

IN THE SUPREME COURT OF OHIO

CERTIFIED QUESTIONS FROM
THE UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

DOUGLAS GROCH, et al., :
 : Case No. 2006-1914
 Plaintiffs-Petitioners, :
 : [United States District
 v. : Court, Northern District of
 : Ohio, Western Division Case
 General Motors Corp., et al., : No. 3:06-CV-1604]
 :
 Defendants-Respondents. :

BRIEF OF AMICUS OHIO AFL-CIO IN SUPPORT OF
PLAINTIFFS-PETITIONERS DOUGLAS GROCH, ET AL.

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FILED
 FEB 26 2007
 MARCIA J. MENGEL, CLERK
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I. STATEMENT OF THE CASE

This case involves nine certified questions from the United States District Court, Northern District of Ohio, Western Division. These questions address:

- [1] the constitutionality of the workers' compensation subrogation law (R.C. 4123.93 and R.C. 4123.931) [certified questions 1 through 3];
- [2] the constitutionality of the product liability statute of repose (R.C. 2305.10(C) and (F)) [certified questions 4 through 8]; and
- [3] whether the bill which enacted the product liability statute of repose (Senate Bill 80) violated the one-subject rule [certified question 9].

Amicus Ohio AFL-CIO believes the statutes involved to be unconstitutional for the reasons set forth in the argument section of this brief, as well as for the reasons set forth in the brief of Petitioner Groch.

II. STATEMENT OF FACTS

Amicus Ohio AFL-CIO adopts and incorporates by reference the statement of facts contained in the brief of Petitioner Groch.

III. ARGUMENT

PROPOSITION OF LAW I:

THE WORKERS' COMPENSATION SUBROGATION LAW VIOLATES OHIO CONSTITUTION ARTICLE I, SECTION 16 AND ARTICLE I, SECTION 19.

A. SUBROGATION IS ONLY CONSTITUTIONAL TO PREVENT DOUBLE RECOVERY. THE WORKERS' COMPENSATION SUBROGATION LAW IS UNCONSTITUTIONAL BECAUSE IT APPLIES TO THE ENTIRE TORT RECOVERY AND DOES NOT CONSIDER OR PREVENT DOUBLE RECOVERY.

R.C. 4123.93 and R.C. 4123.931, the workers' compensation subrogation law, violate the constitutionally protected interest of claimant-plaintiffs such as Mr. Groch in their tort recovery. In determining what amount the injured worker receives, and what amount is paid as subrogation, the workers' compensation subrogation law never considers whether a double recovery exists.

The workers' compensation subrogation law is unconstitutional because of the failure to consider whether there is a double recovery. The failure to provide for subrogation only to prevent double recovery violates Oh. Const. Art. I, Sec. 16 and Art. I, Sec. 19, because subrogation laws "are not rationally related to their purpose where they operate to reduce a plaintiff's tort recovery irrespective of whether a double recovery has actually occurred." Holéton v. Crouse Cartage Co. (2001), 92 Ohio St.3d 115, 122.

That the workers' compensation subrogation law does not act only to prevent a double recovery is clear from examining the

formula used to calculate the subrogation amount, which is set forth in R.C. 4123.931(B) and (D). R.C. 4123.931 (B) applies to calculation of subrogation where there is a settlement of the tort suit; R.C. 4123.931 (D) applies where there is a verdict resulting from a trial.

The calculations in R.C. 4123.931(B) and (D) apply the same formula: the portion of the "net amount recovered" (whether resulting from settlement or a jury verdict)¹ which an injured worker receives is calculated by dividing what the statute defines as "uncompensated damages" by the total damages² and multiplying it by the net amount recovered.³

¹ R.C. 4123.93(E) defines "net amount recovered" as:

the amount of any award, settlement, compromise, or recovery by a claimant against a third party, minus the attorney's fees, costs, or other expenses incurred by the claimant in securing the award, settlement, compromise, or recovery. "Net amount recovered" does not include any punitive damages that may be awarded by a judge or jury.

² The statute states that the "uncompensated damages" are divided by "the sum of the subrogation interest plus the uncompensated damages." [R.C. 4123.931(B) and (D).] However, R.C. 4123.93(F) defines "uncompensated damages" as the "demonstrated or proven damages minus the . . . subrogation interest." Therefore, as a practical matter, "the sum of the subrogation interest plus the uncompensated damages" is the total damages.

³ The amount the subrogee receives is determined by a similar calculation: take the subrogation interest,
(continued...)

The subrogation law creates a proportion. When the statute is applied, what results is a proportional determination of how much of the amount recovered the injured worker is entitled to and how much the subrogee is entitled to. That proportion is then applied to the recovery and the parties receive amounts out of the recovery on a proportionate basis.

However, the proportion used to determine the amount of subrogation has nothing to do with double recovery. Use of the proportion does not consider whether there is a double recovery, nor does use of the proportion prevent double recovery. The subrogation law's failure to consider whether there has been a double recovery and the failure to apply subrogation only to prevent a double recovery renders the statute unconstitutional.

As this Court ruled when invalidating an earlier subrogation law, a workers' compensation subrogation law is unconstitutional when it "precludes claimants who are parties to actions against third-party tortfeasors from showing that their tort recovery or portions thereof do not duplicate their workers' compensation recovery and, therefore, do not represent a double recovery." Modzelewski v. Yellow Freight Sys., Inc. (2004), 102 Ohio St.3d 192, 196.

The proportion used by the current subrogation law does not

³(...continued)

divide it by the total damages, and multiply it by the net award.

consider whether a double recovery is being prevented. Referring to a previous subrogation law, this Court indicated that "R.C. 4123.931 must also satisfy the constitutional requirement that deductible or, in this case, subrogable or recoupable items be matched to those losses or types of damages that the claimant actually recovered from the tortfeasor." Holeton at 122. The present subrogation law fails to satisfy this constitutional requirement because there is no attempt to match the subrogable amounts to the losses or types of damages recovered.

Instead of considering what portion of a tort recovery (if any) constitutes a double recovery, the workers' compensation subrogation law unconstitutionally assumes that any payment from a tort suit constitutes a double recovery. Such an assumption is incorrect because "[w]orkers' compensation laws are not intended to provide a full recovery, and they are not designed to restore injured workers or their families to what they lost." Holeton at 127.

The limited workers' compensation payments which are made to an injured worker provide "less than full compensation for injured employees" because of the workers' compensation compromise whereby employees "accept[ed] lower benefit levels" in return for a system which was not based on tort considerations. Blankenship v. Cincinnati Milacron Chemicals, Inc. (1982), 69 Ohio St.2d 608, 614.

Workers' compensation benefits are not tied to the injured worker's actual loss; nor do they reflect the harm done to the injured worker. Even the limited items which are compensated (such as inability to work) are not compensated at a "full" amount. "The purpose of the act is to only partly reimburse for the impairment of earning capacity." Industrial Commission v. Drake (1921), 103 Ohio St. 628, 635.

Additionally, the non-economic impact of the injury to the injured worker is not considered at all for workers' compensation purposes. For example, "workers' compensation allows no compensation whatsoever for pain and suffering." Sorrell v. Thevenir (1994), 69 Ohio St.3d 415, 422; damages which are "universally allowed" in tort. Fantozzi v. Sandusky Cement Prod. Co. (1992), 64 Ohio St.3d 601, 615. Nor is the effect of the financial loss on the injured worker considered by workers' compensation.

The workers' compensation subrogation law at issue in the present case fails to consider that workers' compensation benefits do not make the injured worker whole.

The proportion created by the subrogation law does not consider whether the amounts sought to be subrogated constitute a double recovery. Nor does it consider that frequently there will not even be the possibility of "double recovery" because the injured worker will never have been made whole. The workers'

compensation system seeks to provide only partial compensation and the tort system may result in an award which is less than the difference between the "total damages" and the workers' compensation payment (due, for example, to insurance limits). Yet in such a situation where the injured worker has not been made whole, and no double recovery exists, the subrogation law would unconstitutionally subrogate the tort recovery.

"It can hardly be said that a double recovery results where a tort victim is allowed to retain two recoveries that, when combined, still do not make him or her whole." Holeton at 126. The subrogation law in the present case makes no attempt to determine whether the two recoveries make the injured worker whole, or what proportion of those recoveries would make the injured worker whole. Instead, the subrogation law presumes the existence of a double recovery and then subrogates the entire award on a proportionate basis.

As this Court has recognized with respect to the intentional tort situation:

Allowing a worker to receive workers' compensation benefits in conjunction with common-law damages in no way constitutes a double recovery. The common-law award represents a supplemental remedy for pain and suffering, and spousal loss of services. . .

None of these types of relief is available under the [Workers' Compensation] Act.

Jones v. VIP Development Co.
(1984), 15 Ohio St.3d 90, 99,
(emphasis and bracketed material added).

The subrogation law improperly presumes that any tort payment is a double recovery and is therefore unconstitutional. There is no mechanism for determining whether double recovery in fact occurred; nor is there any mechanism for determining what amount of the award results in double recovery (and limiting subrogation to that amount).

Because subrogation can only constitutionally exist to prevent double recovery, the current workers' compensation subrogation law's failure to provide for subrogation only to prevent an actual double recovery means that it is unconstitutional.

B. The Alternate Methods of Paying The Subrogation Amount Created by R.C. 4123.931 Require an Injured Worker to Choose Between Two Unconstitutional Methods.

R.C. 4123.931(E) and (F) provide two options for repayment. An injured worker can either pay the whole subrogation amount up front, including estimated future payments (R.C. 4123.931 (F)), or the injured worker can create a trust account and pay the subrogee every 6 months (R.C. 4123.931(E)). Both methods of repayment are unconstitutional.

This Court has already determined that the method of repayment set forth in R.C. 4123.931(F) is unconstitutional in Holeton. Under R.C. 4123.931(F) the injured worker must pay the entire subrogation amount up front, including an estimated amount for future workers' compensation payments. Requiring such up front payment of estimated future workers' compensation payments was found unconstitutional in Holeton.

As this Court recognized in Holeton, at 123, instead of preventing a double recovery, the R.C. 4123.931(F) method of repayment can result in a windfall to the subrogee by over-estimating the amount of future compensation. As a result, the "reimbursement" to the subrogee will actually be greater than the amount of compensation the subrogee winds up paying.

The apparent "choice"⁴ of an alternate method provided by R.C. 4123.931(E) does not remedy the unconstitutionality of R.C. 4123.931(F).

The R.C. 4123.931(E) method is not any sounder constitutionally than the R.C. 4123.931(F) method. R.C. 4123.931(E) still requires withholding the injured worker's money based on the calculation of anticipated future payments. The injured worker is kept from being made whole by the requirement

⁴ As is explained in Petitioner Groch's brief, the apparent choice to create a trust account is not realistic given the costs involved in creating and maintaining such an account.

that this money be withheld in a trust account until after any future subrogation possibility exists.

Because the money must be withheld from the injured worker until the end of any subrogation possibility, the injured worker may never receive the money from the trust account - it will be withheld until the injured worker's death, and then ultimately go to the injured worker's estate.

Such a scheme results in an unconstitutional taking. The injured worker is deprived of his money based on possible future subrogation amounts which may, as this Court recognized in Holeton, substantially overestimate the amount of benefits which will be paid. That the money seized from the injured worker may ultimately go to the injured worker's estate does nothing to make the injured worker whole and therefore does not remedy the unconstitutional nature of the R.C. 4123.931(E) withholding.

PROPOSITION OF LAW II:

THE PRODUCT LIABILITY STATUTE OF REPOSE VIOLATES OHIO CONSTITUTION ARTICLE I, SECTION 2, ARTICLE I, SECTION 16 AND ARTICLE I, SECTION 19. APPLICATION OF THE STATUTE OF REPOSE IN THE PRESENT CASE VIOLATES OHIO CONSTITUTION ARTICLE II, SECTION 28.

A. THE STATUTE OF REPOSE UNCONSTITUTIONALLY DEPRIVES AN INJURED PERSON OF A REMEDY FOR THE HARM DONE TO THEM, IN VIOLATION OF OHIO CONSTITUTION ARTICLE I, SECTION 16 AND ARTICLE I, SECTION 19.

R.C. 2305.10(C) (1), the product liability statute of repose, violates Oh. Const. Art. I, Sec. 16 and Art. I, Sec. 19 because it prevents an injured person such as Mr. Groch from having any remedy for an injury resulting from a product liability. "The language in [Oh. Const. Art. I, Sec. 16] is clear and leaves little room for maneuvering. Our courts are to be open to those seeking remedy for injury to person, property, or reputation." Hardy v. VerMeulen (1987), 32 Ohio St.3d 45, 46.

The statute of repose unconstitutionally closes the courts to individuals such as Mr. Groch. R.C. 2305.10(C) (1) provides that

no cause of action based on a product liability claim shall accrue against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser or first lessee. . .

This statute prevents someone such as Mr. Groch, who is injured more than ten years after a product is sold, from having

any remedy for their claim. Therefore, R.C. 2305.10(C)(1) is unconstitutional because Oh. Const. Art. I, Sec. 16 prevents the legislature from enacting statutes which deprive injured individuals of a remedy for their injury.

Hardy and Gaines v. Preterm-Cleveland, Inc. (1987), 33 Ohio St.3d 54, recognize that an injured person must be provided with meaningful time to bring a claim. Art. I, Sec. 16 requires "plaintiffs have a reasonable period of time to enter the courthouse to seek compensation after the accident." Brennaman v. R.M.I. Co. (1994), 70 Ohio St.3d 460, 466.

R.C. 2305.10(C)(1) does not provide "a reasonable time" for an injured person to seek compensation after an accident. Instead it provides that for individuals such as Mr. Groch there is no time to file suit. If the injury occurs after 10 years, then there is no time to seek compensation for the harm done.

A statute which provides no opportunity to seek compensation for harm done does not meet the constitutional requirement of providing a "reasonable period of time."

Under R.C. 2305.10(C)(1), if an injury occurs after ten years an injured person has no opportunity to bring a suit. Therefore, R.C. 2305.10(C)(1) is contrary to this Court's finding in Burgess v. Eli Lilly & Co. (1993), 66 Ohio St.3d 59, 61, that a claimant cannot be deprived of a remedy "before a claimant knew or should have known of her injury."

**B. THE STATUTE OF REPOSE
UNCONSTITUTIONALLY DEPRIVES SOME
INJURED PEOPLE OF AN OPPORTUNITY OF
A REMEDY FOR THE HARM DONE TO THEM,
IN VIOLATION OF OHIO CONSTITUTION
ARTICLE I, SECTION 2.**

R.C. 2305.10(C) also violates Equal Protection (Oh. Const. Art. I, Sec. 2). For example, suppose that two people suffer the same injury, as a result of the same model machine, on the same day. The first machine was sold one day less than ten years ago and the second machine was sold one day more than ten years ago.

The first person would have two years to file a products liability claim. The second would be barred from any claim.

What basis is there for treating injured people differently based on when the product was sold? As this Court has recognized in the medical malpractice area, there is no justification for such a distinction. An injured person in the second group above is no less injured than someone in the first group, "[y]et [their] legal rights are abridged and even cut off completely for no other reason than the fortuity of timing. . . . The injury suffered is no less real, nor is the claim necessarily less meritorious." Gaines at 58-59.

There is no basis for such a distinction. Therefore, the statute of repose violates Equal Protection.

**C. APPLICATION OF THE STATUTE OF
REPOSE TO RETROACTIVELY BAR A CLAIM
VIOLATES OHIO CONSTITUTION ARTICLE
II, SECTION 28.**

Mr. Groch had a cause of action for product liability when he was injured on March 3, 2005. The statute of repose, R.C. 2305.10, became effective on April 7, 2005. Because the press which injured Mr. Groch had been in the possession of the employer for more than 10 years, Defendants claim that the statute of repose extinguished that existing cause of action.

A statute, such as the statute of repose in the instant case, cannot constitutionally take away an existing cause of action. A statute which takes away an existing cause of action (such as R.C. 2305.10 in the present case) violates Ohio Const. Art. II, Sec. 28. Van Fossen v. Babcock & Wilcox Co. (1988), 36 Ohio St.3d 100.

Although the statute of repose at issue in the present case is not a statute of limitations, it would be unconstitutional for a statute of limitations to be enacted which reduced the time an individual had to file an existing claim. Schneider v. Jefferson Smurfit Corp. (Ohio App. 1 Dist. 1988), 42 Ohio App.3d 53, 55.

The effect of the statute of repose in this case is the same as the statute of limitations in Schneider - it reduced the time Mr. Groch had to file his claim to one month (and three days). Just as reducing the time an individual has to file a claim by creating a shorter statute of limitations violates Art. II, Sec.

28, so does reducing the time an individual such as Mr. Groch has to file the claim by imposing a statute of repose.

IV. CONCLUSION

Mr. Groch has been injured as a result of a workplace accident for which he also has a product liability claim. He is constitutionally entitled to be fully compensated for that injury. A "claimant-plaintiff has a constitutionally protected interest in his or her tort recovery to the extent that it does not duplicate the employer's or bureau's compensation outlay." Holeton at 122.

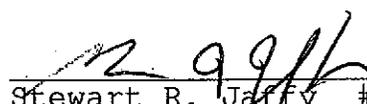
The subrogation statute unconstitutionally deprives Mr. Groch of the right to be fully compensated because it requires subrogation from any tort recovery without considering what part (if any) of the tort recovery constitutes double recovery.

The statute of repose in this case also unconstitutionally deprives Mr. Groch of the right to seek redress for the harm done him by the press which caused his injury because it would bar the door to the courthouse. Ohio law requires that injured people be provided with a meaningful opportunity to pursue suit, and the statute of repose eliminates such a meaningful opportunity.

Because the subrogation law and the statute of repose are unconstitutional, the Court should declare both statutes

unconstitutional and so advise the United States District Court,
Northern District of Ohio, Western Division.

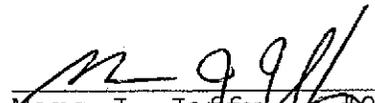
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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing has been served upon the following this 26th day of February 2007, by placing a copy in the United States Mail, postage pre-paid, addressed to: [1] Stephen Paul Carney, Elise W. Porter, ASSISTANT ATTORNEYS GENERAL, 30 East Broad Street, 17th Fl., Columbus, OH 43215, Attorneys for Respondent, State of Ohio; [2] Robert H. Eddy, GALLAGHER SHARP, 420 Madison Avenue, Suite 50, Toledo, Oh 43604, Attorney for Respondents, Kard Corporation and Racine Federated, Inc.; [3] Kimberly A. Conklin, KERGER & ASSOCIATES, 33 S. Michigan Street, Ste. 100, Toledo, OH 43604, Attorney for Respondent, General Motors Corporation; [4] David C. Vogel, Patrick Fanning, LATHROP & GAGE L.C., 2345 Grand Boulevard, Ste. 2800, Kansas City, Missouri 64108, Attorneys for Respondent, General Motors Corporation; and [5] Kevin J. Boissoneault, Theodore A. Bowman, Bonnie E. Haims, Russell Gerney, GALLON, TAKACS, BOISSONEAULT & SCHAFFER CO. L.P.A., 3516 Granite Circle, Toledo, OH 43617, Attorneys for Petitioner Douglas Groch


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APPENDIX A

O Const I Sec. 2 Equal protection and benefit

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

APPENDIX B

O Const I Sec. 16 Redress for injury; due process

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

APPENDIX C

O Const I Sec. 19 Eminent domain

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure, or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money, and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

APPENDIX D

O Const II Sec. 28 Retroactive laws; laws impairing obligation of contracts

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

APPENDIX E

R.C. 2305.10 Product liability, bodily injury or injury to personal property; when certain causes of action arise

(A) Except as provided in division (C) of this section, an action based on a product liability claim and an action for bodily injury or injuring personal property shall be brought within two years after the cause of action accrues. Except as provided in divisions (B) (1), (2), (3), (4), and (5) of this section, a cause of action accrues under this division when the injury or loss to person or property occurs.

* * *

(C) (1) Except as otherwise provided in divisions (C) (2), (3), (4), (5), (6), and (7) of this section or in section 2305.19 of the Revised Code, no cause of action based on a product liability claim shall accrue against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser or first lessee who was not engaged in a business in which the product was used as a component in the production, construction, creation, assembly, or rebuilding of another product.

(2) Division (C) (1) of this section does not apply if the manufacturer or supplier of a product engaged in fraud in regard to information about the product and the fraud contributed to the harm that is alleged in a product liability claim involving that product.

(3) Division (C)(1) of this section does not bar an action based on a product liability claim against a manufacturer or supplier of a product who made an express, written warranty as to the safety of the product that was for a period longer than ten years and that, at the time of the accrual of the cause of action, has not expired in accordance with the terms of that warranty.

(4) If the cause of action relative to a product liability claim accrues during the ten-year period described in division (C)(1) of this section but less than two years prior to the expiration of that period, an action based on the product liability claim may be commenced within two years after the cause of action accrues.

(5) If a cause of action relative to a product liability claim accrues during the ten-year period described in division (C)(1) of this section and the claimant cannot commence an action during that period due to a disability described in section 2305.16 of the Revised Code, an action based on the product liability claim may be commenced within two years after the disability is removed.

(6) Division (C)(1) of this section does not bar an action for bodily injury caused by exposure to asbestos if the cause of action that is the basis of the action accrues upon the date on which the plaintiff is informed by competent medical

authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(7) (a) Division (C) (1) of this section does not bar an action based on a product liability claim against a manufacturer or supplier of a product if all of the following apply:

(i) The action is for bodily injury.

(ii) The product involved is a substance or device described in division (B) (1), (2), (3), or (4) of this section.

(iii) The bodily injury results from exposure to the product during the ten-year period described in division (C) (1) of this section.

(b) If division (C) (7) (a) of this section applies regarding an action, the cause of action accrues upon the date on which the claimant is informed by competent medical authority that the bodily injury was related to the exposure to the product, or upon the date on which by the exercise of reasonable diligence the claimant should have known that the bodily injury was related to the exposure to the product, whichever date occurs first. The action based on the product liability claim shall be commenced within two years after the cause of action accrues and shall not be commenced more than two years after the cause of

action accrues.

* * *

(F) This section shall be considered to be purely remedial in operation and 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.

APPENDIX F

R.C. 4123.93 Definitions

As used in sections 4123.93 and 4123.931 of the Revised Code:

(A) "Claimant" means a person who is eligible to receive compensation, medical benefits, or death benefits under this chapter or Chapter 4121., 4127., or 4131. of the Revised Code.

(B) "Statutory subrogee" means the administrator of workers' compensation, a self-insuring employer, or an employer that contracts for the direct payment of medical services pursuant to division (L) of section 4121.44 of the Revised Code.

(C) "Third party" means 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 this chapter or Chapter 4121., 4127., or 4131. of the Revised Code.

(D) "Subrogation interest" includes past, present, and estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits, and any other costs or expenses paid to or on behalf of the claimant by the statutory subrogee pursuant to this chapter or Chapter 4121., 4127., or 4131. of the Revised Code.

(E) "Net amount recovered" means the amount of any award, settlement, compromise, or recovery by a claimant against a third

party, minus the attorney's fees, costs, or other expenses incurred by the claimant in securing the award, settlement, compromise, or recovery. "Net amount recovered" does not include any punitive damages that may be awarded by a judge or jury.

(F) "Uncompensated damages" means the claimant's demonstrated or proven damages minus the statutory subrogee's subrogation interest.

APPENDIX G

R.C. 4123.931 Subrogation rights

(A) 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.

(B) If a claimant, statutory subrogee, and third party settle or attempt to settle a claimant's claim against a third party, the claimant shall receive an amount equal to the uncompensated damages divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered, and the statutory subrogee shall receive an amount equal to the subrogation interest divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered, except that the net amount recovered may instead be divided and paid on a more fair and reasonable basis that is agreed to by the claimant and statutory subrogee. If while attempting to settle, the claimant and statutory subrogee cannot agree to the allocation of the net amount recovered, the claimant and statutory subrogee may file a request with the administrator of workers' compensation for a

conference to be conducted by a designee appointed by the administrator, or the claimant and statutory subrogee may agree to utilize any other binding or non-binding alternative dispute resolution process.

The claimant and statutory subrogee shall pay equal shares of the fees and expenses of utilizing an alternative dispute resolution process, unless they agree to pay those fees and expenses in another manner. The administrator shall not assess any fees to a claimant or statutory subrogee for a conference conducted by the administrator's designee.

(C) If a claimant and statutory subrogee request that a conference be conducted by the administrator's designee pursuant to division (B) of this section, both of the following apply:

(1) The administrator's designee shall schedule a conference on or before sixty days after the date that the claimant and statutory subrogee filed a request for the conference.

(2) The determination made by the administrator's designee is not subject to Chapter 119. of the Revised Code.

(D) When a claimant's action against a third party proceeds to trial and damages are awarded, both of the following apply:

(1) The claimant shall receive an amount equal to the uncompensated damages divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net

amount recovered, and the statutory subrogee shall receive an amount equal to the subrogation interest divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered.

(2) The court in a nonjury action shall make findings of fact, and the jury in a jury action shall return a general verdict accompanied by answers to interrogatories that specify the following:

(a) The total amount of the compensatory damages;

(b) The portion of the compensatory damages specified pursuant to division (D) (2) (a) of this section that represents economic loss;

(c) The portion of the compensatory damages specified pursuant to division (D) (2) (a) of this section that represents noneconomic loss.

(E) (1) After a claimant and statutory subrogee know the net amount recovered, and after the means for dividing it has been determined under division (B) or (D) of this section, a claimant may establish an interest-bearing trust account for the full amount of the subrogation interest that represents estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits, reduced to present value, from which the claimant shall make reimbursement payments to the statutory subrogee for the future payments of compensation, medical

benefits, rehabilitation costs, or death benefits. If the workers' compensation claim associated with the subrogation interest is settled, or if the claimant dies, or if any other circumstance occurs that would preclude any future payments of compensation, medical benefits, rehabilitation costs, and death benefits by the statutory subrogee, any amount remaining in the trust account after final reimbursement is paid to the statutory subrogee for all payments made by the statutory subrogee before the ending of future payments shall be paid to the claimant or the claimant's estate.

(2) A claimant may use interest that accrues on the trust account to pay the expenses of establishing and maintaining the trust account, and all remaining interest shall be credited to the trust account.

(3) If a claimant establishes a trust account, the statutory subrogee shall provide payment notices to the claimant on or before the thirtieth day of June and the thirty-first day of December every year listing the total amount that the statutory subrogee has paid for compensation, medical benefits, rehabilitation costs, or death benefits during the half of the year preceding the notice. The claimant shall make reimbursement payments to the statutory subrogee from the trust account on or before the thirty-first day of July every year for a notice provided by the thirtieth day of June, and on or before the

thirty-first day of January every year for a notice provided by the thirty-first day of December. The claimant's reimbursement payment shall be in an amount that equals the total amount listed on the notice the claimant receives from the statutory subrogee.

(F) If a claimant does not establish a trust account as described in division (E)(1) of this section, the claimant shall pay to the statutory subrogee, on or before thirty days after receipt of funds from the third party, the full amount of the subrogation interest that represents estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits.

(G) 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.

(H) 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.

(I) The statutory subrogation right of recovery applies to, but is not limited to, all of the following:

(1) Amounts recoverable from a claimant's insurer in connection with underinsured or uninsured motorist coverage, notwithstanding any limitation contained in Chapter 3937. of the

Revised Code;

(2) Amounts that a claimant would be entitled to recover from a political subdivision, notwithstanding any limitations contained in Chapter 2744. of the Revised Code;

(3) Amounts recoverable from an intentional tort action.

(J) If a claimant's claim against a third party is for wrongful death or the claim involves any minor beneficiaries, amounts allocated under this section are subject to the approval of probate court.

(K) The administrator shall deposit any money collected under this section into the public fund or the private fund of the state insurance fund, as appropriate. If a self-insuring employer collects money under this section of the Revised Code, the self-insuring employer shall deduct the amount collected, in the year collected, from the amount of paid compensation the self-insured employer is required to report under section 4123.35 of the Revised Code.