repealed and replaced by S.B. 278 and became effective on September 29, 1995. Pursuant to S.B. 278, the subrogation statute was located at R.C. 4123.931.

Both of those earlier subrogation statutes were later found to be unconstitutional. The current subrogation statutes were part of S.B. 227 which became effective on April 9, 2003. Pursuant to S.B. 227, the workers compensation subrogation language is found in R.C. § 4123.93 and R.C. § 4123.931. R.C. §

4123.93 is entitled "Definitions" and it provides, *inter alia*, the parties who may be statutory subrogees. R.C. § 4123.931 is entitled "Subrogation right of statutory subrogee against third party" and it articulates the rights of the statutory subrogee against third party tortfeasors.

For the sake of simplicity, however, the Petitioner shall refer to the current law, (R.C. § 4123.93 and R.C. § 4123.931 as amended by S.B. 227) as the "subrogation statute." It is also proper to think of R.C. §§ 4123.93 and 4123.931 as one law because neither statute can stand alone. R.C. § 4123.93 cannot stand alone because it defines statutory subrogees without providing them any subrogation rights. R.C. § 4123.931 cannot stand alone because it provides rights to statutory subrogees without defining who may be a statutory subrogee.

II. The Questions

"The Supreme Court may answer a question of law certified to it by a court of the United States. This rule may be invoked when the certifying court, in a proceeding before it, determines there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court, and issues a certification order." SCt R 18(1). The rule provides that the question must be determinative of the proceedings and that there is no controlling precedent. The certified questions in this matter satisfy both requirements.

In the case at bar, the certified questions relating to R.C. §§ 4123.93 and 4123.931, the workers' compensation subrogation statute, will be determinative of the rights and obligations of Defendant GM. Furthermore, it will also be



determinative of the rights and obligations of a number of defendants in actions where there is both an injury compensable under the workers' compensation statutes and a third-party tort claim.

There is no controlling precedent specific to the current versions of R.C. §§ 4123.93 and 4123.931. As noted above, there have been previous workers compensation subrogation statutes which this Court has found to be unconstitutional. Therefore, the constitutionality of R.C. §§ 4123.93 and 4123.931 is an important question suitable for review by this Court. Because it is Petitioner's position that R.C. §§ 4123.93 and 4123.931 are unconstitutional, Petitioner shall briefly explain why R.C. §§ 4123.93 and 4123.931 offend the Ohio constitution and thus are appropriate for this Court's consideration.

A. Article I, Section 19

The first reason for finding R.C. §§ 4123.93 and 4123.931 unconstitutional is found in Certified Question number 1 which asks: "Do the statutes allowing subrogation for workers' compensation benefits, R.C. §§ 4123.93 and 4123.931, violate the takings clause, Article I, Section 19 of the Ohio constitution?"

In Ohio the right to hold private property is protected by Article I, Section 19, of the Ohio constitution?" While the right is not absolute, Article I, Section 19 provides that should private property be appropriated by the State, "then compensation shall be made to the owner." OH CONST. art I, § 19.

There have been two prior versions of the subrogation statutes at issue here. The first was passed in 1993 when the General Assembly passed the original subrogation statute that was part of H.B. 107 placing the subrogation language in

R.C. § 4123.93. Modzelewski v. Yellow Freight Systems, Inc., (2004) 102 Ohio State 3d 192. 194 n2. That statute was repealed and replaced by S.B. 278 and the subrogation language was placed in R.C. § 4123.931. Modzelewski, 102 Ohio St. 3d at 194 n2.

The 1993 version of the subrogation statute was found to be in violation of Article I, Section 19. *Id* at 197. The 1995 version was also found to be in violation of Article I, Section 19 of the Ohio constitution. Holeton v. Crouse Cartage Co., (2001) 92 Ohio St. 3d 115, 130.

The current version of the statute is quite similar to the versions that have been previously struck down. The latest version contains the same deficiencies as the previous two in that it also presumes double recovery without giving the injured worker who settles his action against a third party tortfeasor an opportunity to demonstrate that no double recovery has occurred. As a result, this version of the subrogation statute, §§ 4123.93 and 4123.931 as amended by SB 227, is also unconstitutional. Therefore, Petitioner prays the Court accept for review Certified Question number 1.

B. Article I, Section 16

Certified Question number 2 asks: “Do R.C. §§ 4123.93 and 4123.931 violate the due process and remedies clause, Article I, Section 16, of the Ohio constitution?”

Article I, Section 16 is the due process clause of the Ohio constitution. Mominee v. Scherbarth et al., (1986) 28 Ohio St. 3d 270, 272. Under Ohio law, a statute will be found to be constitutional pursuant to a due process analysis

(assuming no fundamental right is involved) provided it “bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary.” Benjamin v. City of Columbus, (1957) 167 Ohio St. 103, SYLLABUS ¶ 5.

Although Petitioner believes that a fundamental right is implicated in this action, even if that were not the case R.C. §§ 4123.93 and 4123.931 as amended by SB 227 bears no substantial relation to the public health, safety, morals or general welfare of the public and it is most certainly unreasonable and arbitrary.

It has long been understood that the legislature has the power to enact laws to prevent an injured person from recovering twice for the same wrong provided it can be shown with certainty that such a double recovery has or will occur. However, the subrogation statute presumes that every injured worker who settles a tort claim against a third party has had a double recovery while providing no mechanism whereby the injured worker can rebut this presumption. Instead, the injured worker’s recovery is reduced by the amount he or she received in workers’ compensation benefits regardless of whether the compromised settlement represents economic or non-economic damages. Such a statutory scheme is inherently unreasonable and arbitrary in that it tends to penalize those persons who settle their third party claims, which clearly contradicts long-standing public policy that favors the settlement of claims as opposed to litigation. As such, R.C. §§ 4123.93 and 4123.931 are in violation of Article I, Section 16 of the Ohio constitution. Therefore Petitioner prays the Court accept Certified Question number 2 for review.

C. Article I, Section 2

Certified Question number 3 asks: "Do R.C. 4123.93 and 4123.931 violate the equal protection clause, Article I, Section 2, of the Ohio constitution?"

In Ohio, a "statutory classification which involves neither a suspect class nor a fundamental right does not violate the Equal Protection Clause of the Ohio [constitution] ... if it bears a rational relationship to a legitimate government interest." Menefee v. Queen City Metro, (1990) 49 Ohio St. 3d 27, 29. Thus, the Court must first determine if a fundamental right or a suspect class is implicated so as to use the correct standard when performing its equal protection analysis.

"Injured employees are not a suspect class." Holeton, 92 Ohio St. 3d at 138 (Moyer, C.J. dissenting). However, "[l]egislation must apply alike to all persons within a class ..." State of Ohio v. Buckley et al., (1968) 16 Ohio St. 2d 128, SYLLABUS ¶ 3.

In the instant matter, the class of persons to whom the statutes apply, injured workers who receive workers compensation benefits and damages from a third party tortfeasor are treated differently depending on whether they settle the third party claim or whether the claim proceeds to trial. The difference is that parties who proceed to trial have the opportunity to have a jury determine if they have received a double recovery. However, the subrogation statute presumes that every injured worker who settles a tort claim against a third party has had a double recovery while providing no mechanism whereby the injured worker can rebut this presumption. Instead, the injured worker's recovery is reduced by the amount he or she received in workers' compensation benefits regardless of whether the compromised settlement

represents economic or non-economic damages. Such a statutory scheme is inherently unreasonable and arbitrary in that it tends to penalize those persons who settle their third party claims, which clearly contradicts long-standing public policy that favors the settlement of claims as opposed to litigation.

As such, R.C. §§ 4123.93 and 4123.931 are in violation of Article I, Section 2 of the Ohio constitution. Therefore Petitioner prays the Court accept Certified Question number 3 for review.

THE STATUTE OF REPOSE QUESTIONS

I. Background Facts

The Petitioner was injured on March 3, 2005 when the trim press he was operating came down on his right arm and wrist. The trim press had been manufactured by Kard Corporation. Racine Federated, Inc. is the successor to Kard Corporation.

On April 7, 2005 SB 80 became effective--almost a month after Plaintiff's injury. SB 80 provided, *inter alia*, for the statute of repose currently found in R.C. 2305.10. Plaintiff filed his complaint on June 2, 2006.

It is alleged by Defendants Kard Corporation and Racine Federated, Inc. that the trim press involved in the injury giving rise to the present suit has been in the possession of GM for more than ten years and that the statute of repose found in R.C. § 2305.10, as amended by SB 80, immunizes them from liability. Clearly, a decision on the constitutionality of the statute of repose will be determinative for Defendants Kard Corporation and Racine Federated, Inc. If the statute of repose is

constitutional, then those Defendants will be immune from liability in this action by operation of law.

There is no controlling precedent specific to R.C. § 2305.10, as amended by SB 80. There have been previous statutes of repose which this Court has found to be unconstitutional. Therefore, the constitutionality of R.C. § 2305.10, as amended by SB 80 is an important question suitable for review by this Court. Because it is Petitioner's position that R.C. § 2305.10, as amended by SB 80 is unconstitutional, Petitioner shall briefly explain why R.C. § 2305.10, as amended by SB 80 offends the Ohio constitution and thus is appropriate for this Court's consideration.

II. The Questions

A. Article II, Section 28

Certified Question number 14 asks: "Does R.C. 2305.10 (C) and (F) violate the ban on retroactive laws, Article II, Section 28 of the Ohio constitution?"

The Ohio constitution provides "The general assembly shall have no power to pass retroactive laws..." OH CONST. art. II § 28.

The repose statute provides, in pertinent part, "This section ... shall be applied in a remedial manner in any civil action commenced on or after the effective date of this amendment, in which this section is relevant, regardless of when the cause of action accrued and notwithstanding any other section of the Revised Code or prior rule of law of this state, but shall not be construed to apply to any civil action pending prior to the effective date of this amendment." R.C. § 2305.10 (2005). The statute became effective on April 7, 2005.

The statute, on its face, is to be applied retroactively--contrary to the mandate of Article II, Section 28. It has been long been understood that when "the retroactive application of a statute of limitations operates to destroy an accrued substantive right, such application conflicts with Section 28, Article II of the Ohio Constitution." Gregory v. Flowers, (1972) 32 Ohio St. 2d 48, SYLLABUS ¶ 3.

In the case at bar, a substantive right accrued on March 3, 2005 when the Petitioner was injured. This right was terminated by R.C. 2305.10(F) because the Petitioner had not filed an action when the statute became effective--April 7, 2005. Despite the use of the term "remedial" in the statute, the retroaction application of the statute of repose serves, in this matter, to terminate Petitioner's accrued substantive right to bring suit for his injuries. Therefore, Petitioner prays the Court accept for review Certified Question number 14.

B. Article I, Section 2

Certified Question number 13 asks: "Do R.C. 2305.10(C) and (F) violate the equal protection clause, Article I, Section 2, of the Ohio constitution?"

As noted above, "Injured employees are not a suspect class." *Holeton*, at 138 (Moyer, C.J. dissenting). However, "[l]egislation must apply alike to all persons within a class ..." *Buckley*, (1968) 16 Ohio St. 2d at, SYLLABUS ¶ 3. In the case at bar, the statute of repose, because of its retroactive nature, applies to certain persons within the class while not applying to others. Specifically, the statute serves to shorten the time limit in which to file certain product liability actions to, in the case of the Petitioner, just one month while providing other similarly situated persons a full two years to file the same action. Such disparate treatment of similarly situated

persons within the same class offends the equal protection clause of the Ohio constitution. Therefore, Petitioner prays the Court accept for review Certified Question number 13.

C. Article I, Section 16

There are two certified questions going to the constitutionality of R.C. 2305.10(C) and (F) based on Article I, Section 16 of the Ohio constitution. The first is Certified Question number 10 which asks: "Do R.C. 2305.10(C) and (F) violate the open courts provision of the Ohio constitution, Article I, Section 16?" The second is Certified Question number 12 which asks: "Do R.C. 2305.10(C) and (F) violate the due process and remedies clause, Article I, Section 16, of the Ohio constitution?" Petitioner respectfully asks that the Court accept one unified question which includes not only the open courts provision of Section 16, but the remedies and due process clauses as well.

The statute of repose in the present action bears a striking similarity to a statute of repose struck down as unconstitutional by this Court in Brennaman v. R.M.I. Company, (1994) 70 Ohio St. 3d 460, SYLLABUS ¶ 2. The statute of repose in *Brennaman* terminated the right to sue for negligent improvements to real property once ten years elapsed from the date the tortfeasor last rendered the flawed service. The *Brennaman* Court found such a statute offensive to the right to a remedy found in Article I, Section 16 of the Ohio constitution

The statute of repose in the instant matter terminates the right to sue for products liability after ten years have elapsed from the date the product was delivered to its first consumer. The current statute suffers from the same



constitutional defects as the one struck down in *Brennaman*. Therefore, Petitioner prays the Court accept for review Certified Questions number 10 and 12 or, in the alternative, Certified Question number 12 with the understanding that said question also encompasses the concept of open courts as found in Article I, Section 16 of the Ohio constitution.

D. Article I, Section 19

The final question for consideration is Certified Question number 11. That question asks: "Does R.C. § 2305.10 violate the takings clause, Article I, Section 19 of the Ohio constitution?"

It has long been understood that "any actual and material interference with private property rights is a taking of property within the meaning of the constitution." Commissioners v. Gates, (1910) 83 Ohio St. 19, 24. In the case at bar, an accrued right to bring suit was terminated by the legislature. Such a material interference with the right to sue (a property right) offends Article I, Section 19 of the Ohio constitution.

The property right protected by Article I, Section 19 is not limited to real property. In both *Holeton* and *Modzelewski* this Court found that the prior workers' compensation subrogation statutes violated Article I, Section 19 by improperly taking the award received by an injured worker. In the case at bar, the taking is effected by means of an actual and material interference with a private property right much like the interference seen in *Holeton* and *Modzelewski*. Thus, for reasons similar to those found to make the workers compensation subrogation statutes



unconstitutional in *Holeton* and *Modzelewski* the statute of repose found at R.C. § 2305.10 is an unconstitutional taking of private property.

CONCLUSION

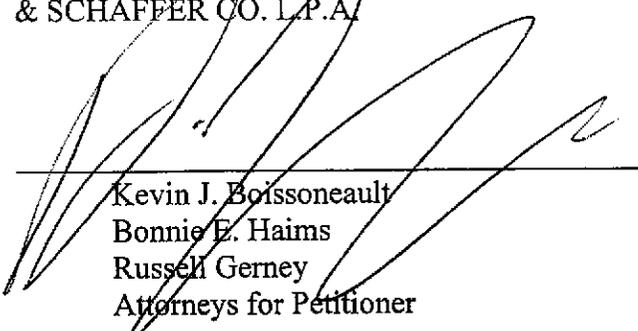
Consideration of certified questions numbers 1-3, and 11-14 is appropriate for several reasons. First, regarding questions 1-3, this version of the workers' compensation subrogation statute has not been before this Court previously. The three suggested questions all directly raise substantial constitutional issues. Furthermore, the answers to these questions is very important to the general public in that the workers' compensation subrogation statute has the potential to effect every person who works in Ohio. It is important for employees, employers and the Bureau of Workers' Compensation to know if the subrogation statute is constitutional. Thus, guidance from this Court is vital.

Consideration of the statute of repose Certified Questions is also appropriate for several reasons. These questions also raise substantial constitutional issues. Furthermore, the answers to these questions is of great importance to the general public because the statute of repose has the potential to effect every person in Ohio who purchases a consumer good. Thus, it is important to both manufacturers and consumers to know if the statute of repose is constitutional. Again, guidance from this Court is vital.

WHEREFORE, Petitioner respectfully prays the Court accept Certified Questions 1-3 and 11-14.

Respectfully submitted

GALLON, TAKACS, BOISSONEAULT
& SCHAFER CO. L.P.A.



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CERTIFICATION

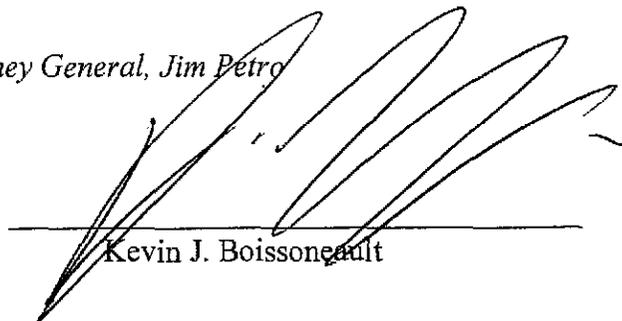
This is to certify that a copy of the foregoing **Preliminary Memorandum of Petitioner, Douglas Groch, in Support of Acceptance of Certified Questions** was sent this 1st day of November, 2006, via ordinary U.S. mail, postage pre-paid, to:

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

DOUGLAS GROCH, et al.,	:	Case No. 3:06-CV-1604
	:	
Plaintiffs,	:	
	:	
vs.	:	Judge JAMES G. CARR
	:	
GENERAL MOTORS	:	
CORPORATION, et al.,	:	
	:	
Defendants.	:	

ORDER

There are issues of Ohio law that may be determinative of the present case and for which there is no controlling precedent in the decisions of the Supreme Court of Ohio. Therefore, this Court finds it appropriate to certify questions of Ohio law to the Supreme Court of Ohio.

A. NAME OF THE CASE AND NAMES OF ALL PARTIES

The name of this case is *Douglas Groch, et al. v. General Motors Corporation, et al.* case number 3:06-CV-1604. The parties in this case are: Plaintiffs Douglas Groch and Chloe Groch versus Defendants General Motors Corporation, Kard Corporation and

Racine Federated, Inc. The Attorney General of Ohio is a party for purposes of defending the constitutionality of the Ohio statutes at issue.

B. BRIEF STATEMENT OF FACTS

The Amended Complaint alleges the following: Plaintiff Douglas Groch (“Groch”) was injured on March 3, 2005 when the trim press he was operating came down on his right arm and wrist. At the time of his injury Plaintiff Douglas Groch was acting in the course and scope of his employment with Defendant General Motors Corporation. The trim press that he was using was manufactured by Defendants Kard Corporation and Racine Federated, Inc.

Groch bought an action in the Court of Common Pleas, Lucas County, Ohio seeking damages from Defendant General Motors Corporation (“GM”) based on a theory of employer intentional tort and from Defendants Kard Corporation and Racine Federated, Inc. (respectively, “Kard” and “Racine”) based on a theory of product liability. Plaintiff Chloe Groch (“Chloe”) sought damages for loss of consortium.

The action was removed to federal court by GM. Federal jurisdiction is based on 28 U.S.C. 1332 because there is diversity between the Plaintiffs and the Defendants, and the amount in controversy exceeds \$75,000.00.

GM has asserted a subrogation interest in Groch’s recovery for its payment to him of workers’ compensation benefits. Groch asserts that the Ohio statutes granting GM subrogation interests—R.C. 4123.93 and R.C. 4123.931—are unconstitutional. To fully adjudicate this matter and determine the rights and liabilities of each party, this Court needs a determination by the Ohio Supreme Court regarding the constitutionality of the statutes under the Ohio Constitution. The Supreme Court of Ohio has not yet had

opportunity to issue a decision on the constitutionality of R.C. 4123.93 and R.C. 4123.931, passed as Senate Bill 227 and made effective in April 2003. Therefore, this Court certifies questions 1 through 3 to the Supreme Court of Ohio.

Kard and Racine assert that they are immune from liability based on the statute of repose for products liability claims provided at R.C. 2305.10. To fully adjudicate this matter and fully determine the rights and liabilities of each party, this Court needs a determination by the Ohio Supreme Court regarding the constitutionality of the statutes under the Ohio Constitution. The Supreme Court of Ohio has not yet had opportunity to issue a decision on the constitutionality of R.C. 2305.10, passed as Senate Bill 80, and made effective in April, 2005. Therefore this Court certifies questions 10 through 14 to the Supreme Court of Ohio.

C. THE CERTIFIED QUESTIONS

1. Do the statutes allowing subrogation for workers' compensation benefits, R.C. 4123.93 and 4123.931, violate the takings clause, Article I, Section 19, of the Ohio constitution?
2. Do R.C. 4123.93 and 4123.931 violate the due process and remedies clause, Article I, Section 16, of the Ohio constitution?
3. Do R.C. 4123.93 and 4123.931 violate the equal protection clause, Article I, Section 2 of the Ohio constitution?
10. Do R.C. 2305.10(C) and (F) violate the open courts provision of the Ohio Constitution, Article I Section 16?
11. Do R.C. 2305.10(C) and (F) violate the takings clause, Article I, Section 19, of the Ohio constitution?
12. Do R.C. 2305.10(C) and (F) violate the due process and remedies clause, Article I, Section 16, of the Ohio constitution?
13. Do R.C. 2305.10(C) and (F) violate the equal protection clause, Article I, Section 2, of the Ohio constitution?

14. Do R.C. 2305.10 (C) and (F) violate the ban on retroactive laws, Article II, Section 28 of the Ohio constitution?

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E. MOVING PARTY

The Plaintiff Douglas Groch is designated as the moving party.

s/ James G. Carr

Hon. James G. Carr