

In the
Supreme Court of Ohio

DOUGLAS GROCH *et al.*,

Plaintiffs-Petitioners,

v.

GENERAL MOTORS
CORPORATION, *et al.*,

Defendants-Respondents.

: Case No. 2006-1914
:
: On Review of Certified Question from the
: United States District Court, Northern
: District of Ohio, Western Division
:
: District Court Case
: No. 3:06-CV-1604
:

RESPONDENT STATE OF OHIO'S BRIEF

KEVIN J. BOISSONEAULT* (0040180)

**Counsel of Record*

THEODORE BOWMAN (0009159)

BONNIE E. HAIMS (0072465)

RUSSELL W. GERNEY (0080186)

Gallon, Takacs, Boissoneault, & Schaffer, Co.

3516 Granite Circle

Toledo, Ohio 43617-1172

419-843-2001

419-841-2608 fax

Counsel for Petitioners

Douglas and Chloe Groch

MARC DANN (0039425)

Attorney General of Ohio

ELISE PORTER* (0055548)

Acting Solicitor General

**Counsel of Record*

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

eporter@ag.state.oh.us

Counsel for Respondent

State of Ohio

ROBERT H. EDDY* (0030739)

**Counsel of Record*

COLLEEN A. MOUNTCASTLE (0069588)

Gallagher, Sharp

420 Madison Avenue, Suite 1250

Toledo, Ohio 43604

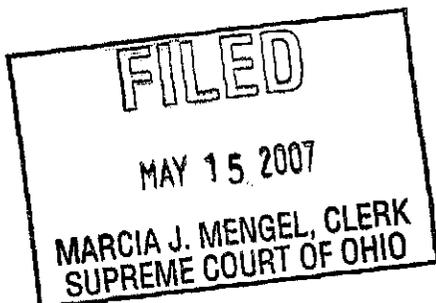
419-241-4860

419-241-4866 fax

Counsel for Respondents

Kard Corporation and Racine Federated, Inc.

National/Kard Division



KIMBERLY CONKLIN* (0074726)

**Counsel of Record*

Kerger & Associates

33 S. Michigan Street, Suite 100

Toledo, Ohio 43604

419-255-5990

419-255-5997 fax

Counsel for Respondent

General Motors Corporation

PATRICK N. FANNING

DAVID C. VOGEL

DAN E. CRANSHAW

Lathrop & Gage L.C.

2345 Grand Boulevard Suite 2800

Kansas City, Missouri 64108-2684

816-292-2000

816-292-2001 fax

Counsel for Respondent

General Motors Corporation

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	1
STATEMENT OF THE CASE AND FACTS	2
A. Revised R.C. 4123.931 was enacted in response to <i>Holeton v. Crouse Cartage Co.</i> (2001), 92 Ohio St. 3d 115, 2001-Ohio-109.....	2
B. Revised R.C. 4123.931 creates a formula under which non-compensable damages are not subject to subrogation.....	3
C. Revised R.C. 4123.931 allows the claimant to put the amount amenable to subrogation for future benefits into an interest-bearing trust account.....	5
D. The statute of repose, R.C. 2305.10, was enacted as part of Senate Bill 80, the 2004 tort reform bill	6
E. Petitioner Groch alleges he was injured at his job with Respondent General Motors by a machine manufactured by Respondents Kard and Racine.....	7
F. This Court granted review of nine questions certified by the federal district court	8
ARGUMENT.....	9
I. The new subrogation statute corrects all of the constitutional infirmities found in the statute analyzed in <i>Holeton</i>	9
<u>Respondent State of Ohio's Proposition of Law No. 1:</u>	10
<i>The new subrogation statute does not violate the due process provision of Section 16, Article I of the Ohio Constitution</i>	<i>10</i>
<u>Respondent State of Ohio's Proposition of Law No. 2:</u>	14
<i>The new subrogation statute does not violate the takings provision of Section 19, Article I of the Ohio Constitution</i>	<i>14</i>
<u>Respondent State of Ohio's Proposition of Law No. 3:</u>	16
<i>The new subrogation statute does not violate the equal protection clause in Article I, Section 2 of the Ohio Constitution.....</i>	<i>16</i>

II. The new statute of repose does not violate the Ohio Constitution	18
<u>Respondent State of Ohio’s Proposition of Law No. 4:</u>	19
<i>R.C. 2305.10(C) and (F), the statute of repose for products liability, do not violate the open courts provision or the due process and remedies clauses of the Ohio Constitution, Article I Section 16</i>	19
<u>Respondent State of Ohio’s Proposition of Law No. 5:</u>	21
<i>The products liability statute of repose, R.C. 2305.10(C) and (F), does not violate the takings clause, Article I, Section 19 of the Ohio Constitution</i>	21
<u>Respondent State of Ohio’s Proposition of Law No. 6:</u>	21
<i>The products liability statute of repose, R.C. 2305.10(C) and (F), does not violate the equal protection clause, Article I, Section 2 of the Ohio Constitution</i>	21
<u>Respondent State of Ohio’s Proposition of Law No. 7:</u>	23
<i>The products liability statute of repose, R.C. 2305.10(C) and (F), does not violate the ban on retroactive laws, Article II, Section 28 of the Ohio Constitution</i>	23
III. The new tort reform statute, Senate Bill 80, does not violate the single-subject rule	23
<u>Respondent State of Ohio’s Proposition of Law No. 8:</u>	23
<i>Senate Bill 80 complies with the one-subject rule, Article II, Section 15 of the Ohio Constitution</i>	23
CONCLUSION	27
CERTIFICATE OF SERVICE.....	unnumbered

TABLE OF AUTHORITIES

Cases	Page(s)
<i>AFL-CIO v. Voinovich</i> (1994), 69 Ohio St. 3d 225.....	12, 26
<i>Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.</i> (1999), 87 Ohio St. 3d 55.....	21
<i>Beagle v. Walden</i> (1997), 78 Ohio St. 3d 59.....	24
<i>Brennaman v. R.M.I.</i> (1994), 70 Ohio St. 3d 460.....	18, 19
<i>Burlington N. & Santa Fe Railway Co. v. Skinner Tank Co.</i> (5th Cir. 2005), 419 F. 3d 355.....	A1
<i>Carson v. Maurer</i> (N.H. 1980), 424 A.2d 825.....	A1
<i>Cnty. Res. For Justice, Inc., v. City of Manchester</i> (N.H. 2007), 917 A.2d 707.....	A1
<i>Daily v. New Britain Machine</i> (Conn. 1986), 512 A.2d 893.....	A2
<i>Davis v. Whiting</i> (Or. Ct. App. 1984), 674 P.2d 1194.....	A1
<i>Dickie v. Farmers Union Oil Co.</i> (N.D. 2000), 611 N.W.2d 168.....	A1
<i>Estate of Branson v. O.F. Mossberg & Sons, Inc.</i> (8th Cir. 2000), 221 F. 3d 1064.....	A1
<i>Fassig v. State ex rel. Turner</i> (1917), 95 Ohio St. 232.....	19
<i>Harding v. K.C. Wall Products, Inc.</i> (Kan. 1992), 831 P.2d 958.....	A1
<i>Hardy v. VerMeulin</i> (1987), 32 Ohio St. 3d 45.....	20

<i>Hazine v. Montgomery Elevator Co.</i> (Ariz. 1993), 861 P.2d 628.....	A1
<i>Heath v. Sears, Roebuck & Co.</i> (N.H. 1983), 464 A.2d 288	A1
<i>Holeton v. Crouse Cartage Co.</i> (2001), 92 Ohio St. 3d 115, 2001-Ohio-109	1, 2, 3, 6, 9, 10, 11, 14, 15, 16, 18
<i>Hoover v. Bd. of Cty. Comm'rs</i> (1985), 19 Ohio St. 3d 1	26
<i>In re Nowak</i> , 104 Ohio St. 3d 466, 2004-Ohio-6777	24
<i>Kennedy v. Cumberland Engineering Co.</i> (R.I. 1984), 471 A.2d 195	A1
<i>Lankford v. Sullivan, Long & Hagerty</i> (Ala. 1982), 416 So.2d 996.....	A1
<i>Love v. Whirlpool Corp.</i> (Ga. 1994), 449 S.E.2d 602.....	A1
<i>Massachusetts Bd. of Retirement v. Murgia</i> (1976), 427 U.S. 307	22
<i>Menefee v. Queen City Metro</i> (1990), 49 Ohio St. 3d 27.....	21
<i>Munn v. Illinois</i> (1876), 94 U.S. 113	19
<i>Northwest Bank Neb. v. W.R. Grace & Co.</i> (8th Cir. 1992), 960 F.2d 754	A1
<i>Olsen v. J.A. Freeman Co.</i> (Idaho 1990), 791 P.2d 1285	A2
<i>Pitts v. Unarco Industrial Co.</i> (7th Cir. 1983), 712 F.2d 276	A1
<i>Porter v. Oberlin</i> (1965), 1 Ohio St. 2d 143.....	22
<i>Pulmosan Safety Equip. Corp. v. Barnes</i> (Fla. 2000), 752 So.2d 556.....	A1

<i>Sedar v. Knowlton Construction Co.</i> (1990), 49 Ohio St. 3d 193	2, 7, 18, 19, 20
<i>Simmons-Harris v. Goff</i> (1999), 86 Ohio St.3d 1	25
<i>State ex rel. Dix v. Celeste</i> (1984), 11 Ohio St. 3d 141	23
<i>State ex rel. OCSEA v. SERB</i> (2004), 104 Ohio St. 3d 122	25, A1
<i>State ex rel. Ohio Acad. of Trial Lawyers v. Sheward</i> (1999), 86 Ohio St. 3d 451	7, 18, 24, 25
<i>State ex rel. Romans v. Elder Beerman Stores Corp.</i> , 100 Ohio St. 3d 165, 167, 2003-Ohio-5363	23
<i>State ex rel. United Auto. Aerospace & Ag. Imp. Workers of Am. v. Bur. of Workers' Comp.</i> , 108 Ohio St. 3d 432, 2006-Ohio-1327	10
<i>Strock v. Pressnell</i> (1988), 38 Ohio St. 3d 207	20
<i>Tetterton v. Long Manufacturing Co.</i> (N.C. 1985), 332 S.E.2d 67	A2
<i>Van Fossen v. Babcock & Wilcox Co.</i> (1988), 36 Ohio St. 3d 100	23
Statutes	
R.C. 2305.10	6, 8
R.C. 2305.10(C)	2, 7, 18, 23, 24, 27
R.C. 2305.10(F)	18, 24, 26
R.C. 4193.93	8
R.C. 4123.93(D)	4, 12
R.C. 4123.93(E)	4, 12
R.C. 4123.93(F)	4, 12
R.C. 4123.931	<i>passim</i>

R.C. 4123.931(B).....	3, 5, 11, 17
R.C. 4123.931(D)	3, 5, 11, 17, 18
R.C. 4123.931(E).....	6, 11, 14, 15, 16
R.C. 4193.931(F).....	6, 14

Other Authorities

Article I, Section 16, of the Ohio Constitution.....	8, 9, 10, 18, 19
Article I, Section 19, of the Ohio Constitution.....	8, 9, 14, 18, 21
Article I, Section 2, of the Ohio Constitution.....	8, 9, 16, 18, 21
Article II, Section 15, of the Ohio Constitution	9, 23
Article II, Section 28, of the Ohio Constitution	23
S.B. 227.....	3, 5, 10
Legislative Service Comm., Final Analysis of S.B. 227 (124th G.A.).....	5
S.B. 80	6, 22, 23, 24, 25
Colo. Rev. Stat. 13-21-403 (2007)	A2
Minn. Stat. 176.061(6).....	10
Minn. Stat. 604.03 (2007).....	A2
Ark. Code Ann. 16-116-101-05 (2007).....	A2
Ky. Rev. Stat. Ann. 411.310 (2007)	A2
Wash. Rev. Code 7.72.060 (2007).....	A2

INTRODUCTION

This case involves constitutional challenges to the new Ohio's workers' compensation subrogation statute—R.C. 4123.931 (the “subrogation statute”)—and the new statute of repose for products liability—R.C. 2305.10 (the “statute of repose”). Here, Plaintiff-Petitioner Douglas Groch (“Groch”), an employee who was injured on the job, received workers' compensation benefits from his employer, Defendant-Respondent General Motors (“GM”). Groch also sued three companies in tort for the same injuries. He sued GM in intentional tort and Kard and Racine for products liability because they had manufactured the machine that caused his injuries.

Ohio law permits a self-insured employer or the Workers Compensation Fund—the “subrogee”—to assert a claim from a tort award or settlement for the amount paid out in workers' compensation for the same injury. R.C. 4123.931. At issue here is whether that statute violates the Ohio Constitution.

The General Assembly recently passed a new version of R.C. 4123.931 specifically to address and correct all three constitutional infirmities found in former R.C. 4123.931. This Court in *Holeton v. Crouse Cartage Co.* (2001), 92 Ohio St. 3d 115, 2001-Ohio-109 found three constitutional infirmities in the former subrogation statute. The first was that the entire amount of a settlement was open to subrogation, even if it was limited by an insurance policy ceiling or some other cap and did not represent a double recovery. The second was that allowing the subrogee to immediately get the entire estimated future value of workers' compensation placed all the risk for overestimated future expenditures on the claimant. The third was that the former statute treated differently plaintiffs who tried their cases and those who settled.

As explained below, revised R.C. 4123.931 specifically avoids all of the pitfalls in *Holeton*, and is constitutional, because it establishes a formula by which the subrogee and the claimant share only that part of a tort judgment that represents a double recovery, the claimant may use an

interest-bearing trust account to escrow the estimated future value of the subrogee's interest, and claimants who settle are treated similarly to those who try their cases.

As also explained below, Ohio's new statute of repose for products liability—R.C. 2305.10(C)—does not affect a vested property right, and therefore is constitutional. Ohio's new tort law limits recovery for products liability to causes that arise within ten years of the product's manufacture and sale. At issue here is the constitutionality of that statute of repose. As explained below, the constitutionality of a statute of repose can differ based on its subject matter, so the fact that other statutes of repose have been deemed unconstitutional does not render R.C. 2305.10 unconstitutional. See *Sedar v. Knowlton Construction Co.* (1990), 49 Ohio St. 3d 193, 197-200.

And finally, the 2004 tort reform legislation does not violate the single subject rule for at least two reasons. First, the claimant here has not really stated a claim for a violation of the single-subject rule because he challenged only one provision of a large and complex tort-reform law, and that provision falls within the subject matter of the bill. Second, even if he has successfully stated a claim under the single-subject rule, the legislation has a severance clause, so any non-conforming provisions can be severed.

In short, both the subrogation statute, R.C. 4123.931, and the statute of repose, R.C. 2305.10(C), are constitutional and should be upheld.

STATEMENT OF THE CASE AND FACTS

A. Revised R.C. 4123.931 was enacted in response to *Holeton v. Crouse Cartage Co.* (2001), 92 Ohio St. 3d 115, 2001-Ohio-109.

In *Holeton*, the Court answered certified questions posed by the United States District Court for the Northern District of Ohio, and held that former R.C. 4123.931—the former workers' compensation subrogation statute—violated various provisions of the Ohio

Constitution. Specifically, *Holeton* held that former R.C. 4123.931 violated the equal protection, due process and takings provisions of the Ohio Constitution. However, the Court was also careful to reject “the proposition that a workers’ compensation statute is *per se* unconstitutional.” 92 Ohio St. 3d at 135.

In reaction to *Holeton*, the Ohio General Assembly in 2003 rescinded former R.C. 4523.931 and passed the current law, also R.C. 4523.931, aimed specifically at correcting the problems identified in *Holeton*. Am. Sub. S.B. 227. S.B. 227 was enacted as compromise legislation following negotiations between the major statewide business interest groups and the Ohio Academy of Trial Lawyers (“OATL”). The new statute was drafted with input from the Bureau of Workers’ Compensation, OATL, the Self-Insured Employers Association, and the Ohio Chamber of Commerce.

B. Revised R.C. 4123.931 creates a formula under which non-compensable damages are not subject to subrogation.

As part of the new subrogation scheme, the General Assembly created a formula under which both the claimant’s and statutory subrogee’s interest in the damages owed by the third-party tortfeasor are determined, and under which non-compensable damages are not subject to subrogation. R.C. 4123.931(B) (settlements); R.C. 4123.931(D) (awards following trial).

Under the formula, punitive damages and the claimant’s attorney fees and other expenses are paid to the claimant before any subrogation is taken from an award or settlement amount. The formula provides a pro-rata distribution to the subrogee and the claimant of the “net amount recovered” or NAR. “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." R.C. 4123.93(E).

The formula assures that the subrogation acts only on amounts that the subrogee has or will compensate through workers' compensation payments. Uncompensated damages or UD "means the claimant's demonstrated or proven damages minus the statutory subrogee's subrogation interest." R.C. 4123.93(F). Subrogation interest or SI "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." R.C. 4123.93(D).

Finally, under the formula, the claimant receives an amount equal to his "uncompensated damages" divided by the sum of the "subrogation interest" and the "uncompensated damages" multiplied by the "net amount recovered." The statutory subrogee is to receive its "subrogation interest" divided by the sum of the "subrogation interest" and the "uncompensated damages" multiplied by the "net amount recovered." This calculation can be set forth symbolically as follows:

Claimant receives an amount equal to $UD/(SI + UD) \times NAR.$

Statutory subrogee receives an amount equal to $SI/(SI + UD) \times NAR.$

The claimant and the subrogee receive approximately the same percentage recovery. To use the example from the Legislative Service Commission, if the net amount recovered is \$70,000, the subrogation interest is \$60,000 and the uncompensated damages is \$50,000, the claimant would receive $\$31,818 = (50K/(60K + 50K) \times 70K)$, or 64% of his uncompensated damages. The subrogee would recoup $\$38,182 = (60K/(60K + 50K) \times 70K)$, or 64% of the subrogee's outlay in

workers' compensation payments. Legislative Service Comm., Final Analysis of S.B. 227 (124th G.A.).

For a claimant who settles his case, if the parties find that the statutory formula works an injustice, "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." R.C. 4123.931(B).

For a claimant who tries his case, the judge or jury must specify the amount of compensatory damages and the amount of those damages that are economic and non-economic in nature. R.C. 4123.931(D)(2).

C. Revised R.C. 4123.931 allows the claimant to put the amount amenable to subrogation for future benefits into an interest-bearing trust account.

Many work-related injuries result in situations where the worker requires medical care and other compensation for a long time. As a result, tort cases based on the same injury often are settled or result in judgment long before the last compensation is paid by the Bureau of Workers' Compensation or a self-insured employer. Tort judgments or settlements usually result in a single lump sum payment, making it difficult to determine the appropriate amount to set aside for the subrogee for future payments.

Former R.C. 4123.931 attempted to solve this problem by entitling the Bureau or a self-insured employer to subrogation not only of amounts it had already compensated, but on the estimated value of future payments. However, the estimates are just that—estimates. In some cases, particularly where a claimant takes longer than anticipated to heal or cannot go back to work at all, the continued workers' compensation eventually exceeds the estimated future value. In other cases, where a claimant heals more quickly than anticipated, dies prematurely, or a worker's widow or widower remarries, the estimated future value may greatly exceed the amount actually compensated by the subrogee.

The constitutional problem in former R.C. 4123.931 arose because the claimant was required to disgorge the entire amount of the estimated future value to the subrogee at the time he received his tort judgment or settlement. If the estimated future value later turns out to have exceeded the amount actually compensated, the claimant lost the difference, and the subrogee received a windfall. The *Holeton* Court found that placing the risk of for overestimated future expenditures solely on the claimant effected an unconstitutional taking. 92 Ohio St.3d at 125.

The revised statute gives the claimant a choice between a variation on the old scheme and a new scheme that permits the claimant to establish an interest-bearing trust account. R.C. 4123.931(E) and (F).

Under the revised R.C. 4123.931 trust fund scheme, the claimant deposits into the trust account the amount of the subrogation interest that represents estimated future payments of compensation or benefits. The claimant then reimburses the subrogee from the account every six months as benefit payments are made. If the statutory subrogee's duty to continue making payments ends, any remainder in the trust account belongs to the claimant or his estate. R.C. 4123.931(E).

Alternately, the claimant may pay the entire amount of the subrogation interest that represents estimated future payments to the statutory subrogee, as he would have done under the old statute. R.C. 4123.931(F). However, unlike former R.C. 4123.931, the amount paid to the subrogee is never the entire amount of the judgment or settlement proceeds, but only a portion of the amount calculated under the formula as subrogation interest.

D. The statute of repose, R.C. 2305.10, was enacted as part of Senate Bill 80, the 2004 tort reform bill.

The new products liability statute of repose at issue here, R.C. 2305.10, was enacted in 2004 as part of Senate Bill 80 ("2004 Tort Reform"). In enacting the tort reform statutes, the

General Assembly addressed concerns that this Court expressed in invalidating a previous, broader tort reform effort. See *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward* (1999), 86 Ohio St. 3d 451. *Sheward* broadly struck an earlier tort reform law because the Court found that its adoption violated the single-subject clause and violated separation of powers. As a result, the Court has never analyzed in detail the specific issue of the constitutionality of a statute of repose for products liability.

Unlike a statute of limitations, “which limits the time in which a plaintiff may bring suit *after* the cause of action accrues, a statute of repose . . . potentially bars a plaintiff’s suit before the cause of action arises.” *Sedar*, 49 Ohio St. 3d at 195 (emphasis in original). In this case, R.C. 2305.10(C) can act to bar a plaintiff’s suit for products liability before it accrues, as it states:

Except as otherwise provided . . . 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.

R.C. 2305.10(C). Thus, a plaintiff is precluded from bringing a products liability suit more than ten years after the product is delivered to its first purchaser or lessee.¹

E. Petitioner Groch alleges he was injured at his job with Respondent General Motors by a machine manufactured by Respondents Kard and Racine.

The Amended Complaint alleges the following: Plaintiff-Petitioner Douglas Groch (“Groch”) was injured on March 3, 2005, when the trim press he was operating came down on his right arm and wrist. When he was injured, Groch was acting in the course and scope of his employment with Defendant-Respondent General Motors Corporation (“GM”). Defendants-

¹ This limit has some exceptions; for example, R.C. 2305.10 (C)(4) states that if a cause of action arises within the 10-year period, but less than two years before that period expires, a plaintiff may sue within two years after the cause of action accrues. See also R.C. 2305.10(C)(5) (disability tolls the statute of repose).

Respondents Kard Corporation and Racine Federated, Inc. (“Kard” and “Racine”) made the trim press he was using.

Groch sued GM in intentional tort and Kard and Racine for products liability in the Lucas County Court of Common Pleas. Plaintiff Chloe Groch (“Chloe”) sought damages for loss of consortium. GM removed the case to federal court on the basis of diversity.

GM has asserted a subrogation interest in Groch’s tort 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. Kard and Racine assert that they are immune from liability based on R.C. 2305.10, the statute of repose for products liability claims. Groch asserts that R.C. 2305.10 is unconstitutional, and also that the tort reform statute violates the single-subject rule. The State of Ohio intervened to defend the constitutionality of the challenged statutes.

F. This Court granted review of nine questions certified by the federal district court.

Groch, Kard and Racine, and the State of Ohio moved the federal court to certify questions to this Court about the constitutionality of R.C. 4123.93, 4123.931 and 2305.10. The federal court certified the following questions to this Court:

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?
4. Does the statute providing for a statute of repose for product liability, R.C. 2305.10(C) and (F), violate the open courts provision of Article I, Section 16, of the Ohio Constitution?

5. Do R.C. 2305.10(C) and (F) violate the takings clause, Article I, Section 19, of the Ohio Constitution?
6. Do R.C. 2305.10(C) and (F) violate the due process and remedies clause, Article I, Section 16, of the Ohio Constitution?
7. Do R.C. 2305.10(C) and (F) violate the equal protection clause, Article I, Section 2, of the Ohio Constitution?
8. Do R.C. 2305.10(C) and (F) violate the ban on retroactive laws, Article II, Section 28, of the Ohio Constitution?

A ninth question was later certified by the federal court:

9. Does Senate Bill 80 violate the one-subject rule, Article II, Section 15, of the Ohio Constitution?

This Court granted review of all the questions on December 27, 2006.

ARGUMENT

I. The new subrogation statute corrects all of the constitutional infirmities found in the statute analyzed in *Holeton*.

The *Holeton* Court found three constitutional infirmities in former R.C. 4123.931. The first was that the entire amount of a settlement was open to subrogation, even if it was limited by an insurance policy ceiling or some other cap and did not represent a double recovery. The second was that the provisions for estimated future values placed all the risk for overestimated future expenditures on the claimant. The third was that it treated differently plaintiffs who tried their cases and those who settled. The General Assembly addressed and corrected all three of these infirmities in revised R.C. 4123.931.

This Court has already indirectly endorsed the scheme in revised R.C. 4123.931 in at least three ways. First, the *Holeton* Court endorsed subrogation in the workers' compensation context. The *Holeton* Court considered eight challenges to the constitutionality of former R.C. 4123.931. At least three of the eight challenges were predicated on the argument that former R.C. 4123.931 operated to reduce the amount of a claimant's workers' compensation benefits. In

rejecting this premise, the *Holeton* Court explained that “[a]ny decision that would hold the mere concept of a subrogation or reimbursement statute per se invalid in the workers’ compensation context would constitute a legal anomaly.” 92 Ohio St. 3d at 120. The Court also held 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.” *Id* at 121-22.

Second, as explained below, the *Holeton* Court, when discussing the provisions for recouping estimated future values of compensation, spoke favorably of a Minnesota statute, Minn. Stat. 176.061(6). 92 Ohio St. 3d at 124. Revised R.C. 4123.931 contains important provisions similar to those in Minn. Stat. 176.061(6).

And third, as also explained below, the General Assembly specifically addressed each aspect of former R.C. 4123.931 the *Holeton* Court found unconstitutional, and corrected it. Although not yet reaching the constitutional merits, this Court has already acknowledged the effort: “the manifest objective of the General Assembly in enacting S.B. 227 was to comply with our holding in *Holeton*.” *State ex rel. United Auto. Aerospace & Ag. Imp. Workers of Am. v. Bur. of Workers’ Comp.*, 108 Ohio St. 3d 432, 2006-Ohio-1327, at ¶17.

Revised R.C. 4123.931 is constitutional and should be upheld.

Respondent State of Ohio’s Proposition of Law No. 1:

*The new subrogation statute does not violate the due process provision of Section 16, Article I of the Ohio Constitution.*²

In many tort cases, as a practical matter, recovery is limited by a cap on damages in the tortfeasor’s insurance policy, and plaintiffs often settle for the maximum insurance amount, or

² This proposition of law corresponds to certified question No. 2: Do R.C. 4123.93 and 4123.931 violate the due process and remedies clause, Article I, Section 16, of the Ohio Constitution?

compromise a settlement for other reasons. Settlements limited by an insurance cap or compromise under former R.C. 4123.931(D) made all proceeds subject to subrogation, even if no double recovery occurred. 92 Ohio St. 3d at 125-126. In other words, under the former statute, in some situations the claimant had to disgorge funds to the subrogee even if these funds had been intended to compensate the claimant for non-economic damages unrelated to reimbursable compensation or medical bills. The *Holeton* Court found this unconstitutional because it was not preventing a double recovery, so it did not satisfy the justification for subrogation. *Id.* at 125-128.

The General Assembly remedied the no-double-recovery problem by creating the formula described above at page 4. Under the formula, both the claimant's and statutory subrogee's interest in the damages owed by the third-party tortfeasor are determined, and non-compensable damages are not subject to subrogation. See, R.C. 4123.931(B) (settlements); R.C. 4123.931(D) (awards following trial). The formula ensures that the statutory subrogee is only reimbursed from amounts that constitute an impermissible double recovery.

Groch and amici, in equating this statute with the old, ignore this aspect of the formula. A claimant receives a "double recovery" for purposes of workers' compensation subrogation when he gets both the recovery of full workers' compensation benefits, plus a tort award *that covers the same compensated benefits*. If non-economic damages are excluded from the formula, no double recovery occurs. The new formula achieves that goal.

First, the formula ensures that the claimant can keep—free and clear of any subrogation—any punitive damages awarded by the judge or jury. In addition, the claimant's attorney fees and other expenses are also paid before any subrogation is taken from an award or settlement amount. R.C. 4123.931(E). As described above, once punitive damages and attorney fees are

subtracted from the award or settlement, only the remaining money—the “net amount recovered” or NAR—is subject to the formula.

Second, the formula ensures that the subrogation acts only on amounts that the subrogee has compensated or will compensate through workers’ compensation payments. UD or “uncompensated damages” has already subtracted the “double recovery”—the amount that has been or will be paid by the subrogee in workers’ compensation. “Uncompensated damages means the claimant’s demonstrated or proven damages *minus the statutory subrogee’s subrogation interest.*” R.C. 4123.93(F) & (D) (emphasis added). Contrary to Groch’s contention (Groch Br. at 43), and amici’s assertion (Am. AFL-CIO Br. at 3-9), the formula *does* exclude non-compensated damages, and ensures that the subrogee is taking only from amounts that constitute a double recovery.

Finally, as also described above, because the total amount of the NAR—the tort award minus costs and punitives—is often insufficient to cover both the UD and the SI, the formula divides up the remainder *pro rata*, so that claimant and subrogee receive the same percentage of the amount owed them by the tortfeasor.

Therefore, the claimant is assured by the formula that he receives his full workers’ compensation payments *as well as* some proportion of the tort judgment or settlement. By never allowing the statutory subrogee to recoup more than its *pro rata* share of the “net amount recovered,” the formula in revised R.C. 4123.931 ensures that the subrogee never unconstitutionally takes more from the claimant than what would represent a double recovery of workers’ compensation benefits. Indeed, the subrogee almost never receives its full subrogation amount—that happens only when the net amount recovered equals the total amount of all non-

punitive damages. On the other hand, the claimant *always* receives his *full* amount of workers' compensation benefits.

Nor does Groch's example—or numerous other hypothetical situations—prove otherwise. Groch posits a situation where a worker is injured on the job, and ends up receiving less than his full wages in worker's compensation, and where the tortfeasor has an unusually low personal injury limit. Groch complains that such a claimant “is not fully compensated for his injuries,” because he got neither his full wages nor the full amount of his pain and suffering. Groch Br. at 41. But the outcome is a result not of the formula, but of other factors—primarily the tortfeasor's insufficient coverage, and the wage replacement formulas under workers' compensation law.

The claimant in Groch's example is paid by the subrogee the *full* amount of worker's compensation medical and wage benefits, plus—unlike under the former statute—a portion of the tort award towards his other damages. And—again, unlike under the former statute—the subrogee gets only a small portion of the tort award to offset its damages, i.e., the workers' compensation outlay.

Moreover—unlike under the former statute—the claimant's portion of the award already takes into account the “double recovery” problem in its calculation of uncompensated damages. Groch implies that the hypothetical subrogee should get nothing because the claimant is not fully compensated for his extra wages and for pain and suffering. Groch Br. at 41. But the subrogee is also an injured party, and the tortfeasor, not the subrogee, is responsible for the damages. The hypothetical subrogee is also not fully compensated for its damages, namely the workers' compensation it paid due to the negligence of the tortfeasor.

Respondent State of Ohio's Proposition of Law No. 2:

*The new subrogation statute does not violate the takings provision of Section 19, Article I of the Ohio Constitution.*³

As explained above, the *Holeton* Court found a constitutional problem in former R.C. 4123.931 because the claimant was required to disgorge the entire amount of the estimated future value to the subrogee at the time the claimant received his tort judgment or settlement. But if the estimated future value later turns out to have exceeded the amount actually compensated, the claimant would lose the difference, and the subrogee would receive a windfall. The *Holeton* Court found that placing the risk of for overestimated future expenditures solely on the claimant effected an unconstitutional taking. 92 Ohio St. 3d at 125.

In revising R.C. 4123.931, the General Assembly specifically corrected the problem in two ways. First, as explained in detail above at page 4, the statute provides a formula by which the types of damages in a tort award or settlement are calculated. This means that all punitive damages and some part of the remainder of a judgment or settlement is always the claimant's, free of any subrogation.

Second, as to the amount amenable to subrogation for future benefits, the revised statute gives the claimant a choice between a variation on the old scheme and a new scheme that permits the claimant to establish an interest-bearing trust account as described above at page 5-6. R.C. 4123.931(E) and (F). The trust fund concept enacted in division (E) was modeled in part after the Minnesota statute cited with approval in *Holeton*.

As explained above, the claimant may deposit into the trust account the amount of the subrogation interest that represents estimated future payments of compensation, and reimburses

³ This proposition of law corresponds to certified question No. 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?

the subrogee every six months. Any remainder after all payments are made belongs to the claimant or his estate. R.C. 4123.931(E).

In other words, revised R.C. 4123.931 has solved the “takings” infirmity found in *Holeton* because the statutory subrogee does not have a current collectible interest in estimated future expenditures that might result in a windfall. Revised R.C. 4123.931 does not require the claimant to reimburse the statutory subrogee for future benefits that the claimant may never receive. The claimant no longer risks losing overestimated future benefits, and so no “taking” has occurred.

Groch’s arguments to the contrary flatly contradict the statute’s language and he relies on inadmissible and misleading evidence. First, contrary to Groch’s assertions, the residue of a trust would not “stay in the employer’s hands” or “escheat to the [S]tate.” Groch Br. at 38. The statute specifies that the trust account is controlled by the claimant, not the subrogee: “from which the claimant shall make reimbursement payments to the statutory subrogee.” R.C. 4123.931(E)(1). Thus the trust is never “in the employer’s hands.”

Further, the statute provides that any residue will revert to the claimant or his heirs: “any amount remaining in the trust account after final reimbursement is paid to the statutory subrogee . . . shall be paid to the claimant or the claimant’s estate.” R.C. 4123.931(E)(1). Therefore, Groch is plainly incorrect that the statute “provides no mechanism for the heirs to recoup the money from the statutory subrogee.”

Moreover, Groch’s argument that a trust account would not be “realistic” is not only incorrect, but based on inadmissible and misleading “evidence.” Groch relies on a letter from a trust officer at a bank that was not in evidence at the district court, is therefore inadmissible here, and should be disregarded by this Court.

However, even if the Court does consider it, the letter reflects that the trust officer was given incorrect information about a R.C. 4123.931 trust. First, the letter assumes that the bank would be the trustee. Nothing in the statute requires a bank to be the trustee. Indeed, the statute implies that the claimant is the trustee, as it is the claimant who “shall make reimbursement payments to” the subrogee. Thus, the trustee fee of \$5,000 would not apply to a trust set up under R.C. 4123.931.

Second, the letter assumes no interest to offset fees for the trust account, while the statute states that the claimant “may establish an interest-bearing trust account,” and that “[a] claimant may use the interest that accrues on the trust account to pay the expenses of establishing and maintaining the trust account” R.C. 4123.931(E)(1) and (2).

And third, of course, the record includes no evidence how other banks might treat a R.C.4123.931 trust, or what they would charge in fees. Because Groch considered only the letter from one bank, and gave the bank official incomplete and incorrect information, the letter does not indicate how that bank or any other would really handle a subrogation trust under the statute.

The revised R.C. 4123.931 trust fund scheme solves the “takings” problem in the former statute, and should be upheld as constitutional.

Respondent State of Ohio’s Proposition of Law No. 3:

*The new subrogation statute does not violate the equal protection clause in Article I, Section 2 of the Ohio Constitution.*⁴

Finally, *Holeton* held that the original statute violated equal protection because it treated those who try their cases differently from those who settle.⁵ 92 Ohio St. 3d at 132. The General

⁴ This proposition of law corresponds to certified question No. 3: Do R.C. 4123.93 and 4123.931 violate the equal protection clause, Article I, Section 2 of the Ohio Constitution?

⁵ Claimants in other cases have also asserted that R.C. 4123.931 violates equal protection because it treats persons injured on the job differently from those injured elsewhere. *Holeton*

Assembly specifically dealt with that issue by applying the formula under which both the claimant's and statutory subrogee's interest in the damages owed by the third-party tortfeasor is determined to both settlements (R.C. 4123.931(B)) and awards following trial (R.C. 4123.931(D)). Thus, claimants who go to trial and those who settle are subject to exactly the same formula for determining the proportion of a judgment or settlement that is subject to subrogation.

The only difference in treatment of subrogation between claimants who go to trial and those who settle is a "safety-valve" mechanism for each path that, once again, ensures that subrogated funds come only from amounts that represent a double recovery. For a claimant who settles his case, if the parties find that the statutory formula works an injustice, "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." R.C. 4123.931(B).

For a claimant who tries his case, the judge or jury must specify the amount of compensatory damages and the amount of those damages that are economic and non-economic in nature. This is to allow calculation of the "claimant's demonstrated or proven damages" for purposes of the formula. Having the jury or judge specify the amounts allows the claimant to determine whether the fact-finder was discounting economic or non-economic parts of the award because of an assumed collateral source such as workers' compensation or insurance. If the award was so discounted, the claimant's "demonstrated or proven damages" can be adjusted accordingly for purposes of the formula. R.C. 4123.931(D)(2). And, contrary to Groch's

held that this distinction was rational and constitutional. "[E]qual protection does not require the General Assembly to pass a valid collateral-benefits-offset statute covering tort claims in general before it can enact a workers' compensation subrogation statute." 92 Ohio St. 3d at 132.

assertion, R.C. 4123.931(D) does not prevent the claimant or other parties from requesting interrogatories on subjects other than economic and non-economic damages.

In short, the General Assembly, by enacting the new subrogation statute, corrected the prior constitutional infirmities found in the old law by the *Holeton* Court. Revised R.C. 4123.931 does not violate Sections 2, 16 or 19 of Article I of the Ohio Constitution, and should be upheld.

II. The new statute of repose does not violate the Ohio Constitution.

Except as part of its sweeping rejection of the 1996 tort reform bill in *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward* (1999), 86 Ohio St. 3d 451, the Court has not specifically addressed the constitutionality of a statute of repose for products liability. The history and jurisprudence of statutes of repose demonstrate that the subject matter of the law to which the statute is applied can make a difference as to its constitutionality. See, e.g., *Sedar*, 49 Ohio St. 3d at 197-200. Specifically, *Sedar* found that a statute of repose for negligent design or construction of a building is constitutionally distinguishable from one for medical malpractice.

Although the Court overruled *Sedar's* holding in *Brennaman v. R.M.I.* (1994), 70 Ohio St. 3d 460, its reasoning still makes sense. Just as a statute of repose for negligent design and construction of a building differs from one for medical malpractice, so, too, does a statute of repose for products liability differ from one for medical malpractice. This is so because it does not deny a remedy for a vested cause of action, but bars the action before it ever arises. Therefore, the Court should revisit the *Sedar* rationale and evaluate R.C. 2305.10(C) and (F) under the reasoning found there. In doing so, the Court should find the statute of repose in R.C. 2305.10(C) and (F) constitutional.

Most States to have considered the issue have upheld under the State's constitution statutes of repose for products liability. See Appendix A. Ohio's current statute of repose for products liability does not violate the Ohio Constitution because products liability carries with it issues not

necessarily present in previously-analyzed statutes of repose for medical malpractice—specifically, it does not harm a vested right, as medical malpractice statutes of repose do.

Respondent State of Ohio’s Proposition of Law No. 4:

*R.C. 2305.10(C) and (F), the statute of repose for products liability, do not violate the open courts provision or the due process and remedies clauses of the Ohio Constitution, Article I Section 16.*⁶

A statute of repose for products liability does not violate open courts, due process, or right-to-remedy clauses of the U.S. and Ohio constitutions. A statute of repose for product liability is constitutional because, unlike that for medical malpractice, it does not deny a remedy for a vested cause of action, but bars the action before it ever arises.⁷ See *Sedar*, 49 Ohio St. 3d at 201; *Brennaman*, 70 Ohio St. 3d at 468-69 (Moyer, C.J. concurring in part and dissenting in part).

Ohio’s right-to-remedy and open courts clauses and the federal due process clause contemplate only vested rights, not hypothetical rights. See *Sedar*, 49 Ohio St. 3d at 202. The application only to vested rights is necessary to ensure that the law does not become an ossified, inflexible body of rules that no longer serves society. As this Court stated many years ago, no one has a vested right in the rules of law:

No one has a vested right in the rules of the common law. Rights of property vested under the common law cannot be taken away without due process, but the law itself as a rule of conduct may be changed at the will of the legislature . . .

Fassig v. State ex rel. Turner (1917), 95 Ohio St. 232, 248; see also *Munn v. Illinois* (1876), 94 U.S. 113, 134. Indeed, the primary role of the legislature is “to remedy defects in the common law as they are developed, and to adopt it to new circumstances” *Fassig*, 95 Ohio St. at 248.

⁶ This proposition of law corresponds to certified questions No. 4: Does the statute providing for a statute of repose for product liability, R.C. 2305.10(C) and (F), violate the open courts provision of the Ohio Constitution, Article I Section 16?; and No. 6: Do R.C. 2305.10(C) and (F) violate the due process and remedies clause, Article I, Section 16, of the Ohio Constitution?

This Court has historically held that the General Assembly “may modify or entirely abolish common-law actions.” *Strock v. Pressnell* (1988), 38 Ohio St. 3d 207, 214, and cases cited therein. Indeed, if the legislature is precluded from abolishing hypothetical rights, then it could make no change at all to the common law; it would be precluded from changing statutes of limitations, or of abolishing some causes of action altogether. And, as this Court has already held, the General Assembly did not violate the due process and right-to-remedy clauses when it abolished amatory causes of action in R.C. 2305.29. *Id.*

Similarly here, the General Assembly can abolish or modify a products liability cause of action, as long as by doing so it does not disturb a *vested* right. Statutes of repose for medical malpractice may disturb vested rights, because the injured party’s cause of action is cut off after the injury occurs, but sometimes before discovery of the injury—thus a party has a vested cause of action that is cut off before the party can act on it. See *Hardy v. VerMeulin* (1987), 32 Ohio St. 3d 45, and cases cited in *Sedar*, 49 Ohio St. 3d at 197 n.3. In products liability, unlike with medical malpractice, the injury is usually immediately obvious. Thus, if the injury occurs within the ten-year limitation, the injured party has a cause of action and can sue immediately. If the injury occurs after the ten-year limitation, no cause of action ever vests for the injured party to lose.

In short, the statute of repose for products liability actions does not violate the due process, open courts, or right-to-remedy clauses of the U.S. and Ohio constitutions.

⁷ The only exception might be for those cases potentially subject to retroactive application of the statute, discussed below (at 23).

Respondent State of Ohio's Proposition of Law No. 5:

*The products liability statute of repose, R.C. 2305.10(C) and (F), does not violate the takings clause, Article I, Section 19 of the Ohio Constitution.*⁸

Similarly, the statute of repose does not violate the takings clause, because, as explained above, no vested right has accrued when a statute of repose is applied to a products liability case. Instead, the cause of action is denied before it occurs. With no vested right to recovery, no property exists to take. Thus, no taking occurs, so the takings clause cannot be violated.

Respondent State of Ohio's Proposition of Law No. 6:

*The products liability statute of repose, R.C. 2305.10(C) and (F), does not violate the equal protection clause, Article I, Section 2 of the Ohio Constitution.*⁹

In the absence of a fundamental right or a suspect classification, the Ohio General Assembly needs only to have a reasonable ground for a legislative distinction that “impinge[s] on mere economic interests.” *Sedar*, 49 Ohio St. 3d at 203, and cases cited therein. “A statutory classification which involves neither a suspect class nor a fundamental right does not violate the Equal Protection Clause of the Ohio or United States Constitutions if it bears a rational relationship to a legitimate governmental interest.” *Menefee v. Queen City Metro* (1990), 49 Ohio St. 3d 27, 29. Here, no suspect class or fundamental right is involved; the only right is to an economic recovery.

Moreover, the State need not produce evidence to sustain the rationality of a statutory classification. *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.*

⁸ This proposition of law corresponds to certified question No. 5: Do R.C. 2305.10(C) and (F) violate the takings clause, Article I, Section 19, of the Ohio Constitution?

⁹ This proposition of law corresponds to certified question No. 7: Do R.C. 2305.10(C) and (F) violate the equal protection clause, Article I, Section 2, of the Ohio Constitution?

(1999), 87 Ohio St. 3d 55, 58, 60, 1999-Ohio-248. Rather, the challenger bears the burden to negate every conceivable basis that might support the legislation. *Id.* at 58.

Nevertheless, the General Assembly put forward several rational reasons for establishing a statute of repose that treats differently those injured before and after the expiration of the statute. As explained in uncodified sections of S.B. 80, the law recognizes that 1) after the delivery of a product, the manufacturer lacks control over it, over uses made of it, and over the conditions under which it is used; 2) it is more appropriate for the party or parties who have had control over the product over the intervening time to be responsible for harm caused by it; 3) a manufacturer is disadvantaged in that more than ten years after the delivery of a product, it is difficult or impossible for a manufacturer to locate reliable evidence regarding its design and production; and 4) it is inappropriate to apply current legal and technological standards to products manufactured many years before a product liability claim. § 3(C)(3)-(6) S.B. 80.

Nor does equal protection require a legislature to solve all problems in an area. The legislature can solve problems one step at a time. “[T]he drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary. Such action by a legislature is presumed to be valid.” *Massachusetts Bd. of Retirement v. Murgia* (1976), 427 U.S. 307, 314; *Porter v. Oberlin* (1965), 1 Ohio St. 2d 143, 152 (“Furthermore, it is generally recognized that a legislative body, when it chooses to act to correct a given evil, need not correct all the evil at once, but may proceed step by step.”).

In short, R.C. 2305.10(C) and (F) do not violate equal protection by treating differently those injured before and after the expiration of a statute of repose.

Respondent State of Ohio's Proposition of Law No. 7:

*The products liability statute of repose, R.C. 2305.10(C) and (F), does not violate the ban on retroactive laws, Article II, Section 28 of the Ohio Constitution.*¹⁰

R.C. 2305.10(C) does not violate Article II, Section 28 of the Ohio Constitution because in most cases, it is not applied retroactively. Usually, both the injury and the filing of the claim will occur either before or after the effective date of the statute.

In a few cases, a claim filed after the effective date will involve an injury that had occurred before the effective date, April 7, 2005. In those cases, the statute might be applied retroactively, so the retroactivity clause is at least raised in those cases. However, as the statute is constitutional in most applications, it is constitutional on its face.

Moreover, a "law may be applied retroactively if (1) there is an express legislative intent that it do so and (2) it affects a remedial, not substantive, right." *State ex rel. Romans v. Elder Beerman Stores Corp.*, 100 Ohio St. 3d 165, 167, 2003-Ohio-5363, citing *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100. This statute meets that test, as it is intended to be retroactive and remedial for those small classes of cases where the injury occurs before, but the suit was filed after, the effective date.

In short, R.C. 2305.10(C) is not unconstitutionally retroactive on its face.

III. The new tort reform statute, Senate Bill 80, does not violate the single-subject rule.

Respondent State of Ohio's Proposition of Law No. 8:

Senate Bill 80 complies with the one-subject rule, Article II, Section 15 of the Ohio Constitution.

The single-subject rule is not implicated here, or, if it is, this Court should sever offending provisions (if any) to preserve Senate Bill 80. See *State ex rel. Dix v. Celeste*, 11 Ohio St. 3d

141; *Sheward*, 86 Ohio St. 3d 451; *Beagle v. Walden* (1997), 78 Ohio St. 3d 59; *Simmons-Harris* (1999), 86 Ohio St. 3d 1; *In re Nowak*, 104 Ohio St. 3d 466, 2004-Ohio-6777, paragraph 1 of the syllabus (only a “manifestly gross and fraudulent violation” of the single-subject provision authorizes a court to pronounce a law unconstitutional).

The Court should not strike Senate Bill 80 under the single subject clause of the Ohio Constitution, for at least two reasons. First, this case involves only one provision in the enacted bill, not the law as a whole. Senate Bill 80 is related to the subject of tort reform—a natural combination of provisions that all address a single subject, and which is set forth in the title of the bill. Groch claims to be affected only by R.C. 2305.10(C) and (F). While there may be provisions in S.B. 80 that do not fall under the general title of “tort reform,” a provision establishing a statute of repose surely does. Because the provision at issue here falls under the intended topic, and it is otherwise constitutional, the single-subject rule is not implicated here.

And even if the single-subject rule is fairly reviewed here, the Court should sever any provisions of the law that do not fall under the topic of tort reform. As the Court stated in *Sheward*, “[e]very presumption in favor of the enactment’s validity should be indulged” and courts should give “the General Assembly great latitude in enacting comprehensive legislation by not construing the one-subject provision so as to unnecessarily restrict the scope and operation of laws, or to multiply their number excessively, or to prevent legislation from embracing in one act all matters properly connected with one general subject.” 86 Ohio St. 3d at 496.

For this reason, where the inclusion of a particular provision in a bill is found to violate the single subject clause, that provision is almost always severed from the remainder of the bill,

¹⁰ This proposition of law corresponds to certified question No. 8: Do R.C. 2305.10 (C) and (F)

which remains in effect. See *In re Nowak*, 104 Ohio St. 3d 466 (Court severed statute regarding mortgages from appropriations bill); *State ex rel. OCSEA v. SERB* (2004), 104 Ohio St. 3d 122 (Court severed provision excluding employees of the School Facilities Commission from the definition of public employees from the remainder of a budget bill); *Simmons-Harris v. Goff*, 86 Ohio St. 3d 1 (Court severed vouchers statute from remainder of budget bill).

Moreover, unlike in H.B. 350—the law at issue in *Sheward*—in S.B. 80 the General Assembly expressly provided that the provisions be severable. Section 5 of S.B. 80 provides that “[t]he items of law of which the sections of this act are composed, and their applications, are independent and severable.” Thus, this case is distinguishable from *Sheward*, in which the Court could not determine the General Assembly’s intent regarding severability and invalidated the entire bill. 86 Ohio St. 3d at 500-501. If any provisions of S.B. 80 are found to fall outside the general topic of tort reform, the Court should sever them rather than finding the entire law unconstitutional.

violate the ban on retroactive laws, Article II, Section 28 of the Ohio Constitution?

CONCLUSION

For the foregoing reasons, Respondent Attorney General of Ohio respectfully requests that this court declare R.C. 4123.93, 4123.931 and 2305.10(C) constitutional.

Respectfully submitted,

MARC DANN (0039425)
Attorney General of Ohio



ELISE PORTER* (0055548)

Acting Solicitor General

**Counsel of Record*

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

eporter@ag.state.oh.us

Counsel for Respondent
State of Ohio

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Respondent State of Ohio was served by U.S. mail, postage prepaid, this 15th day of May, 2007, upon the following counsel:

Kevin J. Boissoneault
Theodore Bowman
Bonnie E. Haims
Russell Gerney
Gallon, Takacs, Boissoneault & Schaffer Co.
3516 Granite Circle
Toledo, Ohio 43617-1172

Counsel for Petitioners
Douglas and Chloe Groch

Robert H. Eddy
Gallagher Sharp
420 Madison Avenue, Suite 1250
Toledo, Ohio 43604
Counsel for Respondents
Kard Corporation and Racine Federated, Inc.
National/Kard Division

Kimberly Conklin
Kerger & Associates
33 S. Michigan Street, Suite 100
Toledo, Ohio 43604

Counsel for Respondent
General Motors Corporation

Patrick Fanning
Lathrop & Gage L.C.
2345 Grand Boulevard, Suite 2800
Kansas City, Missouri 64108-2612

Counsel for Respondent
General Motors Corporation

I also served courtesy copies upon the following counsel for *Amici*:

Paul Flowers
Paul W. Flowers, Co.
Terminal Tower 35th Floor
50 Public Square
Cleveland, Ohio 44113-2216

Counsel for *Amicus Curiae*
Ohio Academy of Trial Lawyers

Stewart Jaffy
Marc Jaffy
Stewart Jaffy & Associates Co.
306 East Gay Street
Columbus, Ohio 43215

Counsel for *Amicus Curiae*
AFL/CIO


Elise Porter
Acting Solicitor General

APPENDIX A

The majority of courts to consider statutes of repose for products liability have found them constitutional:

Pulmosan Safety Equip. Corp. v. Barnes (Fla. 2000), 752 So.2d 556 (upholding Florida statute now repealed)

Love v. Whirlpool Corp. (Ga. 1994), 449 S.E.2d 602

Harding v. K.C. Wall Products, Inc. (Kan. 1992), 831 P.2d 958

Tetterton v. Long Mfg. Co. (N.C. 1985), 332 S.E.2d 67

Davis v. Whiting (Or. Ct. App. 1984), 674 P.2d 1194.

Burlington N. & Santa Fe Ry. Co. v. Skinner Tank Co. (5th Cir. 2005), 419 F.3d 355 (Texas statute)

Estate of Branson v. O.F. Mossberg & Sons, Inc. (8th Cir. 2000), 221 F.3d 1064 (Iowa statute)

Northwest Bank Neb. v. W.R. Grace & Co. (8th Cir. 1992), 960 F.2d 754 (Nebraska statute)

Pitts v. Unarco Indus. Inc. (7th Cir. 1983), 712 F.2d 276 (Indiana Statute)

Those courts that have struck down product liability statutes of repose have done so because the statutes violate the state constitution:

Lankford v. Sullivan, Long & Hagerty (Ala. 1982), 416 So.2d 996

Hazine v. Montgomery Elevator Co. (Ariz. 1993), 861 P.2d 625

Dickie v. Farmers Union Oil Co. (N.D. 2000), 611 N.W.2d 168

Kennedy v. Cumberland Eng'g Co. (R.I. 1984), 471 A.2d 195

Heath v. Sears, Roebuck & Co. (N.H. 1983), 464 A.2d 288 (relies on previous case, since overruled, which interpreted state constitution, see *Carson v. Maurer* (N.H. 1980), 424 A.2d 825 overruled by *Cnty. Res. For Justice, Inc., v. City of Manchester* (N.H. 2007), 917 A.2d 707).

Some statutes merely raise a presumption that the product is beyond its useful life, or establish a defense for the manufacturer if the product is beyond its useful life. These statutes are rarely challenged.

Daily v. New Britain Machine (Conn. 1986), 512 A.2d 893 (upholding presumption)

Olsen v. J.A. Freeman Co. (Idaho 1990), 791 P.2d 1285

Colo. Rev. Stat. 13-21-403 (2007)

Minn. Stat. 604.03 (2007)

Ark. Code Ann. 16-116-101-05 (2007)

Ky. Rev. Stat. Ann. 411.310 (2007)

Wash. Rev. Code 7.72.060 (2007)