IN THE SUPREME COURT OF OHIO

DOUGLAS GROCH, et al.,	:	**Case No. 2006-1914**
Appellees,	:	**United States District Court, Northern District of Ohio, Western Division Case No. 3:06-CV-1604**
GENERAL MOTORS CORP., et al.,	:	
Appellants.	:	

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I. INTRODUCTORY STATEMENT ABOUT THE AMICUS CURIAE

Amicus Curiae COSE Group Services, Inc. ("COSE") is a Cleveland-area alliance of small businesses offering group-benefits to its constituent members, including group purchasing programs, access to collective resources, and an ability to speak with a single voice with respect to issues of interest to small businesses throughout Ohio. Its explicit mission is to foster cooperation and goodwill within the business community and to empower smaller businesses politically and economically in the Greater Cleveland area. COSE's workers' compensation program consists of 5,500 companies, which covers approximately 70,000 employees in Northeast Ohio.

II. STATEMENT OF THE CASE

This Court's consideration of this case results from the its certification of nine questions of law posed by the United States District Court for the Northern District of Ohio in the underlying action. Those questions, taken *in toto*, address three separate areas of the law: (1) the constitutionality of the Ohio's Workers' Compensation subrogation statutes, R.C. §§ 4123.93 and 4123.931 ("the subrogation statutes"); (2) the constitutionality of Ohio's products liability statute of repose, R.C. § 2305.10(C) and (F); and (3) the viability of Senate Bill 80—the bill through which the Ohio legislature enacted the statute of repose—under Ohio's one-subject rule.

For the reasons set forth in the briefs of Respondent State of Ohio, Respondents Kard Corporation and Racine Federated, Inc., and *amicus curiae* National Federation of Independent Business Legal Foundation (and others), COSE believes that R.C. § 2305(C) and (F) are constitutional and that S.B. 80 does not violate Ohio's one-subject rule. Accordingly, COSE adopts the arguments made in those briefs as if fully reproduced herein.

In addition, COSE sets forth the following more comprehensive arguments of its own, combined with those of the parties and *amici*, in support of the constitutionality of the subrogation statutes.

III. STATEMENT OF FACTS

COSE adopts the Statement of Facts set forth more fully in Respondent General Motors Corporation's ("GM") brief. To summarize: Petitioner Douglas Groch suffered an injury in the course of and arising out of his employment with GM when a trim press he was operating came down on his right arm and wrist. Mr. Groch sought and received compensation for this injury through the Ohio workers' compensation system.

A few months after his injury, Mr. Groch filed an action in the Lucas County Court of Common Pleas against both GM and the manufacturers of the trim press, alleging claims of employer intentional tort and product liability under Ohio law. GM subsequently removed the case to the United States District Court for the Northern District of Ohio.

GM also responded to the suit by asserting a subrogation interest in any tort recovery made by Mr. Groch because of its payment of workers' compensation benefits to Mr. Groch (GM is a self-insured employer). In response, Mr. Groch asserted that the subrogation statutes granting this right to GM were themselves unconstitutional. At the urging of the parties, the federal court determined that it should poll this Court regarding, *inter alia*, whether the subrogation statutes were constitutional under the takings, due process, and equal protection clauses of the Ohio Constitution.

IV. LEGAL ARGUMENT

A. The Subrogation Statutes

Versions of the subrogation statutes[1] have existed for many years; the most recent was enacted in 2002 and became effective in 2003, and was primarily a reaction to this Court's holding in *Holeton v. Crouse Cartage Co.* (2001), 92 Ohio St. 3d 115, 122, which found that certain provisions of former R.C. §§ 4123.93 and 4123.931 were unconstitutional, under several theories.

Under R.C. § 4123.931(A), the payment of workers' compensation benefits 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 "statutory subrogee" is "the administrator of workers' compensation, a self-insuring employer, or an employer that contracts for the direct payment of medical services." R.C. § 4123.93(B).

This Court (in *Holeton* and elsewhere) found several parts of former R.C. § 4123.931 constitutionally offensive. R.C. § 4123.931(A) specified:

> A statutory subrogee's subrogation interest includes . . . estimated future values of compensation and medical benefits arising out of an injury to or disability or disease of a claimant.

Former R.C. § 4123.931(D) further provided:

> The entire amount of any settlement or compromise of an action or claim is subject to the subrogation right of a statutory subrogee, regardless of the manner in which the settlement or compromise is characterized. Any settlement or compromise that excludes the amount of compensation or medical benefits shall not preclude a statutory subrogee from enforcing its rights under this section.

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[1] Ohio's subrogation law is unusually structured, in that it is divided into two statutes—R.C. §§ 4123.93 and 4123.931. R.C. § 4123.93 defines the terms used with respect to subrogation in the state of Ohio (i.e. by defining "claimant," "statutory subrogee," and the like), while R.C. § 4123.931 provides the actual right of subrogation which exists in statutory subrogees and provides the means and mechanisms for payment. For simplicity's sake, this brief will refer to them collectively as "the subrogation statutes."

> The entire amount of any award or judgment is presumed to represent compensation and medical benefits and future estimated values of compensation and medical benefits that are subject to a statutory subrogee's subrogation rights unless the claimant obtains a special verdict or jury interrogatories indicating that the award or judgment represents different types of damages.

In *Holeton*, this Court determined that these provisions violated Ohio Const. art I, §§ 2, 16, and 19 . With respect to Ohio Const. art. I, § 19—Ohio's version of the takings clause—this Court wrote that:

> By giving the subrogee a current collectible interest in estimated future expenditures, [former] R.C. § 4123.931(A) creates the conditions under which a prohibited taking may occur. This would happen in those situations where the amount of reimbursement for 'estimated future values of compensation and medical benefits' proves to be substantially greater than the subrogee's eventual compensation outlay. In other words, [former] R.C. 4123.931(A) requires the claimant to reimburse the bureau or self-insuring employer for future benefits that the claimant may never receive. In that event, the statute operates not to prevent the claimant from keeping a double recovery but to provide the statutory subrogee with a windfall at the expense of the claimant's tort recovery.

Id. at 123.

With respect to the due process clause of the Ohio Constitution (Section 16, Article I) , this Court wrote:

> [Former] R.C. 4123.931(D) establishes a procedural framework under which an unconstitutional taking of the claimant's property or a denial of remedy by due course of law can occur. This framework distinguishes between third-party claims that are tried and third-party claims that are settled. In the case where an award or judgment is rendered in the third-party action, [former] R.C. 4123.931(D) allows the claimant to obtain jury interrogatories segregating damages that do not represent workers' compensation or medical benefits and, therefore, are not subject to the reimbursement right of the statutory subrogee. In contrast, the entire amount of any settlement or compromise is deemed subject to the reimbursement right of the statutory subrogee, and the claimant is precluded, under any circumstances, from showing that his or her settlement or portions thereof do not represent or duplicate workers' compensation or medical benefits.

Id. at 125–126; *see also*, *Modzelewski v. Yellow Freight Sys., Inc.* (2004), 102 Ohio St. 3d 192.

Finally, with respect to the equal protection clause of the Ohio Constitution (Section 2, Article I), this Court wrote:

> [Former] R.C. § 4123.931(D) essentially creates a presumption that a double recovery occurs whenever a claimant is permitted to retain workers' compensation and tort recovery. Claimants who try their tort claims are permitted to rebut this presumption, while claimants who settle their tort claims are not. Such disparate treatment of claimants who settle their tort claims is irrational and arbitrary because . . .there are situations where claimants' tort recovery is necessarily limited to amounts that if retained along with workers' compensation cannot possibly result in a double recovery.
>
> Contrary to respondent's assertions, these claimants are not free to make the decision to proceed to trial or to settle. Their only freedom is to choose the mechanism by which to forfeit their rights to property and remedy. And in those situations where claimants are forced to settle for amounts that are insufficient to satisfy more than the subrogee's claim, as happened in Ross, supra, their only freedom is to have their tort recovery obliterated.

Holeton, supra, 92 Ohio St. 3d at 132.

In response, as described by this Court in *State ex rel. United Auto., Aerospace & Agric. Implement Workers of Am. v. Ohio Bureau of Workers' Comp.* (2006), 108 Ohio St. 3d 432, 435, the Ohio General Assembly enacted 2002 Sub.S.B. No. 227 ("S.B. 227"), which substantially amended the subrogation provisions in R.C. §§ 4123.93 and 4123.931, effective April 9, 2003 in an effort to comply with the specific holdings of this Court in *Holeton.*

In particular, as this Court has already found, the General Assembly repealed the former provisions in R.C. §§ 4123.931(A) and (D) that the Court had found unconstitutional in *Holeton* and created various new settlement and evaluation mechanisms in an attempt to comply with the Court's holding in *Holeton. See United Auto., Aerospace & Agric. Implement Workers of Am.*, 108 Ohio St. 3d at 435.

To that end, the General Assembly created a new settlement procedure entitling a claimant to 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."

R.C. § 4123.931(B). The statutory subrogee would 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." *Id.* In addition, the claimant and statutory subrogee can instead agree to divide the net amount recovered on a more fair and reasonable basis. *Id.*

In addition, the new version of the subrogation statutes permits claimants to:

> . . . . 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.

R.C. § 4123.931(E)(1).

An objective examination of the current subrogation statutes shows that the arguments raised by the Petitioner in this case are simply incorrect; despite his protestations (and those of his *amici*) to the contrary, the Ohio General Assembly met its ultimate goal of creating workers' compensation subrogation mechanisms free of the problems which compelled this Court to strike down the former version of the statutes. For the reasons explained below, this Court should hold that the current versions are facially constitutional.

B. The Subrogation Statutes Do Not Effect an Unconstitutional Taking.

In essence, Petitioner and his *amici* have largely parroted the language of *Holeton* and the objections of the parties in that case to the former subrogation statutes. *See, Holeton, supra* at 122. As in that case, they begin with the concept that the statutes work an unconstitutional taking on Petitioner and others in a like position.

An examination of the new subrogation statutes, and of the specific holding in *Holeton*, shows this to be unequivocally untrue. This Court in *Holeton* found that former R.C. § 4123.931(A), by giving the statutory subrogee a current collectible interest in estimated future

expenditures, created a situation in which a prohibited taking might occur when the statute operated, not to prevent the claimant from keeping a double recovery, but rather to provide the statutory subrogee with a windfall at a claimant's expense: "In other words, R.C. § 4123.931(A) requires the claimant to reimburse the bureau or self-insuring employer for future benefits that the claimant may never receive." *Id.* at 123.

In other words, former R.C. § 4123.931(A) worked an unconstitutional taking because it required a claimant to disgorge the entire amount of the estimated value of future benefits to the statutory subrogee. In several cases, this meant that the claimant would *never* receive the future benefits, resulting in a windfall for the statutory subrogee. This would happen when compensation the statutory subrogee was obligated to pay was terminated earlier than what was estimated for purposes of determining future values. According to this Court in *Holeton*, the former statute irrationally and arbitrarily placed the risk of an overestimation of future benefits on the claimant. *Id.* at 125.

The current version of R.C. § 4123.931, however, eliminates the possibility of such a windfall, because it does not require the claimant to reimburse the statutory subrogee for future benefits that the claimant may never receive.

To accomplish this, new divisions (E) and (F) of R.C. § 4123.931 permit the claimant to establish an interest-bearing trust account for the full amount of the subrogation interest that represents estimated future payments of compensation and benefits. If the claimant establishes a trust account, every six months the statutory subrogee must provide a payment notice to the claimant, listing the amounts paid on the claimant's behalf. The claimant must then reimburse the subrogee from the trust account in accordance with the notice. If the statutory subrogee's duty to continue making payments is terminated, any amount that remains in the trust account,

after final reimbursement is paid to the subrogee, must be paid to the claimant or the claimant's estate. If a claimant does not establish a trust account under division (E)(1), the claimant must, within 30 days after receipt of funds from the third-party tortfeasor, pay the statutory subrogee the full amount of the subrogation interest that represents future benefits.

This trust fund concept is modeled after Minn. Stat. § 176.061(6), which this Court in *Holeton* cited with approval. *Holeton*, *supra*, at 124. Minn. Stat. § 176.061 provides a formula under which the employer can obtain reimbursement for compensation paid, and provides that remaining tort proceeds should be paid to the claimant and constitute a credit to the subrogee against future compensation payments. Like the Minnesota statute, the current version of R.C. § 4123.931 does not require the claimant to reimburse the statutory subrogee for future benefits the claimant may never receive. Additionally, under the present version of R.C. § 4123.931, the claimant may keep proceeds remaining after the statutory subrogee's duty to continue making payments ends.

Petitioner and *amici curiae* arguing on his behalf have indicated that the trust fund solution—because of the burden on the worker to establish a trust account and bear any attendant administration costs—is unreasonable. Such accusations are meritless (and, in any event, legally irrelevant). This Court's holding in *Holeton* that former R.C. § 4123.931 was problematic from a takings perspective was founded on the statute's purported irrationality and its arbitrary imposition of the risk of liability *for overestimation of future expenditures* on the claimant. There is no dispute in this case that the new statute removed this risk by providing for the creation of a trust account. There is now no risk that the amount of future benefits will be overestimated, as the subrogee is reimbursed only for amounts actually expended up to the amount placed in trust.

Moreover, the contention that the creation of a trust account imposes an undue burden upon a claimant is simply false. First, it is the claimant's option to create the trust account; under division (F), the claimant may elect to pay the future benefits up front. Second, even if the claimant bears the cost of the trust account, such cost would likely be minimal; R.C. § 4123.931(E)(2) even accounts for such costs by authorizing the claimant to use the interest that accrues on the trust account to pay the expenses associated with the account. Finally, once the trust account is established, the burden is on the subrogee to submit a payment notice to the claimant every six months, and the new statute makes no provision for reimbursement in the absence of a timely payment notice.

In other words, the trust fund created by the General Assembly in R.C. § 4123.931 adequately corrects the constitutional infirmity identified by *Holeton*. There is now no risk to the plaintiff that future benefits may be estimated at too great an amount. The trust account provision is manifestly a reasonable response to the legitimate concern of preventing double recoveries and complies with the holding in *Holeton*.

C. The Subrogation Statutes Do Not Violate Due Process Principles.

Petitioner and his *amici* also contend, puzzlingly, that the current subrogation statutes deny claimants due process by preventing them from demonstrating that part or all of their tort recoveries are attributable to sources other than those compensated through the workers' compensation system, and thus do not constitute "double recoveries" which the state can rationally require to be surrendered. While it is true that the version of the subrogation statutes stricken in *Holeton* contained these features, the current version is carefully drafted to avoid this problem.

The parties in this case share common ground; all agree with this Court in *Holeton* that the state has a legitimate interest in preventing double recoveries: "it is constitutionally permissible for the state to prevent a tort victim from recovering twice for the same item of loss or type of damage, once from the collateral source and again from the tortfeasor." *Holeton, supra*, at 121-22. This Court in *Holeton* noted, however, that statutes designed to prevent double recoveries "are not rationally related to their purpose where they operate to reduce a plaintiff's tort recovery irrespective of whether double recovery has actually occurred." *Holeton, supra*, at 122; *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451; *Buchman v. Wayne Trace Local School Dist. Bd. of Edn.* (1995), 73 Ohio St. 3d 260; *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415.

Taking these considerations into account, this Court stated:

> [A claimant] 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. If R.C. 4123.931 operates to take more of the claimant's tort recovery than is duplicative of the statutory subrogee's workers' compensation expenditures, then it is at once unreasonable, oppressive upon the claimant, partial, and unrelated to its own purpose.

Holeton, supra at 122.

Petitioner contends that the present versions of R.C. §§ 4123.93 and 4123.931 assume there will be a double recovery in a settlement, and provide no process by which parties can determine what is a fair award for all economic and non-economic losses, as well as past and future injuries. He argues that the formula employed by R.C. §§ 4123.93 and 4123.931(B) and (D) to determine how a recovery by the claimant against a third-party tortfeasor will be distributed deprives the claimant of the opportunity to show there was no double recovery.

This argument overlooks the procedures outlined in R.C. § 4123.931 to determine the respective amounts to be recovered by the claimant and the subrogee in the event that the

claimant objects to the recovery calculation rendered by the formula. Indeed, R.C. § 4123.931 provides several such methods for determining how a recovery by the workers' compensation claimant against a third-party tortfeasor is distributed. First, the claimant has the option of joining the Bureau or a self-insured employer as a party to the underlying tort action. Once the subrogee is a party, if the parties are unable to agree on a settlement amount under R.C. § 4123.931(B), the matter may proceed to trial, where all issues can be heard. The statutory subrogee presents evidence at trial regarding its expenditures on behalf of the claimant and other evidence regarding its entitlement for future damages. The subrogation amount can be determined as part of the damages proven through use of jury interrogatories submitted by the court pursuant to Civ.R. 49(B).

Second, if the claimant does not join the Bureau or a self-insured employer as a party to the underlying tort action, and has settled with the tortfeasor without the participation of the Bureau or the self-insured employer, the Bureau and the claimant may choose to use the aforementioned formula, some other mutually agreed to allocation, or seek a declaratory judgment to determine the respective amounts to be recovered by the claimant and the subrogee. If the case proceeds to trial, the claimant may present evidence as to what portions of the amount recovered represent a double recovery. Both of these options ensure that the claimant will obtain a full and fair hearing.

Third, the parties may lawfully settle at any time. R.C. § 4123.931(B) provides the parties with the option to use the formula or any other agreed upon allocation of the net amount recovered. The parties are free to agree to any allocation they deem proper. If the parties cannot agree, the issue can be resolved at trial. This option also provides a claimant with the opportunity for a full, fair hearing. Therefore, each of the procedures set forth in R.C. § 4123.931 provides a

claimant with due process when determining how a recovery by the workers' compensation claimant against a third-party tortfeasor is distributed.

D. The Subrogation Statutes Do Not Violate the Equal Protection Guarantees of the Ohio Constitution.

Finally, Mr. Groch contends that the subrogation statutes are unconstitutional because they irrationally distinguish between claimants who settle their claims and claimants who proceed to trial. This argument stems from the determination in *Holeton* that subsection (D) of former R.C. § 4123.931 was unconstitutional because it distinguished between third-party claims that are tried and third-party claims that are settled. Under the former statute, if the claim was tried, the claimant could obtain a special jury interrogatory indicating that the award or judgment represented different types of damages. These interrogatories allowed the claimant to show that certain damages did not represent workers' compensation benefits; those damages, therefore, were not subject to subrogation. In the case of a settlement, however, the entire settlement amount was subject to subrogation, regardless of the manner in which the settlement was characterized. This practice prevented the claimant from showing that portions of the settlement did not represent workers' compensation benefits, and thus, were not subject to subrogation.

Under the current version of R.C. § 4123.931, however, sections (B) and (D) set forth a formula which determines both the claimant's and statutory subrogee's interests in the damages owed by the third-party tortfeasor. The formula applies to both settlements (R.C. § 4123.931(B)) and awards following trial (R.C. § 4123.931(D)). This equal application avoids the disparate result of the former statute and provides a clear definition of the claimant's and statutory subrogee's interests in the damages.

Ohio courts have consistently applied the rational-basis test when addressing constitutional challenges to workers' compensation statutes, *State ex rel. Doersam v. Indus.*

Comm. (1989), 45 Ohio St.3d 115, and this Court in *Holeton* used this test in analyzing the equal protection arguments pertaining to former R.C. 4123.931. "Under an equal protection analysis, the challenged statute will be upheld if the classification bears a rational relationship to a legitimate governmental interest or if reasonable grounds exist for drawing the distinction." *Holeton*, 92 Ohio St.3d at 131.

Under the rational-basis test, a challenged statute must be upheld if there exists any conceivable set of facts under which the classification rationally furthers a legitimate legislative objective. *See Schwan v. Riverside Methodist Hosp.* (1983), 6 Ohio St. 3d 300; *Heller v. Doe* (1993), 509 U.S. 312, 320. The party challenging the constitutionality of an enactment has the burden to negate "every conceivable basis which might support it." *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.* (1999), 87 Ohio St.3d 55, 60.

It is evident that R.C. § 4123.931 is a rational response to the legitimate state concern of minimizing losses to the workers' compensation fund caused by the acts of third-party tortfeasors. This Court in *Holeton* agreed that this is a legitimate state concern, to the extent that it prevents a double recovery. As analyzed above, under the amended version of R.C. § 4123.931, the statutory subrogee recoups only to the extent that there is a double recovery. Further, the claimant is given substantial opportunity in either a trial or a settlement to prove amounts that would not represent a double recovery. Thus, R.C. § 4123.931 is a rational response to a legitimate state concern.

As to the argument that R.C. § 4123.931 creates an unreasonable classification by singling out for special, less favorable treatment those workers who settle, this argument is not cognizable, insofar as it is a facial challenge to the statute. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must

establish that no set of circumstances exists under which the Act would be valid. The fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid . . ." *United States v. Salerno* (1987), 481 U.S. 739, 745; *see also, Emerson Elec. Co. v. Tracy* (2000), 90 Ohio St.3d 157, 162 (Cook, J., dissenting).

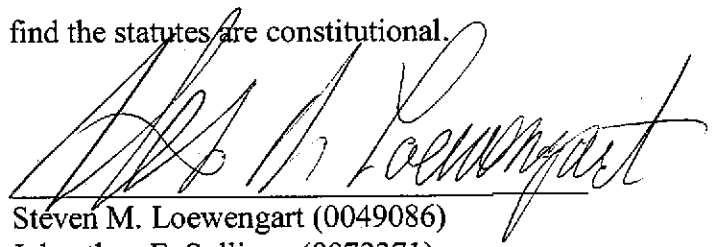
In *Holeton*, this Court determined that the prior version of R.C. § 4123.931 violated Article I, Section 2 of the Ohio Constitution because claimants who settled their third-party tort claims were precluded from showing their tort recovery did not duplicate workers' compensation benefits, whereas claimants who tried their tort claims were able to demonstrate the same via special jury interrogatories. Claimants who went to trial were able to have some portion of their award shielded from the statutory subrogee's right of reimbursement, but claimants who settled had no such method available to them.

The current version of R.C. § 4123.931 eliminates this distinction, treating claimants who settle their cases in exactly the same manner as those who go to trial on their claims. As one Ohio court found with respect to this very argument, "[t]he pro rata formula employed by R.C. § 4123.931 in the case of settlements and trial ensures that the statutory subrogee does not recoup more from the claimant than the amount representing a double recovery." *McKinley v. Ohio Bureau of Workers' Comp.*, 2006 Ohio 5271. In short, Petitioner can find no traction in the argument that the current subrogation statutes violate equal protection in the same manner as the former subrogation statutes; the new statutes utilize a mechanism specifically designed to forever end the problems identified by this Court in *Holeton*. The Court should rule accordingly.

V. CONCLUSION

The manifest objective of the General Assembly in enacting the current versions of R.C. §§ 4123.93 and 4123.931 was to comply with this Court's holding in *Holeton*. *See State ex rel.*

United Auto., Aerospace & Agricultural Implement Workers of Am., supra. Because the current versions of R.C. §§ 4123.93 and 4123.931 avoid the constitutional pitfalls of the former statutes with regard to due process and takings under Article I, Section 16 and 19 of the Ohio Constitution, and because the statutes were specifically drafted by the General Assembly to comply with the *Holeton* holding, this Court should find the statutes are constitutional.



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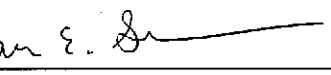

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